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LEGAL HISTORY IN AUSTRALIAN LAW SCHOOLS: 1982 AND 2005

> It is a difficult task to generalise accurately about Australian undergraduate law students ... One general observation it is possible to make, however, is that they largely view legal history (particularly of the English variety) as at best a charming irrelevance and at worst a painful imposition upon their time, as something to be endured whilst waiting for the teaching of 'real law' to begin. As a group, they seem generally impervious to the delights of the old mediaeval forms of action; they are unmoved by the drama of the confrontations between Sir Edward Coke and King James I; and the birth of equity in the Courts [*sic*] of Chancery routinely engenders within their ranks the kind of vacant stare normally reserved for suggestions of extra-curricular reading. [1]

For a mere historian to address readers of an academic law journal on the place of history in the curriculum of Australian law schools may seem impertinent as well as rash. In response I can only plead a longstanding professional concern with the role of law and lawyers in early modern English society, and an almost equal if somewhat more sporadic interest in and involvement with Australian legal history. How far these credentials may excuse or justify the contents of this brief note is doubtless best left for others to judge.

As an historian, I propose to proceed in chronological order, and so begin with William Blackstone, who also happens to be the main object of my current research. Yet this is also to begin at the beginning, or one of them, so far as education in the common law is concerned. For Blackstone's great achievement was to provide, in his *Commentaries on the Laws of England*, first published in 1765-69 and continuously in print thereafter, a book which could serve as the basic text for systematic academic education in the common law. All training previously undertaken by would-be common lawyers had effectively combined some form of apprenticeship with a good deal of self-education, especially after the collapse in the later seventeenth century of the medieval system of 'learning exercises' at the Inns of Court and Chancery. While substantial elements of the old method lingered on until relatively recent times in the guise of articled clerkships and the like, sooner or later attendance at a university law school would become the standard

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[1] Ben Golder, review of Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (2005) 27 *Sydney Law Review* 181.

pathway to a legal career, at first in North America, and eventually throughout the entire common-law world.[2]

William Blackstone's inaugural lecture 'Of the Study of the Laws' was delivered at Oxford on 25 October 1758.[3] Towards its close the first Vinerian Professor, who was also of course 'the first ever professor of the common law',[4] explained that the sequence of lectures he would deliver over the coming academic year followed the plan set out in his *Analysis of the Laws of England*,[5] published two years earlier as a learning aid for students taking the private lecture course he had first offered in 1753.[6] With typical self-deprecation, Blackstone avowed that his present aim was merely

> to fill up and finish that outline with propriety and correctness, and to render the whole intelligible to the uninformed minds of beginners, (whom we are too apt to suppose acquainted with terms and ideas, which they never had the opportunity to learn).[7]

But to this modest mission statement he then appended a description of 'rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done'.[8] Ideally such a paragon would seek to present 'a general map of the law, marking out the shape of the country, its connexions and boundaries'.[9] In 'tracing out the originals and as it were the elements of the law',[10] he would follow the 'originals... to their fountains, as well as our distance will permit'.[11] Nor was this all:

> These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shown how far they are

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2 For a splendid account of the centrality of the *Commentaries* to the lives of nineteenth-century law students in the United States, see Ann Fidler, '"A Dry and Revolting Study": The Life and Labours of Antebellum Law Students' in W Wesley Pue and David Sugarman (eds), *Lawyers and Vampires: Cultural Histories of Legal Professions* (2003) 86.

3 Stanley Katz (ed), *William Blackstone: Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (1979) vol 1, 3n. Hence Black.Com.

4 The phrase comes from Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1.

5 William Blackstone, *An Analysis of the Laws of England* (1756).

6 Black.Com, sig. a.

7 Ibid., 35.

8 Ibid.

9 Ibid.

10 Ibid.

11 Ibid.36.

> connected with, or have at any time been affected by, the civil transactions of the kingdom[12]

In the published *Commentaries*, essentially a much-revised version of his Oxford lectures, the 'reasons' Blackstone gives for specific legal doctrines and procedures are as often as not historical.[13] This 'historicism' – if we may so characterise Blackstone's tendency to discuss and explain legal institutions by recounting how they came over time to be the way they are, rather than in terms of their conformity or otherwise to philosophical, rational or utilitarian first principles – was plainly a major underlying cause of Jeremy Bentham's deep-rooted and enduring enmity towards his former teacher.

So for Dr Blackstone,[14] the original common-law academic, legal history and legal education were closely intertwined. Indeed, while the *Commentaries* 'are not a history of English law, but a statement of what that law was in Blackstone's own day, they are in fact the best history of English law which had yet appeared'.[15] And Blackstone's book continued to exert a dominant influence on legal education well over a century after its first publication, especially, but not solely, in North America.[16] Indeed, the influence of a broadly Blackstonean, or at all events historicist approach to legal education was still apparent at the University of Melbourne in the late 1950s. There, no less than half of the compulsory first-year undergraduate law curriculum consisted of two year-long history subjects. They were British Constitutional History and Legal History, a course then taught by the distinguished scholar L J (Leslie) Downer and strongly weighted towards Downer's own interests in medieval English legal history. When I arrived at the University of Adelaide in 1966, law students still faced a similar mandatory first-year survey course in British political and constitutional history, although as at Melbourne the teaching of this subject (History IC) had been contracted out by the Law School to the History Department.

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12 Ibid.

13 This was fully in accord with his earliest recorded impressions of the common law, as a student at the Middle Temple in 1746: 'There seem in the modern Law to be so many References to the antient Tenures & Services, that a Man who would understand the Reasons, the Grounds, & Original of what is Law at this Day must look back to what it was formerly; otherwise his Learning will be both confused & superficial.' See W R Prest (ed), *The Letters of Sir William Blackstone 1744-1780* (2006) 3-4; cf. Daniel Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (1996) 36: 'The treatment of every subject in the Commentaries begins with an historical exposition'.

14 The fullest biographical account of Dr Blackstone is currently that of I. Doolittle, *Blackstone: A Biography* (2001).

15 Sir William Holdsworth, *A History of English Law* (1966) Vol 12, 725.

16 See the brief discussion and references in Wilfrid Prest, 'Antipodean Blackstone: The Commentaries "Down Under"' (2003) 6 *Flinders Journal of Law Reform*, 151, 161-4.

By the late 1960s, the era of the Vietnam War and student revolution, the future of such compulsory non-vocational subject offerings looked increasingly bleak, as traditional academic folkways of all kinds came under increasingly hostile scrutiny from activist students and academic staff. So the surging floodtide of Australian cultural nationalism, which marked the 1970s and scarcely ebbed until well after the 1988 bicentennial, carried away with little protest or resistance most of the conventional legal history courses then offered in Australian law schools, especially those whose content appeared to embody an excessively Anglophile cultural cringe. By 1982 a survey of all 10 Australian university law schools then in existence revealed that no free-standing legal history whatsoever was being taught at the Australian National University (ANU) or the University of Queensland (UQ). Macquarie, Melbourne and the University of Western Australia (UWA) did each still retain a compulsory legal history subject, or at least one containing a large legal history component specifically designated as such. But only in the avowedly iconoclastic and progressive Macquarie syllabus was that subject taught over a full academic year, as indeed its remarkably wide chronological and geographical sweep fully justified and probably demanded. At the other five university law schools (Adelaide, Monash, University of New South Wales (UNSW), Sydney and Tasmania) optional legal history units with mixed English and Australian content were offered in the later years of the standard four-year Bachelor of Laws (LLB) courses, but only at Adelaide did these appear to attract large enrolments.[17]

These findings were incorporated in a paper delivered to the inaugural Australasian Law and History conference, held at La Trobe University's Department of Legal Studies in mid-1982. That conference brought together historians and lawyers, academics, postgraduate students and practitioners from both sides of the Tasman, enlivened by the stimulating presence of the colonial American legal historian Stanley Katz as invited plenary speaker. The annual Australian and New Zealand Law and History conferences, as they have since become, constitute a small but not insignificant part of what may now be recognised as a much larger international phenomenon. In the United Kingdom the post-World War II revival and expansion of legal history as a field of research and writing was signalled by the convening at Aberystwyth in 1972 of what 'seems to have been the first specialist legal conference held in Britain since April 1913'.[18] This inaugurated a biennial series of British Legal History conferences with accompanying volumes of published papers, and the launching in 1980 of the *Journal of Legal History*. Yet by contrast with their North American colleagues the British were relatively slow off the mark, perhaps partly because of a long-established and not wholly misleading image of English legal history as a somewhat esoteric field of scholarship dominated by the medievalist heirs and successors of F W Maitland and F Pollock. In the United States, by contrast, legal history seems to have powered from strength to strength as an intellectually and institutionally buoyant discipline since at least the middle

17 W R Prest, 'Law and History: Present State and Future Prospects' in Ian Duncanson and Chris Tomlins (eds), *Law and History in Australia* (1985) 29.

18 Dafydd Jenkins (ed), *Legal History Studies 1972* (1975) vii.

decades of the twentieth century. Alongside outstanding studies of the colonial and national experience published in the late 1950s and 1960s by J Willard Hurst, George Haskins, Julius Goebel Jr, Richard Morris, David Flaherty and Lawrence Friedman, there were also continuing contributions to the understanding of what is still rightly regarded as a joint Anglo-American legal heritage in work by Samuel Thorne, W H Dunham Jr and Thomas Barnes, among others. While the Selden Society, founded in 1887 'to encourage the study and advance the knowledge of the history of English law'[19] continues to enrol more American than UK members, its junior trans-Atlantic counterpart, the American Society for Legal History (ASLH), was founded in 1956 with a global brief, to encourage 'scholarship, teaching and study concerning the law and legal institutions of all legal systems, both Anglo-American and those that do not operate in the Anglo-American tradition'.[20] The Selden Society essentially exists to facilitate the annual publication of a series of edited records of legal proceedings in English courts, and other related material. By contrast the ASLH holds annual conferences, supports a thriving book-length monograph publications programme in conjunction with the University of North Carolina Press, issues a regular newsletter and sponsors a learned journal, originally the *American Journal of Legal History*, but since 1983 the *Law and History Review*. The title of that latter periodical, with its stated mission of furthering 'research and writing in the fields of social history of the law and the history of legal ideas and institutions',[21] encapsulates the new ways of thinking about and studying past law which had come to prominence over the previous two decades or so: interdisciplinary (attracting a sizeable contingent of academic historians, as distinct from academic or practising lawyers), eclectic as to subject matter and place, and emphasising the law's interactions with society at large, rather than law as a subject sufficient in itself. From this standpoint even the label 'legal history' came to be seen in some quarters as redolent of a narrow, discipline-bounded and otherwise outmoded approach to the subject, and so was increasingly challenged by such formations as 'socio-legal history', the history of law, or indeed 'law and history'.[22]

But the remarkable blossoming – indeed explosion – of historico-legal and legal-historical research over the past quarter-century or so, in Australia as throughout the common law world, has hardly been matched on the undergraduate teaching side. The sad reality, in this country at least, is apparent from the results of an updated version of the 1982 survey. Whereas that exercise was initiated by writing a letter (as one did in those days) to all 12 Australian university faculties and departments of law and legal studies, in June 2005 an email was sent via the Council of

19 *A Centenary Guide to the Publications of the Selden Society* (1987), 4.

20 American Society for Legal History <http://www.h-net.org/~law/ASLH/aslh.htm> at 22 May 2007

21 *A Centenary Guide to the Publications of the Selden Society* (1987), 4.

22 For further discussion of the new legal history see David Sugarman and G R Rubin, 'Towards a New History of Law and Material Society in England 1750-1914', in idem, *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (1984), 1-123; and successive volumes of the *Law and History Review*.

Australian Law Deans network to 29 law school Deans, requesting information 'about any legal historical subjects offered in your current curriculum (undergraduate and postgraduate)'. The following two tables summarise the substance of the replies received.

A. Legal History in Law Schools established by 1982

	1982 survey	**2005 survey**
University of Adelaide	'Legal History'	Nil[23]
ANU	Nil	'Comparative Legal History'[24]
Macquarie	Required 1st year 'History + Phil. of Law'	'Comparative Legal History'[25]
University of Melbourne	Required 1st year 'Legal Process', including 'History'	Required 1st year 'History and Law'
Monash University	'Legal History'	Nil
UNSW	'Legal History'	'Legal History';'Principles of Law'; 'Roman Law'[26]
UQ	Nil	Nil
University of Sydney	'Legal History' (two options)	Nil
University of Tasmania	'Legal History'	'Crime and Law in Hist. Perspective'
UWA	Required 1st year 'Legal Process'	'Legal History'

Note: unless otherwise specified, subjects listed were offered as later year electives.

23 In 2006 'Legal History' was offered as an elective subject.

24 This course was jointly taught with the University of British Columbia, the University of Victoria (Canada) and Macquarie University.

25 This course was jointly taught with the University of British Columbia, the University of Victoria (Canada) and the Australian National University.

26 i.e. 'Roman Law in Medieval and Modern Europe' and 'Roman Law and Modern Civil Law'.

B. Legal History in Law Schools established after 1982

Bond University	1st year 'Australian Legal System' (20%); 'Constitutional Law' (20%)
Charles Darwin University	'Legal History'
Deakin University	1st year 'Law, Society and Civil Rights' (20%)
Edith Cowan University	Nil
Flinders University	Required 2nd year 'History and Philosophy of Law'; 'Australian legal history'
Griffith University	Nil
James Cook University	Nil
La Trobe University	Nil
Murdoch University	Nil
Queensland Univ. of Tech.	Nil (but legal-historical elements in all first year and some later year subjects)
Southern Cross University	Nil
University of Canberra	Nil
University of New England	Nil
University of Newcastle	Nil
University of Notre Dame	Required 1st year (elective for postgraduate students);'Legal History'
Univ. of Tech. Sydney (UTS)	Required 1st year 'Legal Process and History'
University of Western Sydney	Nil
University of Wollongong	Nil
Victoria University	Nil

Note: unless otherwise specified, subjects listed were offered as later year electives.

A survey of this kind is obviously dependent on not only the co-operation of respondents, but also their understanding of the questions asked and the information which it is appropriate to provide in return, as well as on the collator's interpretation of that information. In general I have preferred to accept respondents' judgments as to whether a particular subject offering should be classified as 'legal history', rather than making my own assessment of the data provided. Nevertheless, of the few courses still offered in Roman law, those which appear to be largely confined to an exposition of substantive law have been excluded from the table.[27] A number of respondents emphasised that first-year 'introduction to law' subjects, as well as constitutional law, equity, property and various other undergraduate units taught at their institution necessarily included sizeable elements of historical background, or used legal historical materials to explain how the law came to be as it now is. It could indeed be argued that all law is 'frozen history' (in the words of C J Friedrich), and so can scarcely be understood without some historical context.[28]

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27 In 2005 elective later-year courses in Roman law were offered at the University of Adelaide, the University of New South Wales and the University of Sydney.

28 C J Friedrich, *The Philosophy of Law in Historical Perspective* (1958) 233.

Indeed one may doubt whether it is possible to make sense of any current political or social topic without some preliminary information about how things have come to be as they are now. Yet providing such essential data must often be a very different enterprise from undertaking a coherent, extended and multi-faceted account of the past, where the prime focus and purpose is other than the present or future. There may also be some danger that such background accounts are presented as a given, which students expect and are expected to take on trust, rather than to question or debate. Yet such orthodox history, as Maitland famously observed, is not real history at all, but merely 'the handmaid of dogma' – orthodox history being a contradiction in terms.[29] Further, fully granting this point would make it difficult to draw any clear distinction at all between historical and non-historical law subjects. Finally, a snapshot view of a single year's syllabus offerings may well be highly misleading in particular cases, for example if subjects normally available have been cancelled or held over because of temporary absences of teaching staff, or are due to be re-arranged in a process of wholesale curriculum change.

For all these reasons the results set out above must be regarded as indicative and provisional rather than conclusive. Yet despite the various caveats, some conclusions can be drawn. First, it is apparent that the majority of post-1982 law schools offer no free-standing legal history subjects at all. Second, legal history offerings are only slightly more abundant in the longer established law schools; there are indeed signs of contraction since 1982 at Adelaide, Macquarie, Monash, Sydney and UWA (although the Adelaide position has improved in 2006). This trend might seem to be somewhat offset by developments at ANU and Melbourne. But unfortunately the future of the highly innovative jointly-taught internet-based courses on comparative colonial legal history involving students and teachers at ANU and Macquarie together with their counterparts in two west coast Canadian universities seems uncertain,[30] while Melbourne's revised syllabus for 2006 has dropped the two compulsory 'History and Philosophy of Law' first-year subjects. Thirdly, and perhaps somewhat surprisingly, legal history is an identifiable 'badged' element in courses required of all LLB students only at Flinders, Melbourne (but see above), Notre Dame and UTS. If lists of required subjects are any sort of guide to the values of particular academic institutions, it would seem that legal history finds its most committed advocates and friends among the staff of the younger Australian law schools. On the other hand many respondents (as already noted) specifically referred to the presence of legal-historical 'elements' in both introductory and substantive law subjects. At Melbourne the new LLB curriculum introduced in 2006 lays special emphasis on what are referred to as 'cross-cutting influences' or significant perspectives on the law, in which history features along with theory, ethics, comparative approaches, religion, indigenous

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29 F W Maitland, 'Why the History of English Law is Not Written' (1888), in H A L Fisher (ed), *Collected Papers of F. W. Maitland* (1908) vol 1, 491-92.

30 D. Harris, 'Webbing the Pacific: Teaching an Intercontinental Legal History Course', *Law and History Review*, 18 (2000), 445-56.

culture, law and policy, intercultural perspectives, cross-jurisdictional law and practice, law reform and policy and interdisciplinary influences.[31]

The nature and extent of any specifically historical element in such circumstances must doubtless vary a good deal, depending not least on the aptitudes and interests of the teaching staff concerned. Finally, in terms of geographical and chronological coverage, post-1788 Australia seems to be the most popular teaching area and no course deals exclusively with English legal history, although most of the specifically 'badged' legal history offerings do include some coverage of pre-1788 English law. Data on enrolments were not uniformly returned and are difficult to tabulate in a meaningful fashion, given the significant differences in overall enrolments between institutions: however later-year legal history electives can evidently attract classes ranging in size from eight or fifteen to 60 or 110.[32]

If we may indeed assume that there has been a marked contraction in the teaching of legal history since the early 1980s, despite the legal history research boom, and growth in both the numbers and size of university law schools, various possible explanations suggest themselves. Education has developed a distinctly more vocational character since the early 1980s, while the humanities and softer social sciences have generally been at a discount, not least among educational bureaucrats, career counsellors and politicians. So far as legal education is concerned, the influential *Pearce Report* of 1987 gave little explicit encouragement to include historical subjects in the undergraduate curriculum.[33] Meanwhile inflated student-staff ratios have made it increasingly difficult for law schools to offer a wide assortment of electives and 'non-core' subjects, rather than seeking efficiency gains by reducing the range of student options. Academics, now under greater pressure than ever before to avoid unfavourable student assessments of their teaching, may fear resentment generated by compulsory non-vocational subjects. Nor were the dominant intellectual fashions of the last decades of the twentieth century particularly favourable to historical studies, with much loose talk of 'the end of history' and the postmodern deconstruction of all forms of 'objectivist' knowledge. Finally, the apparent accelerating pace of cultural, social and technological innovation may seem to identify any sustained interest in the past, let alone the relatively distant past, with mere nostalgic antiquarianism. So we may well ask, 'Why study legal history? How can historical understanding be of any professional

31 I am grateful to Prof. Michael Crommelin for this list.

32 'Crime and Law in Historical Perspectives' taught at the University of Tasmania by two members of the Department of History and Classics, is available to law students as a cross-listed later year subject; student numbers have varied between 60 and 110. I am grateful to Dr Julia Davis for this information.

33 D. Pearce, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987).

value in a world which seems to change by the week? Such questions invite a negative response in an age of globalism and materialism'.[34]

Various potential objections and practical difficulties stand in the way of any substantial revival of legal-historical teaching in Australian university law schools. Thus the general decline of school history teaching means that most students now enter university equipped with significantly less historical knowledge than ever before. This situation complicates the task of those attempting to teach legal history, which tends to take at least some general historical background for granted. Further, full fee-paying students, and those accumulating a substantial Higher Education Contribution Scheme debt, may well be less acquiescent and more demanding than their predecessors. They are perhaps more likely to demand a syllabus which prepares them directly for a vocation, rather than providing anything broadly educative, and to react negatively to subjects perceived as 'irrelevant', hence representing less value for their money. To make matters worse, there is a lack of good basic teaching textbooks, especially for Australian legal history, where coverage at the level of the individual states and for the whole twentieth century is particularly weak. Moreover the new 'external' law and history approach has not yet had much impact on published teaching materials for Australian or British/English legal history; thus there seems to be no Australian or British equivalent to the general surveys of American legal history by Lawrence Friedman, Kermit Hall and Norman Cantor.[35] Yet it may well be that the new mode of socio-legal history is more demanding, both for law students and teachers, than the old-style of 'internal' lawyer's legal history. Finally, some would doubtless contend that the broadly educational role of legal history in a law school curriculum may also be served by a variety of other ideological perspectives and methodologies, whether environmental, feminist, philosophical or sociological.

Nevertheless, I have to cast in my lot with Baker, who answers his own question, 'why study legal history?' in the following terms:

> [L]egal history is not about the preservation of trappings. It is an introduction to law and legal culture, which have never been immune from the passing of time ... If law schools ignore everything but the here and now they will fail in their purpose.[36]

History can provide a unique perspective on, and in-depth understanding, of law, legal institutions and legal culture, by contextualising and explaining the present, hence giving a clearer, better informed sense of future possibilities and prospects. It is important for students to realise something of how and why law has changed over

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34 J H Baker, *An Introduction to English Legal History* (2002) v.

35 Lawrence Friedman, *A History of American Law* (1973); Kermit Hall, *The Magic Mirror: Law in American History* (1989); Norman Cantor, *Imagining the Law: Common Law and the Foundations of the American Legal System* (1997).

36 Baker, above n 34.

time. Such knowledge is valuable both for future practitioners and future citizens, no less so as university legal studies take on the character of a general undergraduate degree rather than pre-professional training.

Much time might be spent in debating what sort of history can or should or must be taught as part of the undergraduate law curriculum. Ideally there ought to be something of both the local and the distant, to provide not only an account of how we got to be where we are here and now, but also some indication of other roads not taken but followed elsewhere. In these terms there is much to be said for comparative legal histories of white settler societies, along the lines pioneered by Wes Pue, Bruce Kercher and Ian Holloway,[37] especially since a growing body of teaching literature now exists to support such courses. In general it seems important to aim for a broad overview of the development of law and society in the past. Whether this is best done in first or later years is not clear to me. Likewise, while mandatory components may indicate seriousness of pedagogical purpose, they can also induce counterproductive student resistance. Nor should we underestimate the variety of possible thematic and topical approaches to, for instance, the history of litigation, of the legal profession, of crime, criminal justice, and penal administration, of state security and civil or human rights. But given their lamentable overall lack of historical background, perhaps the first and most pressing need for all law students is something in the nature of a general history subject, with a strongly constitutional and legal emphasis, which must presumably commence in England and finish in Australia. Perhaps there was after all something to be said for Adelaide's old History IC course.

37 See above n. 30.