Abstract

When Australian law teaching began in 1857, few lawyers in common-law systems had studied law at university. The University of Melbourne’s new course joined the early stages of a dual transformation, of legal training into university study and of contemporary common law into an academic discipline. Victoria’s Supreme Court immediately gave the law school what was known in America as ‘diploma privilege’: its students could enter legal practice without passing a separate admission exam. Soon university study became mandatory for locally trained lawyers, ensuring the law school’s survival but placing it at the centre of disputes over the kind of education the profession should receive. Friction between practitioners and academics hinted at the negotiation of new roles as university study shifted legal training further from its apprenticeship origins. The structure of the university (linked to the judiciary through membership of its governing council) and the profession (whose organisations did not control the admission of new practitioners) aided the law school’s efforts to defend both its training role and its curriculum against outside attack.

Legal academics turned increasingly to the social sciences to maintain law’s claim to be not only a professional skill, but an academic discipline. A research-based and reform-oriented theory of law appealed to the nascent academic profession, linking it to legal practice and the development of public policy but at the same time marking out for the law school a domain of its own. American ideas informed thinking about research and, in particular, pedagogy, although the university’s slender financial resources, dependent on government grants, limited change until after World War II. In other ways the law school consciously departed from American models. It taught undergraduate, not graduate, students, and its curriculum included history, jurisprudence and non-legal subjects alongside legal doctrine. Its few professors specialised in public law and jurisprudence, leaving private law to a corps of part-time practitioner-teachers. The result was a distinctive model of state-certified compulsory education in both legal doctrine and the history and social meanings of law.
Declaration

This is to certify that

1. the thesis comprises only my original work towards the PhD except where indicated in the introduction;
2. due acknowledgement has been made in the text to all other material used, and
3. the thesis is less than 100,000 words in length.
Acknowledgements

I gratefully acknowledge the help of the staff of the University of Melbourne Archives and the special collections reading room of the Baillieu Library, where much of the research for this thesis was carried out. My thanks go, too, to the staff of the University of Melbourne Law Library and the manuscripts and oral history sections of the National Library, James Butler at the Supreme Court Library, and Anne Ferguson, for Council of Legal Education minutes. I particularly thank my supervisors, Stuart Macintyre, John Chesterman and Fay Anderson, who have provided invaluable help and encouragement.
Abbreviations

ADB  
Australian Dictionary of Biography, online edition

CM  
Council Minutes, UMA

DP  
Sir David Derham Papers, UMA

FLC  
Faculty of Law Correspondence 1932–77, UMA

HCP  
Law School Historical and Centenary Papers, UMA

LFM  
Law Faculty Minutes

LIV  
Law Institute of Victoria

LSS  
Law Students’ Society

MLS  
Melbourne Law School Historical Collection

NAA  
National Archives of Australia

NLA  
National Library of Australia

PROV  
Public Record Office Victoria

RC  
Registrar’s Correspondence, UMA

RMC  
Registrar’s Miscellaneous Correspondence, UMA

SP  
United Kingdom, House of Commons, Sessional Papers

UMA  
University of Melbourne Archives

VPLA  
Victoria, Votes and Proceedings of the Legislative Assembly

VPLC  
Victoria, Votes and Proceedings of the Legislative Council
CONTENTS

1 THEMES AND SETTING

Introduction 1
The setting: common-law legal education 6
The literature: themes and approaches 24

2 A SCHOOL OF LAW

The university and the law course 34
Becoming a lawyer 38
A lecturer in law 42
Inauguration 48
The course and the admission rules 53
Conclusion 62

3 STUDY: STUDENTS AND SUBJECTS

The law students 65
The early curriculum 82
The degree course to 1927 89

4 THE GATEKEEPER

The admission rules 101
The climate of ideas 108
Ontario 114
The struggle for the curriculum 121
5 THE FACULTY
Lecturers in law 141
William Hearn 147
The Faculty of Law 149
Edward Jenks 156
Harrison Moore 162
Kenneth Bailey 166
Geoffrey Sawer 170
Other staff 172
Funding 173

6 IN CLASS
The case method 178
Tutorials and correspondence 194
Town and gown: location 198
Conclusion 201

7 SCHOLARS AND AUTHORS
Writing and research 203
Hearn 206
Jenks 210
The twentieth century 212
The library 217
Postgraduate study 223

8 CONCLUSION 230

BIBLIOGRAPHY 238
1 THEMES AND SETTING

Introduction

The history of legal education shows two faces of Australian law. One is Australia as a former British colony that received much of its law from England and became part of a unified imperial legal system. In this guise, Australian legal education, like Australian law, was derivative. It looked to the metropolitan centre for its values and content, modelling itself, where it could, on the law and culture of its imperial parent.

The other face is Australia as the antipodes, a place of opposites to Europe and difference from the Old World. In part, this is a consequence of the differentness of Australian society and the possibilities that were created or closed off by the colonial setting. It is also an expression of the liberal or reformist strain in Australian politics, particularly in the nineteenth and early twentieth centuries.

Compared with Britain and North America, Australian legal education reveals both parallels and disjunctions, similarities and new departures. The main theme in the history of Australian legal education from the 1850s to World War II is one that is echoed, in varying forms, in other common-law jurisdictions: the rise of university law schools. In Australia, Britain, the United States and Canada, over differing periods, university study supplemented or replaced the long-standing training of lawyers through apprenticeship in the form of articles of clerkship or other kinds of pupillage, and the study of contemporary law became established as an academic discipline.
Yet the trajectory of this development in Australia is distinctive. In parts of Australia, university study (if not initially a degree) became compulsory, and from an unusually early date. How this happened, and what it meant for the relationship between universities and the profession, are questions that help delineate the path followed in Australia in the dual transformation of common-law legal education in the nineteenth and twentieth centuries: the establishment of the common law as a university discipline, and the establishment of university study of law as a step towards entry to the profession.

This thesis considers the development of legal education at the University of Melbourne against this background. It is a local study, empirical and comparative in method. Its guiding research questions are twofold. One concerns the university’s role as educator and examiner under the rules for admission to legal practice. Legal study at the University of Melbourne was recognised from the start as a qualification for entry to the profession. It was soon compulsory, and in 1905 it became the sole formal test of legal knowledge for new practitioners (serving as an articled clerk remained an additional requirement).

In the United States the freedom of a university graduate to begin practice without passing a separate admission exam became known as ‘diploma privilege’. As the name implied, it was both unusual and a significant advantage for the universities whose qualifications were recognised in this way. For the University of Melbourne to gain and keep diploma privilege was itself distinctive, and for this to be coupled with compulsion from such an early date was highly unusual. Information about the circumstances of the initial recognition of the university’s law course is scanty, but maintaining its status under the admission rules became a theme of the law school’s later history. The university gained and kept a monopoly over teaching and examining for entry to the profession, a monopoly that came under attack from practitioners unhappy with the university’s role as gatekeeper.

In the 1930s and 1940s, some of the leaders of the Law Institute of Victoria, the professional organisation that represented the state’s solicitors,
advocated a greater role for practitioners in training for the profession, and
began to nibble at the university’s accreditation monopoly. Their ideas found
acceptance, or at least toleration, among some of the barristers and judges most
directly involved in determining the qualifications required for entry to the
profession, but accommodation and adjustment by the university drew the teeth
of their proposals. Nor was the Law Institute keen to bear the cost of providing
its own teaching to would-be solicitors, as its more far-reaching proposals
would have required.

My second research question is closely related to the first. It is the
investigation of the characteristics of the law school that the university
developed: its teaching, students, staff and research. One aspect is the genesis
and influence of changes in the curriculum, looking particularly at contested
proposals for reform of the course. The relationship between the law school and
professional organisations, and between law as a social science and law as a
profession, is closely involved here. In the early 1890s and again in the contest
with the Law Institute in the 1930s and 1940s, the curriculum was at the centre
of a tug-of-war over the kind of legal education that future lawyers should
receive, a struggle that illuminated both the university’s role as a training-
school for the profession and the emergence of law as an academic discipline.

As early as 1880, the law school’s first dean addressed the state of the law
and of legal education at a social science congress in Melbourne, following the
lead set in Britain by the National Association for the Promotion of Social
Science (1857) and in the United States by the American Social Science
Association (1865). Some of his successors embraced social science as the
theme of their teaching and research, particularly as recognition of the social
sciences grew locally and internationally in the twentieth century. It was a claim
both to a rightful place in the university for the law school (potentially
undermined by perceptions of it as a trade school, a teacher of professional
skills rather than scholarly knowledge) and to a scholarly element in legal

1 Address on the Amendment of the Law, Hearn Papers, UMA, 3/2/2; ‘Melbourne Social
Science Congress,’ Australian Law Times, 13 November 1880, xxxiv–xxxv.
training and practice, sometimes conveniently linked to older rhetoric in which law was presented as a learned profession.

Social science was an unsteady bridge between academy and profession. Within the university, it was sometimes an awkward basis for claims to equal status with other disciplines, and it had mixed implications for the law school’s place in the university. Although it used some of the language of science (sometimes in more or less superficial ways, as in the repeated claim that the law library was its laboratory), the law school struggled to demonstrate to the wider university that its needs were equal to those of either the humanities or the physical sciences, and its funding often fell short of what was available to other faculties. Law was persistently seen (even by some of the law school’s staff) as something that could be taught cheaply, without the need for large funds for teachers, books or equipment. On the other hand, there was rarely, if ever, any suggestion that Law might break away and either seek or be forced into a more autonomous existence. Unlike some North American law schools, the Melbourne Law School was always an integral part of the university for the purposes of governance, degree-granting and funding.

At the same time, the language and aims of the social sciences could provoke hostile reactions from legal practitioners whose values and whose image of the law centred on the internal culture of the profession and the expertise needed for the day-to-day working of the legal system. The elements of the law course that served the aims of social science—the subjects that went beyond the transmission of legal doctrine and explored the social and intellectual context of law—drew criticism from some practitioners as a foolish distraction from learning the skills needed for the business of legal practice. This clash of values informed much of the protracted dispute between the faculty and the Law Institute in the 1930s and 1940s, but divisions were not always clear-cut. There were faculty members who favoured a reorientation of the course towards more practical subjects, and there were practitioners who believed in a broad legal education that ranged beyond the content of substantive legal doctrine.
Comparisons with other parts of Australia and other common-law countries are involved in many of these themes. I use this comparative material for two main purposes. Although I have not set out to make a general survey of the extensive literature on the history of common-law legal education, I use it selectively to sketch the outline of changes in legal education with which Victoria can be compared. The second use I make of the comparative literature is to identify some of the main motifs or patterns in the historiography of common-law legal education in this period that can inform an interpretation of the Victorian history. Both uses illustrate the interaction of Australian (and particularly Victorian) exceptionalism in legal education and the colonial parallelism that characterises much Australian legal history.

The thesis draws on research I conducted for my book, *First Principles: The Melbourne Law School 1857–2007* (Melbourne: Miegunyah Press, 2007) and incorporates some of its text, but it differs from the book in two main ways. Its structure is more thematic than the book’s narrative history. Secondly, to limit the thesis to an appropriate length and to allow greater thematic unity, I cover a shorter period, ending in 1946 with the close of the last prolonged struggle over the curriculum. After that period, the main themes of the law school’s history changed, as the full-time staff expanded and federal government funding grew.

The main primary sources for the thesis are the archives of the University of Melbourne and the published records of the university, its staff and its students, supplemented by smaller groups of items in other archives. These materials have predictable biases, deriving from the ways in which the documents were generated and the various collections arose. The university records are dominated by decisions and by data, such as enrolments. They are rarely descriptive, except where a problem is outlined in the hope of eliciting a remedy. Reflection or retrospect is almost non-existent, and difficulties or shortcomings generally emerge, if at all, only through a complaint or a request for help. An intention to memorialise or pay tribute appears in post-war faculty minutes of appreciation on the death or retirement of significant members, but
the horizon of earlier minutes is bounded by the present and the immediate future. Most of the documents speak in the voices of the university’s office-holders and in the composed and formal register they used for their official business. Students are frequently mentioned but rarely speak in their own words, except for an occasional complaint. Administrative staff, small in number well into the twentieth century, rarely appear. The world of the university’s records is ordered, rule-compliant and respectful of authority.

In this thesis I generally read these documents with rather than against their grain. I aim where possible to situate them in the wider context of the law school’s functions within the university and the profession, but not to deconstruct them or theorise their interpretation. My project also inherits some of the limitations of these sources. The diversity of experiences of students and staff is most easily documented for later periods. The sources for my period lean in favour of those in office and contain less of the felt experience of life in the law school. Nevertheless, they constitute a rich and extensive body of material on which to draw.

The setting: common-law legal education

The United Kingdom

As colonies of settlement, the Australian colonies derived from Britain both their legal culture and the framework (along with much of the detail) of their substantive law. The main point of imperial reference for Australian lawyers was England, rather than the other parts of the United Kingdom. It was English law that applied in the Australian colonies by force of the common law, the Australian Courts Act 1828 (UK) and later statutes, unaffected by the separate, Roman-based law of Scotland. Personal experience nevertheless brought awareness of variations on the English theme. Ireland was well-known to a number of early Victorian lawyers who received their first training there, and one or two had worked in Canada and New Zealand, as I note below.
Adherence to models provided by the imperial centre usually, and indeed increasingly, characterised the colonial relationship of Australian law through the nineteenth century. Yet legal education was a field in which some of the colonies made departures from English law and practice. This mild innovation was motivated in part by reaction against failings of English legal education that were publicised by an active reform movement in the mid-nineteenth century. As in politics and constitutional law (most of the points of the People’s Charter were adopted in eastern Australia long before their adoption in Britain), Australian colonialism could be marked not only by loyal subordination but also by conscious attempts to avoid the perceived evils of the old world in a new one—and by expedients developed where English models could not be applied in the different circumstances of the colonies.

By the 1850s, when university law teaching began in Australia, legal education had become one of the targets of English movements for legal and social reform. The formal and informal requirements that characterised training for practice as a barrister did more to test candidates’ wealth or social status than their legal skills or knowledge. The system of readings and moots through which the Inns of Court trained students in the late Middle Ages had disappeared, leaving the largely empty ritual of eating dinners. The need for students to support themselves was a significant informal barrier; typically, students also paid practitioners for up to three years of pupillage. From the middle of the nineteenth century, the need to produce testimonials from existing barristers and to find chambers further filtered entrants to the profession.²

Between 1846 and 1855, a movement for the reform of legal education found expression in a series of official enquiries into the Inns of Court, the universities of Oxford and Cambridge, and the state of legal education itself. At the same time, legal practitioners brought about a patchy revival of formal

---

training for admission to practise, underpinned by the economic benefits of raising barriers to entry and belief in the social usefulness of better-trained lawyers. In 1846 the Inns of Court established readerships in English law and made attendance at two courses a prerequisite for admission to the bar. The Inns of Court established the Council of Legal Education in 1852 to supervise the training of barristers, and agreed that a voluntary exam would be an alternative to attendance at lectures as a prerequisite for admission; ‘but here’, the commission on the Inns of Court observed, ‘all effort to enforce the acquirement of information ceases’. The only candidates whose knowledge was tested in any way were those who chose to sit the voluntary exam.

The witnesses and commissioners or committee-members whose views were recorded in the reports of these enquiries were not neutral observers. They came to bury the old legal education, not to praise it: their descriptions of its failings aimed at the adoption of a different kind of training, with more formal teaching, more examinations, and a more systematic method of imparting knowledge to would-be lawyers and testing their abilities. Yet in broad outline it was difficult to contradict their conclusions about the erratic nature of the training of both branches of the profession and the heavy reliance on self-education, particularly for admission to the bar.

The extent of training received by intending barristers continued to depend largely on their motivation and available funds. In his novel *The History of Pendennis* (1848–50), William Makepeace Thackeray drew on his own experience as a student at the Middle Temple to depict the spectrum over which reading for the bar could range, from fashionable indolence to intense self-directed study. Making a case for improved legal education in English

---


universities, the deputy judge advocate-general described for the Oxford royal commission the ‘usual routine’ of study to become a barrister. It began with an undergraduate degree (but not in law), followed by enrolment as a student at one of the Inns of Court and a first year of pupillage, for a fee, in the chambers of a conveyancer. ‘The youth soon finds’, he said, ‘that, at the cost of 100 guineas, he has purchased the right of walking blindfold into a sort of legal jungle’. A student would typically spend another year or two observing the work of a special pleader or equity draftsman, at equal expense, before being called to the bar.\(^5\) Law reformer and former lord chancellor Henry Brougham testified in 1846 about the defects of barristers’ education (his own early training was in Scottish law): it was ‘at as low an ebb as it is possible for education to be in any country’.\(^6\)

Lawyers who handled office work and the procedural and documentary side of litigation, and (unlike barristers) worked directly with clients, had been divided into several callings. The separate professions of solicitor (who handled matters in equity), attorney (who dealt with common-law proceedings) and proctor (who worked in ecclesiastical and admiralty courts) had effectively merged by 1800. In Victoria, as in New South Wales, the Supreme Court recognised a single, catch-all position of attorney, solicitor and proctor.\(^7\) It is convenient here to refer to such lawyers as solicitors, the common name given to them in England by the *Supreme Court of Judicature Act 1873*.\(^8\)

The training of solicitors in England was more technical and lacked most of the gentlemanly polish implied by the university background of many barristers. Unlike barristers, solicitors had to pass a written exam in order to be admitted to

\(^5\) Royal Commission to Inquire into the State, Discipline, Studies and Revenues of the University and Colleges of Oxford (Oxford Royal Commission), *Report, SP*, 1852, no. 1482, Evidence, 197.

\(^6\) Select Committee on Legal Education, *Report, SP*, 1846, no. 686, 274.


\(^8\) *Supreme Court of Judicature Act 1873* (UK), 36 & 37 Vict., c. 66, s. 87.
practise. In London, the solicitors’ Law Society provided lectures from 1833 and cooperated with the judges in administering written exams from 1836. But the core of training was apprenticeship under articles of clerkship, which was required by statute. The cost was high. The stamp duty on articles of clerkship was £120 in 1846, and the fee or premium paid to the attorney ranged from £200 to £400. These expenses ensured ‘a considerable degree of respectability’, according to the Law Society’s secretary.

Others disagreed. The solicitor Sir George Stephen gave evidence to a select committee of 1846 about the lower social status of the profession and its commercial taint: solicitors came from ‘the inferior branches of society’, they had ‘a disposition to push litigation, and to create litigation, and to make the most of litigation when it does arise’ and they were said to ‘concoct public companies for the sake of obtaining business’. In evidence to the select committee, their training drew criticism from advocates of more theoretical education in legal principles. An articled clerk was treated ‘more as a mechanical agent for carrying out the practical processes of the profession’, the select committee concluded, and for ‘higher or more comprehensive instruction’ clerks depended on themselves.

Universities had little part in English legal education in the 1850s. The teaching of English law in universities reached only a small minority of future practitioners and was only partly intended for lawyers. Law had long been taught in English universities, certainly, but not to most would-be lawyers; universities taught the Roman-based civil law, not the home-grown common law. The law faculty at Oxford trained students for the few English courts that followed civil law procedure, such as the ecclesiastical courts and the courts of

---

10 Brooks and Lobban, ‘Apprenticeship or Academy?’, 361–2; Solicitors Act 1843 (UK), 6 & 7 Vict., c. 73, s. 3.
11 Select Committee on Legal Education, Report, SP, 1846, no. 686, 368.
12 ibid., 144, 146, 150.
13 ibid., xiii.
admiralty. It also provided general education (linking civil law with the study of philosophy) and training for the church. But by the end of the eighteenth century, even this had suffered in a general decay of teaching and examining.  

Proposals to teach the common law at Oxford came to nothing until William Blackstone began his famous lectures in 1753. But the lectures were independent of examinations and degrees; there were still no degrees or systematic exams in the common law at Oxford in 1846. Although Blackstone advocated making ‘academical education’, including the rudiments of the law, a prerequisite for legal practice, his lectures had more to do with a different ideal, the broad education of people who would never practise as lawyers: ‘a competent knowledge of the laws of that society, in which we live,’ he said, ‘is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education’.  

Oxford established a school, or separate examination, in law and modern history in 1850, as part of the reform movement that was reviving the university’s moribund teaching. Law, in the form of a final honour school of jurisprudence (for the degree of Bachelor of Arts), separated from modern history in 1872. Even then, students mainly studied Roman law, jurisprudence and international law, and learned about the history of English law, not the law of their own times. In the words of the Oxford Law School’s historian, ‘anything less like a professional law school could hardly be imagined’. The

16 Select Committee on Legal Education, Report, SP, 1846, no. 686, iv.
separate Bachelor of Civil Law exam contained little English law until its reform in 1873, and it had few students.¹⁹

At Cambridge, Roman law dominated the syllabus for the degree of Bachelor of Laws, but some English law was included for comparative purposes, along with legal history, the law of nations and moral philosophy. As late as 1852, the university prescribed no exam for the degree, only an exercise (a public debate in Latin), but successive professors of civil law required their students to pass exams.²⁰ Lectures had been held only intermittently. Jurisprudence and history were part of a new moral sciences tripos, or exam leading to the degree of Bachelor of Arts, that was established in 1848, and a board of studies for law and an LLB (Hons) degree were established in 1854. But, as two historians of legal education have put it, ‘these reforms were driven largely by internal university politics rather than by a broader vision of legal education’.²¹ The law tripos (leading to a BA or LLB, at the student’s choice) was established in 1858. Roman law remained a significant component.²²

The teaching of English law was stronger in London, in a new university closer to the courts and the centres of the profession. Lectures in English law and jurisprudence began at the University of London in 1828, delivered by John Austin and Andrew Amos, but Austin’s fame as a legal philosopher grew only after his death, and his dry and inaudible lectures drove students away. Only 135 students graduated with LLBs at University College, London, in the

---

²⁰ Royal Commission on the State, Discipline, Studies and Revenues of the University and Colleges of Cambridge (Cambridge Royal Commission), Report, SP, 1852–53, no. 1559, 33, and Evidence, 23, 78.
²¹ Brooks and Lobban, ‘Apprenticeship or Academy?’, 374–5.
nineteenth century, and most of them studied privately.\textsuperscript{23} None of these various university courses were comprehensive or, most significantly, connected with admission to practise, except that graduates in arts or law could be admitted more quickly to the bar or serve a shorter period as articled clerks. The select committee could still declare in 1846, in a much-quoted summation: ‘No Legal Education, of a public nature, worthy of the name, is at this moment to be had’, in either England or Ireland.\textsuperscript{24}

Many provincial centres had professional organisations of their own, some of which provided lectures in much the same way as the Law Society did in London; in 1846 the select committee said there were thirty or more.\textsuperscript{25} Provincial colleges, too, could provide training. From 1849 Queen’s College, Birmingham, offered what Wesley Pue has called ‘England’s first college-based program of professional legal training’, combining scholarly and practical education.\textsuperscript{26} The course attracted few students until a new professor cut back its scholarly elements and concentrated on training attorneys for admission. But the program was short-lived and ended when the second professor resigned in the 1860s. The number of law schools outside London grew in the early twentieth century, supported by the Law Society.\textsuperscript{27}

The training of barristers and solicitors in Ireland, where some of the protagonists in the establishment of university legal education in Victoria first entered the profession, resembled that found in England. Among the prominent Irish barristers in Melbourne were William Stawell, chief justice of the Supreme Court from 1857 and founding member of the University of Melbourne’s council, and Redmond Barry, Supreme Court judge and the

\begin{footnotes}
\item[25] ibid., xvi.
\item[27] Abel-Smith and Stevens, \textit{Lawyers and the Courts}, 181–2.
\end{footnotes}
university’s first chancellor. In their home country, the movement for reform of legal education had been gathering recruits since the late 1830s. The English parliamentary select committee of 1846 originated as an inquiry into Irish legal education, its scope later broadened to include both jurisdictions. By 1850 two professorships of law had been established in Dublin and attendance at lectures was compulsory for admission to the bar. Direct Victorian references to the Irish precedent are scarce, but Stawell and Barry were probably well aware of the reform movement there, and it appeared fleetingly in the reform of law teaching at Melbourne in 1873.28

In Scotland, training for the profession had older links with the universities, thanks to Continental influence in Scotland’s Roman-based legal system. In the first half of the nineteenth century, many students attended law lectures, albeit without taking degrees, as preparation for the admission exams of the Faculty of Advocates or while serving as apprentices before becoming solicitors. Attendance at university law lectures became compulsory for intending advocates in 1855, though the only compulsory exams were those of the Faculty of Advocates itself.29

The United States and Canada

North America was another source of ideas for English and Australian lawyers with an interest in legal education. The 1846 select committee received detailed information about the course of study at the Harvard Law School, although in Australia the United States were called on more often in constitutional debates than in other branches of law.30 Two prominent Melbourne lawyers of the 1850s, Henry Chapman and Archibald Michie, had worked (briefly, in Michie’s

case) in Canada, though North American influence is hard to detect in their Australian careers.31

In the United States, admission standards (in the form of compulsory apprenticeship) imposed during the colonial period were commonly weakened or abandoned down to 1860, and entry to practice often depended on nothing more than personal recommendation. The removal of barriers to entry is often ascribed to the egalitarian attacks on state-sponsored privilege characteristic of Jacksonian democracy, but Lawrence Friedman has argued that economic purposes, too, were served by the ‘large, amorphous, open-ended legal profession’ that resulted.32

Among university law schools, Harvard (where an LLB course began in 1817) offered scholarly teaching whose reputation had reached the members of the British select committee of 1846; it was the only American university in which they showed any interest. But the powerful influence of the Harvard Law School as a model for other universities was largely a creation of a later period, after the appointment of Christopher Langdell as dean in 1870. In the 1850s, examinations as a prerequisite for a Harvard law degree had disappeared, and most students attended the school for as long as they chose, as an adjunct to practical training.33

By 1860, according to Alfred Z. Reed in his compendious report for the Carnegie Foundation in 1921, there were twenty-one college or university law schools in the United States. Nor did universities operate the only law schools. A distinctive feature of American legal education (partly resembling English


private colleges or crammers) was the large number of profit-making, proprietary law schools. Their relationship with universities was complex, as they sometimes competed, sometimes coexisted by targeting different students, and occasionally merged or split apart again.\(^{34}\) Yale, for example, affiliated itself with a private law school in the 1820s. Although the university incorporated the law school in its course offerings and awarded law degrees from 1843, the school remained a proprietary one until the early twentieth century, in the sense that the university accepted no financial responsibility for it and the professors ran it at their own risk.\(^{35}\)

In the 1850s, what most law schools offered was not a mandatory qualification required for accreditation as a practitioner. Instead their students sought knowledge of the law for the sake of its usefulness and economic value in practice (or, for some, as part of a general education). When so little stood between a would-be lawyer and admission to the bar, university study was a source of professional skills and a qualification to display to future clients, rather than a prerequisite to produce to the admitting authorities. In 1860 only nine jurisdictions out of thirty-nine required anything more than age and residency as qualifications for admission to practise, and even in those nine, enforcement of the additional requirements was lax.\(^{36}\)

It followed that only a minority of states recognised law degrees for the purposes of admission to practise. If no study was required, the question of qualifications did not arise, at least so far as formal requirements for practice were concerned. In states that did impose some form of test or additional prerequisite, law schools began to gain certification that allowed their successful students to enter practice without further examination. This diploma privilege, which was first granted in 1842 in Virginia, spread slowly and in


\(^{36}\) Burrage, Revolution and the Making of the Contemporary Legal Profession, 257.
1870 still applied in only seven states, though the list grew in the next two decades.\textsuperscript{37} University law study as a preliminary to a separate bar admission exam, an emerging trend in the late nineteenth century, only became widely established during the twentieth century, as barriers to entry rose and universities came to dominate American legal education.\textsuperscript{38}

In Canada, university training in law was strongest in the French-based system of Quebec, where a law school had been established at McGill University in 1848. Elsewhere, apprenticeship and (in Ontario) highly developed training by the profession were the foundations of admission to practise, even after the first common-law school opened, at Dalhousie University, Nova Scotia, in 1883.\textsuperscript{39} A key distinction was that, unlike their Australian counterparts, the Canadian colonies vested control over admission in associations of practitioners rather than the judges. The widespread removal of formal prerequisites for entry to the profession in the United States in the early and middle decades of the nineteenth century had few Canadian parallels, although from 1850 to 1864 legislation in Nova Scotia gave every citizen who voted or paid poor rates the full rights of practitioners to plead in the courts, and in the early 1850s the Legislative Assembly of Canada heard motions from members and petitions from citizens calling for the democratisation of court procedure and the ending of the lawyers’ monopoly over advocacy.\textsuperscript{40}

\textsuperscript{37} Alfred Z. Reed, \textit{Training for the Public Profession of the Law} (New York: Updike, 1921), 249–51.


Even within the common-law provinces, regional differences were pronounced. Alberta was influenced by the example of Nova Scotia, where many of the province’s prominent lawyers had studied; university study for intending lawyers became established in Alberta earlier than in Ontario, and the University of Alberta administered the local law society’s professional admission exams. In Saskatchewan, too, university teaching began relatively early, and in 1923 the University of Saskatchewan took over all legal education, edging out a competing law school operated by the local profession. By contrast, legal education in British Columbia resembled that in Ontario, but not, it seems, through conscious emulation. Practitioners operated law schools in the early decades of the twentieth century, and a university law faculty was not established until 1945.

New Zealand

The legal profession in New Zealand was well known to one of the people most closely connected with the early years of the Melbourne Law School. Henry Samuel Chapman, the university’s second law lecturer, had been a judge in New Zealand and returned to another judicial appointment there in 1864. As I discuss in more detail in chapter 3, in Melbourne Chapman showed a particular interest, unusual for the 1850s and 1860s, in the law of acquisition of colonial sovereignty by Britain and related questions of title to land. His New Zealand experience was the basis for his work on a topic that was rapidly disappearing from legal discussion in eastern Australia, as the orthodoxy of colonisation by settlement displaced earlier judicial speculation about a limited reach for imperial law.

---


43 W. Wesley Pue, Law School: The Story of Legal Education in British Columbia (Vancouver: University of British Columbia Faculty of Law, 1995), 44–62.
In the 1850s, five years’ service as an articled clerk qualified a candidate for admission to practise as a solicitor in New Zealand. Although there was no provision for local admission of barristers (other than those already admitted to practise in England or Ireland), the two branches of the profession had reciprocal rights of practice, and a local candidate admitted as a solicitor was entitled to work as a barrister. From 1861 legislation allowed for the admission of local candidates to both branches of the profession, after a period of either articled clerkship or pupillage to a barrister, and examination in both legal and general knowledge. The requirement to work as an articled clerk was removed in 1882, providing one of the few Australasian examples of deliberate opening-up of the profession by lowering of barriers to entry, but an attempt by former governor and premier Sir George Grey to remove high admission fees was unsuccessful.

University law teaching began, at Otago, in 1873, and in 1889 the judges of the Supreme Court delegated to the federated University of New Zealand the function of examining candidates for admission, though still under the court’s control. This step effectively made university study compulsory for would-be lawyers. Students in New Zealand could choose whether to undertake the admission subjects alone or in conjunction with the additional subjects required for the LLB degree; few chose the longer course. The ‘back door principle’ introduced in 1898, which allowed solicitors of five years’ standing to be admitted as barristers, confirmed the tendency for practitioners to be admitted initially as solicitors even if they intended to practise at the bar (a trend already evident under the earlier rules conferring reciprocal rights of practice). The role of the University of New Zealand became still greater when full authority to prescribe the content of the admission examinations passed to it in 1930.

---


46 Spiller, Finn and Boast, *A New Zealand Legal History*, 265; *Law Practitioners Act Amendment Act 1898* (NZ), s. 2.
Council of Legal Education, created at the same time, merely advised the university, a situation that continued until the dissolution of the university in 1961.47

**Australia**

In Australia, too, legal training depended on apprenticeship and self-education. Until lectures began at Melbourne in 1857, there was no systematic teaching of law. The colony of Victoria inherited the framework of its legal profession from New South Wales, of which it was a part until 1851. The Third Charter of Justice for New South Wales (1823) provided explicitly for the first time for the admission of barristers and attorneys.48 In part, it confirmed the previous custom of recognising in New South Wales courts the qualifications of lawyers admitted to practise in England, Scotland or Ireland. It excluded the emancipated convicts who had acted as attorneys or legal agents and whose presence in New South Wales courts had caused intense controversy during the previous decade.49

The charter went beyond this, however, by allowing for locally trained practitioners. It vested in the judges of the Supreme Court the authority to admit lawyers, and gave the court power to frame rules prescribing the necessary qualifications. The rules made by the judges allowed for the admission of solicitors, proctors and attorneys, rolling up in that catch-all designation the occupations that had once been separate in England but were now effectively combined. The rules made no provision for the admission of locally trained barristers, but in practice candidates were admitted to a merged profession whose practitioners had the combined status of barristers, advocates, proctors,

---

47 Coote, ‘Qualifications for Admission to the Legal Profession in New Zealand,’ 142.


attorneys and solicitors, covering the various branches of the profession in England and Scotland.\textsuperscript{50}

The locus of power over entry to the profession was one of the key determinants of the shape legal education would take. Its vesting in the judiciary excluded other groups whose role in certification for practice became indirect. In Australia, unlike Canada, admission was not controlled by well-established organisations of practitioners; professional associations of solicitors and, particularly, barristers were created too late to have a major role in entry to the profession until well into the twentieth century. The power of the judges also minimised the direct role of the executive and legislative branches of government. The interest of cabinet and parliament in legal training was generally distant and intermittent. When they did become directly involved (as in Victoria in 1891), the technical difficulties and political complications that resulted gave them good reason to leave the issue to the judges or an independent Council of Legal Education. Delegating power to the judges generally suited both the courts and their political masters.

The early, fused legal profession of New South Wales was formally divided in 1834, after which solicitors who had not already been admitted in Britain or Ireland were admitted to practise after serving as articled clerks or clerks of court, and (from 1838) passing written exams administered by the Supreme Court’s board of examiners. Admission in England, Ireland or Scotland was the only route to practice for barristers until 1849. From then on, in New South Wales and later in Victoria, would-be barristers could pass local admission exams, but to prepare for them they had to teach themselves or find private tutors.\textsuperscript{51} In South Australia and Van Diemen’s Land (renamed Tasmania in 1856), the profession remained fused, and locally trained practitioners could be

\textsuperscript{50} Bennett, \textit{A History of Solicitors in New South Wales}, 47–9.

admitted after serving as articled clerks. Practitioners in Western Australia were admitted on the strength of qualifications earned elsewhere or through experience gained in the local courts; it was not until 1855 that legislation provided for the formal examination of local candidates.

The University of Sydney, founded in 1851, showed an early interest in teaching law. Its senate passed a by-law in 1855 stating that there would be a faculty of law in the university, and in 1858 another by-law anticipated the establishment of a board of examiners in the subject. Yet the implementation of these good intentions was long delayed. The university reported in 1857 that the law faculty by-law was not yet in ‘active operation’; no members were appointed to bring the faculty into existence. Lecturing in law began in 1859, but no members were appointed to the board of examiners until 1864, when the first students graduated, with LLBs. Law lectures ceased altogether from 1870, and although they were revived in 1883 the single lecturer could cover little ground in the available class-time. A temporary expansion of the staff in 1887 was short-lived, and it was not until 1890 that the appointment of William Pitt Cobbett as Challis professor of law, along with other, part-time staff, allowed teaching to begin in a comprehensive law course.

The most important reason for the long delays and false starts in the establishment of the Sydney Law School was the relationship between the

---


university’s examinations and admission to practise. The university’s great difficulty in teaching law was that until the 1890s its law examinations were not recognised by the boards of examiners that controlled admission, and the qualifications it offered were therefore of no direct assistance in becoming a barrister or solicitor (although arts graduates did not have to sit the humanities sections of the admission exams, and served a shorter term under articles in order to become solicitors). Its degrees, earned through reading and examination separate from lectures, were grades of distinction in legal knowledge rather than steps towards becoming a lawyer. The early lectures at Sydney were conceived as part of a general education, not training for legal practice. Sydney’s first reader in jurisprudence, John Hargrave, made a point of saying that he lectured on general jurisprudence, in the sense of abstract law, not on law as applied in practice.

Why this recognition was delayed so long is largely a matter of conjecture, but one important influence was scepticism, in the university and in the profession, about the very idea of academic training for lawyers. Hargrave himself doubted the value of academic legal education, and preferred training by the profession. He opposed not only compulsory university study for admission to practise, but also recognition of his own lectures for the purposes of admission, saying it was undesirable to make it harder to enter the profession. Without would-be practitioners as prospective students, the establishment of a law school looked to the university like an unwelcome drain on its funds rather than (as in Melbourne) a rich source of enrolments and fees.

The literature: themes and approaches

Writing about the history of common-law legal education in the nineteenth and twentieth centuries has been shaped by several distinct enquiries. One broad group of writings is institutional and commemorative. Law schools naturally celebrate and publicise their significant anniversaries; histories can serve these purposes. Their authors (who are usually staff members) chronicle the development of their law schools with particular attention to biography and the physical environment. Achievement and progress in size and reputation are common motifs. Histories of most Australian law schools established down to 1975 (the College of Law at the Australian National University is an exception) have been published in various forms, including journal articles, a commemorative register of students and staff, an album of photographs and recollections, and narrative histories. Legal education also figures, to a greater or lesser extent, in histories of universities, some of which have paid particular attention to their law schools and the professional environment in which they operated.

In the United States and Canada, scholars have directed powerful and perhaps predictable critiques at commemorative histories of this kind. One of


the strongest of these was the conspectus of the previous twenty-five years of law school histories published by Alfred S. Konefsky and John Henry Schlegel in the *Harvard Law Review* in 1982. With a few notable exceptions, they stigmatised the books as winners’ history: each law school was the hero of a monotonously similar narrative that was bereft of social context and that reduced its subjects to a uniformity devoid of distinctive characteristics. ‘Simply put,’ they said, ‘the school grows from humble, but auspicious, beginnings to early triumphs and then through occasional hard times, though with never more than a momentary temptation to backslide from fixed and noble goals, to a place—if only a small place—in the sun’.62

In Canada, Wesley Pue has identified three persistent storylines in histories of legal education: progressive development; struggles by academic heroes to establish university legal education despite the opposition of small-minded legal practitioners; and lawyers’ use of legal education to advance their economic and social status by reducing competition and excluding ethnic minorities (this last storyline, he comments, is usually articulated only so that it can be refuted). Common distortions accompany these motifs, among them that law is unaffected by society, that issues are reduced to debates between academics and practitioners, that regional importance is under-recognised, and that the cultural meanings of legal education are not appreciated.63

Not all institutional histories have received or deserved these criticisms. Konefsky, Schlegel and Pue themselves discussed exceptions, and Pue put his ideas about institutional history into practice in his own history of legal education in British Columbia.64 In the wide field of books and articles on American law schools, there are others that aim, through conscious reaction against the celebratory law school narrative or simply through their authors’ choice of historical method, to consider the subject as a branch of wider history,

---


64 Pue, *Law School*. 
usually informed by sociology and the history of the professions. Books on the history of the Yale Law School are some of the many examples.65

This more critical historiography is also found in works whose focus is not on individual institutions, but on aspects of the legal profession. The Australian literature in this category deals mainly with the period since 1945, shading into documentation and analysis of current issues.66 Legal education also figures in histories of the profession.67 While they have not been framed as historical projects, government enquiries into legal education have sometimes prefaced their reports with historical introductions.68

The critical literature on the history of legal education in the United States and Canada provides some of the main alignments and points of reference for interpretation of the Australian history. The divergent patterns of legal education across the common-law world have led to different emphases in historical writing. The United States literature for the period considered in this thesis is predictably the most extensive and diverse, but it is strongly influenced by the widespread abandonment of barriers to professional entry in the mid-1800s and the creation of new barriers through the first half of the twentieth century. This process lends itself to social and economic analyses of controls on


For both Stevens and Abel, the main story was the reintroduction of formal qualifications for practice and the spread of university legal training; they dealt briefly with the period before 1850. Stevens placed these developments in the context of social change, particularly the professionalization and stratification of occupations during economic expansion and structural change after the Civil War. The title of Abel’s chapter on entry to the profession, ‘Controlling the Production of Lawyers’, signalled his instrumental view of legal education and admission controls, which he portrayed as serving the interests of those already in the profession. He particularly noted the efforts of practitioners to restrict entry in the 1920s and 1930s, when, he argued, economic motives operated in conjunction with attempts to exclude recent immigrants.

Burrage extended the historical timeframe, integrating the rise of barriers to entry within a broader narrative that also encompassed their earlier decline (which he attributed to the American Revolution). Comparative analysis of developments in England, France and the United States supplied the overall structure of his project. He downplayed the importance of economic interpretations of lawyers’ collective action and questioned the success of the profession in restricting entry after 1870. He posited a distinctive interpretation of the increase in the number of law schools: as legislated entry requirements disappeared and the economic value of accreditation through admission to practise declined, law schools met a demand for marketable qualifications, providing their own, more selective (and so more valuable) form of certification. In Burrage’s view, ‘once bar admission requirements were eliminated, the best way in which a trained attorney might distinguish himself from an untrained or casually-trained attorney was to hang a law school diploma on his office wall’.69

The range of different patterns across the many jurisdictions of the United States poses a challenge of its own. It can sometimes appear, as Karl Llewellyn said of American university law schools in 1935, that ‘variety overwhelms similarity’. Such is the difficulty of tabulating the American data that the detailed national overview produced by Alfred Z. Reed for the Carnegie Foundation in 1921 remains a key source of evidence—frequently cited, for example, by Burrage. The political context of Reed’s report has drawn perceptive comment, but a reappraisal of his empirical data and interpretive framework seems yet to be written. Local studies provide a patchwork of fresh analyses from primary sources. The documentation and interpretation of the development of individual law schools continue to motivate much ongoing research. No fewer than five books have been published or are in preparation under the aegis of the Harvard Law School History Project (including a new history of the school), and the tercentennial of Yale University in 2001 produced one of the notable recent books on the history of its law school.

In Canada the control of admission to the profession in the nineteenth century by strong organisations of practitioners has focussed attention on different questions. The dominance of the training program provided by the Law Society of Upper Canada, and the political weight of similar organisations elsewhere, contributed to a historical stress on the educative role of the profession, well represented by G. Blaine Baker’s extended study of legal education in Ontario from 1785 to 1889. A heroic narrative of enlightened academics battling reactionary practitioners shaped some histories, among them

---

71 Reed, *Training for the Public Profession of the Law*.
74 Baker, ‘Legal Education in Upper Canada 1785–1889.’
Ian Kyer and Jerome Bickenbach’s study of practitioner and academic influence at the Osgoode Hall law school, *The Fiercest Debate* (1987).\(^{75}\)

The heroic narrative has been questioned by other writers, among them Robert Gidney and Winnifred Millar in their history of the professions in nineteenth-century Ontario, and Wesley Pue in his study of themes in the history of Canadian legal education and in his history of legal education in British Columbia, *Law School* (1995).\(^ {76}\) These authors shared a re-evaluation of apprenticeship and other forms of training by the profession, allowing them to be understood as widely supported alternatives to university education (with cultural affiliations to practical training in skills other than law) rather than as a primitive stage from which legal education was lifted by the forces of progress. Pue also highlighted regional variations in the common-law provinces of Canada, noting the contrasting models provided by Ontario (where training took the form of apprenticeship, lectures by practitioners and self-directed preparation for law society examinations) and Nova Scotia (where university-based legal instruction had operated since the nineteenth century).

Writing on the history of English legal education has been influenced by the dominance of the Inns of Court and the Law Society, and by the relatively weak role and low status of university law schools until well into the twentieth century. English law schools have been the subject of fewer extended histories than their United States or Canadian counterparts, even when differences in population are allowed for. The University of Cambridge law school, which dates its foundation to the Middle Ages, is the subject only of chapters in university histories and a commemorative booklet (albeit one written by the doyen of English legal historians, Sir John Baker).\(^ {77}\)

---


\(^{76}\) Gidney and Millar, *Professional Gentlemen*; Pue, ‘Common Law Legal Education’.

Although the number of institutional histories of university law schools is small, the profession and, particularly, the Inns of Court are the subject of a more extensive literature. Some studies of the profession, such as the detailed historical introduction to the 1971 report of the Committee on Legal Education chaired by Sir Roger Ormrod, served a program of reform that aimed to reduce reliance on apprenticeship and increase requirements for academic study.\(^78\) Others drew on a sociological approach embodied notably in Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts* (1965), and continued in the English chapters of Michael Burrage, *Revolution and the Making of the Contemporary Legal Profession*. The descriptive method of much of the English literature is well represented by Christopher Brooks and Michael Lobban’s analysis of tensions between apprenticeship and academic study in England in the mid-nineteenth century, which describes the reform efforts current there in the period of the establishment of the Melbourne course.\(^79\)

Taken together, the critical literature on the history of university legal education in England provides as many contrasts or disconnections with Victoria as it does obvious parallels or examples of colonial conformity to the imperial centre. This pattern can be compared with other aspects of Australian law. Australian private law, along with many features of legal culture, was increasingly drawn into congruence with English law through the second half of the nineteenth century and into the twentieth. It was of the Federation era that academic and judge Paul Finn said, ‘Legal colonialism had begun in earnest’; legal historian Bruce Kercher analysed the departures from English law in early New South Wales and depicted Australia’s later legal Anglophilia extending unabated into the 1950s.\(^80\) G. Blaine Baker has described a similar process in Ontario. He identified the growth of ‘an unreflective and subservient attitude’


\(^79\) Brooks and Lobban, ‘Apprenticeship or Academy?’.

between about 1880 and 1920, a time when a group of writers made newly systematised English private law readily available for the Canadian profession, and political reasons for Canadian ties with Britain were strengthening. Baker labelled the process ‘nation to colony confirmed’.81

Beyond the legal sphere, historians have described the growing visibility and stridency of imperial loyalty in Australia in the late 1890s and early 1900s, as the after-effects of economic depression and an emerging defence threat from Japan encouraged financial, naval and military cooperation with Britain.82 Australian participation in the Boer War and the creation of Empire Day exemplified more assertive displays of support for imperial ties, though both provoked nationalist retorts from Labor newspapers and from Roman Catholics who had a less sympathetic opinion of Britain. These events may have signified a closer and more reliant relationship with Britain, or they may have been an attempt at repair as ‘the links began to fray’ (in Stuart Macintyre’s words); in either case, they affirmed a colonial relationship of which Australian legal culture was one of the most obvious exemplars.83

Despite this, the influence of English examples and ideas of Home was weaker in the organisation of Victorian legal education than in many other areas of Australian law. Reference to Oxford and Cambridge at Melbourne was patchy, and can be more closely identified with gestures of cultural affiliation and reassurance about status and standards than with emulation of the working of English law faculties or their relationship with the profession. The link between the Melbourne course and admission to practise, and the strong continuing connections between the Melbourne law faculty and senior judges,


were among the significant differences between the colonial university and the metropolitan models it sometimes proclaimed allegiance to.

This pattern was far from uniform across Australia, and in Victoria it was more true of the framework of legal education than the substance of the law that students studied. In Victoria and South Australia, university study was accredited for entry and then made compulsory. In New South Wales, self-directed study for the bar and, for solicitors, articling without formal teaching (both along English lines, albeit under the control of the New South Wales Supreme Court rather than the profession) persisted longer as the means of entry to the profession. After the law course at the University of Sydney was recognised for the purposes of admission to practise in 1890, self-preparation for admission exams remained a popular alternative; the exams continue today in the form of the Legal Profession Admission Board Diploma in Law examinations, for which evening and weekend teaching is provided by the University of Sydney Law Extension Committee. The committee is independent of the university’s Faculty of Law, and its graduates may enter practice without any university qualifications.

In the content of private-law subjects taught at the Melbourne Law School, fidelity to England was strong. English law, English decisions and English texts were central to teaching until well into the twentieth century, consistently with the English deference of many practitioners and judges. Departures from English sources, and the use of material from North America and the Continent, were more likely to be found in the study of jurisprudence and public law. Comparative examples could supply material for jurisprudence (the faculty merged the subjects Jurisprudence and Roman Law in 1900, partly for this reason), and after 1901 Australia’s federal structure encouraged comparison with Canada and, particularly, the United States, which provided models for some of the key features of the Australian constitution.84

This varied historiography provides several guiding ideas for this thesis. It draws on critical rather than commemorative models of writing about the

---

84 CM, 12 August 1895, 359; LFM, 17 July 1900, 278.
history of legal education. As a study of the university rather than the profession, it cannot map fully the social context of legal training, but it does situate the law course in its discipline and in the framework for entry to legal practice. Historical literature from Britain, Canada and the United States supplies points of resemblance and contrast in the relationship between law-teaching and university education, the place of legal study in the social sciences, the development of distinctive legal pedagogy, and tensions between law schools and professional organisations. Like any historical comparisons, sometimes these produce only ‘inverse and unexplained relations and correlations’, in the words of Sheldon Rothblatt and Björn Wittrock. But others are more fruitful, and in combination they help to reveal the distinctive character of legal education at the University of Melbourne.

85 Sheldon Rothblatt and Björn Wittrock, introduction to The European and American University since 1800: Historical and Sociological Essays, ed. Sheldon Rothblatt and Björn Wittrock (Cambridge: Cambridge University Press, 1993), 8.
The university and the law course

Law was not among the subjects initially taught at the University of Melbourne. The university was established in 1853, its foundation spurred by rivalry with Sydney (whose university enrolled its first students the previous year) and by the gold rush that had begun in 1851. The colony of Victoria was newly separated from New South Wales, and its graziers, merchants, professionals and civil servants formed a class whose dominant position was challenged both by gold and by the introduction of a new constitution and self-government, promised by the British government in 1852. They favoured the creation of a university for ‘the moral and social improvement of the colony’, in the words of Hugh Childers (who, as auditor-general, piloted the bill for the creation of the university through the legislature). The select committee he chaired hoped that the new institution would help redeem the colony from ‘the social and moral evils with which she is threatened’. Its creation also suited the pride of the newly rich city. On the same day, the Queen’s representative in the colony, the lieutenant-governor, laid the foundation-stones of two conspicuous claims to rising status, the university and Melbourne’s grand Public Library.

Childers and his colleagues founded a state university, funded by the colonial government and run by a council selected (until the number of

1 Selleck, The Shop, 15.
2 ibid., 15.
3 ibid., 2–3.
graduates grew sufficiently to allow the creation of a university senate) by the lieutenant-governor. Compared with the universities of Britain and Ireland, it was distinctive, a novel combination of features found in the United Kingdom but not united there in one institution: ‘urban, secular, professorial, nonresidential and non-collegiate, centralised in government, controlled by a laity, and possessing power to teach and examine’, as its historian, Richard Selleck, put it.⁴ Government sponsorship and public control gave the university points of resemblance to the state universities of the United States, albeit without the land grants and rivalries with denominational colleges that marked their nineteenth-century history.⁵

The foundation council had strong cross-membership with the colonial legislature, with the lieutenant-governor’s executive council, and with the professions. The twenty founding councillors included the attorney-general, William Stawell (who remained a member when he became chief justice in 1857) and one of the three judges of the Supreme Court, Redmond Barry, who became the university’s first chancellor.⁶ In the absence of a salaried vice-chancellor or other chief executive (not appointed at Melbourne until 1934), chancellor and council exercised a high degree of administrative control, sometimes in conflict with the university’s professors.

The statute that established the university allowed it to grant degrees in four disciplines: arts, law, medicine and music. Of these only arts was offered to the first students, who enrolled in 1855; in line with English practice, it encompassed mathematics and natural science as well as logic and the classics.⁷ Law, like medicine and music, would wait for future expansion, or so it must have seemed at the time. As it turned out, it was not the expansion of the university that prompted the start of teaching in law, but its failure to thrive.

⁴ ibid., 27.
⁷ Act 16 Vict., no. 34 (1853, Vic.), s. 10; Selleck, The Shop, 42.
The second year of classes brought so few new students that the total enrolment remained under twenty. The university’s council, acting on a proposal by Barry, resolved to begin lectures in both law and medicine. The council’s terse minutes say nothing more about this initial decision, but remedying the low enrolments was an obvious motivation. Barry proceeded to develop a detailed proposal for the law course. It began within months, while lack of funding and other difficulties delayed lectures in medicine until 1862. Law required no expensive equipment, a lecturer could easily be found from among the city’s barristers, and students could be attracted in significant numbers if the course was made part of training for admission to practise.

Conditions favoured Barry’s strategy. The colony’s growing wealth, population and aspirations helped create an environment in which the university’s bet on the provision of professional training could succeed. Rising government revenue supported the state funding of the university, and the growing economy and private wealth bankrolled payment of the students’ fees. The legal profession in Victoria was smaller than in New South Wales and its history was shorter (the first Supreme Court sittings were held only in 1841); the stronger corporate identity of the Sydney profession may have provided more fertile ground for the idea, shared by lawyers in the early senate of the University of Sydney and expounded by its first reader in jurisprudence, that legal training should be by apprenticeship or pupillage, and only a general education in the principles of jurisprudence belonged in a university. Press comment on Melbourne’s new course was blandly favourable, the Argus welcoming this ‘first tentative assertion’ of the university’s claim to be ‘the proper channel through which the learned professions may be reached’.

---


9 CM, 8 December 1856; Selleck, The Shop, 58.


11 Argus, 7 March 1857.
Widespread literacy increased the pool of potential students in Victoria from which the law classes could draw, in what was still a relatively small population (just over 390,000 at the start of 1857, but rising fast). Even in 1854, before the start of the free and compulsory primary education that later became a key function of the colonial government, less than 9 per cent of Victorians over the age of fifteen were unable to read. The founding of the free Public Library at the same time as the university, open to all and immediately popular, was one marker of the pervasiveness of textual culture through a wide cross-section of the gold-rush population—as, in a different way, was the uncontroversial acceptance of a literacy test as a limit on adult male suffrage in elections for the lower house of the Victorian parliament (coincidentally in the year when law teaching began). Only a small proportion of literate Victorians had the skills needed for university study, certainly, but by 1861 literacy in Victoria was higher than in the other Australian colonies, and the difference was greater still between Victoria and England. There (to take the usual rough indicator of literacy) over 29 per cent of spouses signed the marriage register with marks rather than their names in 1861. In the same year, less than 15 per cent of Victorian adults were unable to write.

Initially, as a way of maximising enrolments in law, the university offered only a certificate that satisfied the Supreme Court’s requirements for professional admission, rather than a degree. The university’s engineering school followed the same pattern, but in its case the act of parliament that created the university withheld the power to grant degrees. The certificate course was shorter (it could be completed in two years) and had the added advantage that its students were not required to pass the university’s

---


14 Act 21 Vict., no. 33 (Vic., 1857), s. 12.


matriculation exam. The law course was therefore easier to enter than the university’s only other undergraduate offering, the course for the BA. Combined with the advantage of admission to practise, the easier entrance requirements made the new course a highly successful strategy for recruiting students. In its first year, it attracted thirty-three students, helping to lift the university’s total enrolment to fifty-four. Law continued to provide more than half the university’s enrolments into the 1860s, when other courses (notably medicine, from 1862) expanded their share. Non-matriculated students made up the majority of law enrolments until 1867, after the admission rules made matriculation compulsory for both barristers and solicitors.17

**Becoming a lawyer**

The new law school’s recognition in the admission rules was fundamental to its survival. Victoria’s Supreme Court judges first made rules for the admission of practitioners in 1852, exercising a power given to them by the statute that created the court.18 They preserved the separation of the two branches of the profession that had become established in New South Wales. Local candidates who sought to become barristers or attorneys (if they had not been admitted in England, Scotland or Ireland) sat written exams on their legal and general knowledge, under the supervision of separate boards of examiners. The judges, who were members of both boards, prescribed the structure of the exams and listed set texts, but candidates were left to themselves to study their contents. Barristers elected two representatives to their board of examiners, where they and the judges were joined by the attorney-general, as the notional leader of the bar (though this English tradition had little substance in Victoria). Solicitors (or

---


attorneys, as the rules generally called them) had representatives on their board of examiners chosen for them by the judges. Redmond Barry liked to think that the barristers’ board was something like the self-regulating benchers of the Inns of Court in London, likewise made up of senior judges and advocates.\(^19\)

The judges designed an exam that cast prospective barristers as gentlemen with a broad education, much as the university’s LLB course later did.\(^20\) Their five prescribed law papers (real property; common law pleading and practice; equity and insolvency; criminal law; and evidence, oddly combined with contracts) were matched by five others: Greek and Latin; mathematics and algebra; ancient history; English history; and universal history. The scope of this last subject was made a little clearer by the judges’ prescription of the history of the French Revolution and the Napoleonic Wars written by the Scottish lawyer Sir Archibald Alison. A central theme of this ‘Bible of the Tory party’ was that all political innovation was inherently dangerous; perhaps the judges, mindful of the social upheavals of the gold rush, hoped students would take this lesson from their reading.\(^21\) Solicitors sat just three papers, in real property, the practice of the Supreme Court, and criminal law. Barristers paid thirty guineas into the court’s library fund as their admission fee (unless they had previously been admitted elsewhere), while twenty-five guineas were demanded from solicitors. The first barrister to be admitted after passing the local exams was a law reporter for the Argus newspaper, John Morris Travers McDonogh, in 1853.\(^22\)

\(^{19}\) Rules of the Supreme Court, 1852, \textit{VPLC}, 1852–53, vol. 1, 611–14; \textit{In re Spensley} (1864) 1 \textit{WW&'a'B(L)} 173, 183.


\(^{22}\) ‘Domestic Intelligence,’ \textit{Argus}, 29 October 1853, 5; Banco Court Minute Book, PROV, VPRS 5364/P0/1. Henry Lawes, who was admitted in 1859, has previously been identified by Dean and others as the first locally trained barrister: Arthur Dean, \textit{A Multitude of Counsellors: A History of the Bar of Victoria} (Melbourne: F. W. Cheshire, 1968), 26.
The distinction between barristers and solicitors, and the barriers to admission to the bar, were strengthened when the admission rules changed in 1853. The judges did not explain their reasons, but the turmoil of the gold rush provides clues. The threats it posed to the social order worried old colonists such as Stawell’s predecessor as chief justice, Sir William à Beckett.  

“A great wave of barristers set out from England and Ireland”, in the words of the bar’s historian, Arthur Dean, and admissions of new immigrants to the bar rose from two in 1851 to twenty-three in 1853 (from a starting-point of six or seven barristers in practice in 1851). Among the more conservative lawyers, the influx caused concern about the maintenance of ethical standards. Legal standards seemed to need defending against erosion by a long tail of less able barristers who lacked the skill and professional acculturation of their better-known colleagues (the university’s early law lecturers among them). Increasing competition may also have concerned them, but if so they kept this less high-minded motive to themselves.

The new admission rules of 1853 protected the existing members of the bar against locally-trained competitors by closing off most of the ways in which aspiring barristers could earn a living: under the new provisions, if they had not been admitted elsewhere, they had to live in Victoria for three years without engaging in a trade or business. In London, Lincoln’s Inn, too, had excluded students who engaged in trade—Barry later relied on English practice in defending the Supreme Court’s rule—but in Victoria the disqualification was both rigid and strictly applied, and for local students it became a serious obstacle. At the same time, the judges added a new subject, common law, equity and insolvency, to the examination for solicitors, and made explicit the

---


requirement for them to serve five years as articled clerks (omitted from the earlier rules, perhaps through inadvertence).²⁶

In practice, teaching, journalism and (initially) the civil service were not regarded as coming within the description of ‘trade or business’, leaving these opportunities for would-be barristers to support themselves until they were admitted. The Supreme Court later decided, however, that work in the civil service was a trade or business under the rules, but being a member of parliament outside business hours was not (parliament did not sit during the day), and school-teaching remained acceptable.²⁷ Would-be solicitors faced no three-year ban, but the need for them to serve as articled clerks had a similar effect, and they needed certificates of character attesting to the fact that they were not currently engaged in trade. As for solicitors who had been admitted in Britain or Ireland, a requirement for them to disclose to the court how they had been employed since ceasing practice in their home jurisdiction implied that the judges might disapprove of some occupations. The process was easiest for barristers already admitted in England, Scotland or Ireland. They had only to produce evidence of their admission overseas, but the cost, time and trouble of travelling to Australia were themselves a barrier to entry.²⁸

The judges moved swiftly to recognise the law course in the admission rules. An amendment was in place before the start of first term, 1857, exempting successful students at the university from the Supreme Court’s law exams for both barristers and solicitors. Intending barristers still had to pass the prescribed exams in general knowledge, unless they had graduated in Arts.²⁹ Adapting the rules to suit the law course did the university a favour, but this


²⁷ Victoria, Parliamentary Debates, Legislative Assembly, 1 November 1861, 255; In re Goslett (1864) 1 WW&a’B(L) 161; Ex parte Duffy (1876) 2 VLR(L) 142; In re Embling (1903) 29 VLR 1.


was not the judges’ only motivation. University training also served the profession’s own purposes, by taking up the recommendations for systematic legal education that were circulating in Britain and responding to concerns about the poor quality of Melbourne’s gold-era lawyers. The *Victoria Law Times*, the country’s first legal journal (edited by the university’s first law lecturer), complained about ‘bloodsuckers’ in the profession, who prowled watch-houses, prisons and ‘the low haunts of profligacy and ignorance’, preying on their inmates and extracting extortionate costs. Thirty Similar, if less colourful, criticism appeared in the *Argus*, and such practices led to an official complaint from the visiting magistrate of the Melbourne gaol. Thirty-One While it did nothing to police the character of émigré lawyers (the loose controls operating in Britain would have to be relied on in their case), the incorporation of university study into local legal training was part of a discourse of professional improvement, ethical practice and public service. In law as in other disciplines, moral education was one of the planks on which the university took its stand as a state institution.

**A lecturer in law**

The university’s earliest teachers were professors, appointed after their chairs were advertised in Britain, and chosen by a London committee created by the university council for the purpose. The academic world of the United Kingdom was the university’s touchstone in selecting them, partly for reasons of social acceptability. A degree from the university of Oxford, Cambridge, London, Dublin, Edinburgh or Glasgow was a condition of eligibility, to the exclusion even of other British universities. A German applicant was rejected, not, it seems, on academic grounds, but because the committee wanted a candidate

---

30 Leading article, *Victoria Law Times*, 24 May 1856.
who had felt ‘the social influence of a British University’. The University of Sydney, even more restrictive, hoped to recruit only Oxford or Cambridge graduates, but in practice both universities drew on a wider field. Of the four founding professors at Melbourne, two were graduates of Cambridge and had held fellowships there, one was a graduate of Dublin and held a chair at Queen’s College, Galway, and the fourth (despite the council’s instructions) had no degree, but held a chair at Queen’s University, Belfast. One of the four died shortly after arriving in Melbourne; his replacement was an Oxford graduate who was working as a school-teacher in London.

British and Irish universities provided the selection committee with its social standard, but the professors did not always follow English ways, or at least not the ways of Oxford and Cambridge. A few days after the university’s opening ceremony, the professors of modern history and literature, political economy and logic (William Hearn) and of mathematics (William Wilson) wrote publicly to the chancellor to argue against the compulsory study of Latin and Greek, which Barry championed. The incident was a sign of the new university’s stance towards its English counterparts, sometimes taking Oxford and Cambridge as the models from which its academic standards derived, and sometimes rejecting them. It was a pattern that would be repeated in the university’s law school.

In style, if not in numbers of students, the new law course was a much more modest undertaking than the establishment of the university’s four foundation chairs. The university sought, for the first time in its history, a teacher below the rank of professor, a local resident who could teach the law students part-time. Such an appointment was a small investment to make in a course that might not succeed and that led to a mere certificate rather than a degree. Yet even this minor post complicated the emerging power structures of the university, by

33 Turney, Bygott and Chippendale, Australia’s First, vol. 1, 61; Selleck, The Shop, 32–40, 50; Ernest Scott, A History of the University of Melbourne (Melbourne: Melbourne University Press, 1936), 23.
introducing a teacher who was independent of the professors. Law was part of no professor’s department, and the details of the new course were prescribed not by the professorial board but by the council, which had no professors among its members. It was to the council that students took their complaints when problems emerged under the first lecturer, and it was to the council that the lecturer was held accountable. The board’s minor role in supervising the law exams only emphasised its weakness.35

Rather than a salary high enough to attract candidates from Britain—the professors received £1000 a year and free accommodation—the law lecturer would be paid £100 for each of the three terms, supplemented by the fees of the non-matriculated students, who made up most of the early classes. These students paid £4 for each term, twice the fee of the students who had passed the university’s matriculation exam, which went to the university rather than the lecturer. Fees and salary established a comfortable margin of academic prestige over the non-academic staff: the university’s registrar, who doubled as its secretary and librarian, received £270. By 1860 the revenue from the law students’ fees more than doubled the official salary of their teachers (of which there were now two, a second having been appointed to spread the teaching load).36

Allowing the law lecturers to be paid the fees of some of their students was anomalous: the council had decided at the establishment of the university that professors would not receive students’ fees.37 Presumably (the university records are silent) the council traded-off part of its control over salary and revenue for the sake of offering greater rewards to the law lecturers, coupled with an incentive for them to boost enrolments in their classes. Attracting and keeping teachers took on a new aspect for the university as it moved into the field of professional training. Lawyers able to earn far more elsewhere could be

35 ibid., 63–4.
37 Selleck, The Shop, 21.
hard to retain on the university’s staff, but usually other benefits of teaching, such as enhanced professional standing from a university appointment, or the chance to indulge an interest in the academic side of law, helped to even the balance.

The council seemed uncertain about the title of its new law teacher, resolving initially to appoint a ‘Reader or Lecturer in Law’ before plumping for ‘lecturer’ when it picked a candidate. When it next filled the post, the council switched to ‘reader’, which Barry liked; the name had a long history at the Inns of Court, where it had recently been revived, and the two incumbents preferred it when he asked them in 1870. The university’s calendar, however, ignored their choice and listed all sub-professorial teachers as lecturers, perhaps to avoid invidious comparisons between law and other departments, where the grander title was not used. When the law course was reorganised and new teachers appointed in 1873, readers disappeared, until the title was revived by the university in 1954.

Compared with the slow process by which the professors were chosen, weighed down by distance and the apparatus of the London committee, the selection of the law lecturer was rapid, taking only a few weeks. The council decided on the terms of the appointment early in January 1857 and picked the successful candidate before the end of the month.

The incomplete administrative records of the university’s early years document only two applicants for the law lectureship, though there may have been more. Both applicants were graduates of Oxford or Cambridge who had practised as barristers in England before emigrating to Victoria in the 1850s. James Wilberforce Stephen was a member of a family whose extended branches linked law and government administration through a remarkable series of posts in the colonies and England. His relatives included John Stephen, first puisne

38 CM, 5 January 1857.
39 CM, 26 January 1857; Barry to Billing, 2 June 1870, and undated reply, RMC, Law School, loose item 1.
40 CM, 5 and 26 January 1857.
judge of the Supreme Court of New South Wales, his son Sir Alfred Stephen, who followed his father onto the same court and became its chief justice, and Sir James Stephen, powerful permanent under-secretary of the British Colonial Office from 1836 to 1847. If family connections had counted for much, Stephen would have been a strong candidate, yet the council chose someone who had no obvious patron and whose family (while remarkable in its own way) had little political weight. Stephen had to wait for another vacancy at the university, in 1858, when his second application was successful.

The council’s choice was Richard Clarke Sewell, son of a solicitor from the Isle of Wight. Richard’s sister Elizabeth was a novelist and, among his brothers, James was the long-serving head of New College, Oxford, Henry was briefly the first prime minister of New Zealand (the ministry he led lasted only two weeks), and William had a prominent, if somewhat erratic, career as university teacher, college administrator, religious polemicist and Anglican clergyman. All five appear in the Oxford Dictionary of National Biography. The family was affluent enough to put Richard on the track to a university education. From public school (Winchester), he went to Oxford, where he became a fellow of Magdalen College. He took a doctorate in civil law, but this was less impressive than it sounded. At the time the only requirement for the degree was a so-called wall-lecture: ‘that is, the Candidates are shut up in the Schools for an hour or two’.

Sewell’s earliest publication was the poem with which he won the university’s Newdigate prize in 1825. Like others, he combined his Oxford fellowship with outside work, and he became a barrister. Through the 1830s and 1840s, he published a series of books and shorter monographs on topics including common law procedure, local government law, ecclesiastical courts,

43 Oxford Royal Commission, Report, SP, 1852, no. 1482, 84.
electoral law and university politics. History was among his varied interests, and he edited a collection of documents of the reign of the medieval English king Stephen. The book for which he was best known in Australia was a treatise on coronial law and forensic pathology, published in London in 1843.44

In 1855 Sewell emigrated to Victoria. He was admitted to the bar, on the strength of his admission in London, and he quickly developed a prominent practice in criminal law, sometimes defending, but prosecuting in two cases that attracted widespread attention in 1856–57: the trial of the bushranger ‘Captain’ Melville and eight other convicts for the murder of a warder, and that of some of the convicts who killed John Price, the inspector-general of penal establishments. He used his knowledge of electoral law in an appearance before the Legislative Assembly’s elections and qualifications committee, after the 1856 parliamentary elections.45 His editorship of the *Victoria Law Times* showed that publishing continued to attract him. The weekly journal commented on legal news and reported Supreme Court decisions before the advent of official law reports. In his editorials, Sewell argued for higher professional morality (enforced by a professional association, an inn of court along English lines), and against amalgamation of the two branches of the profession. The burden of editing must have been heavy, and Sewell lasted only three months; three other editors followed in succession before the journal folded, after surviving for less than a year.

Such an applicant, with his Oxford doctorate and fellowship, his extensive record of publications and his rapidly acquired prominence at the Melbourne bar, was hard to pass over for the law lectureship. Soon after his appointment, he used his Oxford degree to get an automatic, *ad eundem* doctorate in laws from the University of Melbourne, the first law degree awarded in Australia.46

---


45 ‘Election Qualifications Committee,’ *Herald*, 8 January 1857; ibid., 9 January 1857.

46 University of Melbourne, *Calendar*, 1868–69, 134. The University of Sydney, Australia’s only other university at the time, conferred its first law degrees in 1864: Report of the University of Sydney, 1864, *Votes and Proceedings of the Legislative Assembly of New South Wales*, 1865, vol. 2, 811.
**Inauguration**

In an inaugural lecture on 11 March 1857, Sewell explained his intentions for the course and defended the value of legal education. The lecture was a public event and something of a ceremony, advertised in the press, attended by Redmond Barry as the university’s chancellor and (like many public lectures at the time) published as a pamphlet. In common with American inaugural lectures of the period, it advertised the law school, vindicated the study of law, spoke of the needs of students and began the task of meeting them. It also shared a popular model, Blackstone’s inaugural lecture as Vinerian professor in 1758.47

Blackstone’s characteristic defence of the value of legal knowledge, not only for lawyers but for a wide variety of other social groups, had, perhaps, a particular appeal in publicly funded state universities. It was used in a similar context at the opening of the law school of the University of Michigan in 1859, after the university’s regents were censured for using public money to provide lucrative professional training. Articulating the civic purpose of legal education served the universities’ need to justify their existence to sceptical taxpayers, a need that the council was painfully conscious of following public criticism of the government’s extravagance in establishing the University of Melbourne.48

Sewell quoted Blackstone’s *Commentaries on the Laws of England* at length and announced that he would use them as his textbook. He gestured to the classics by quoting Latin, but (unlike Barry, who scattered classical fragments through his many published speeches) he translated them for his readers. The better training of practitioners was one of the purposes of legal

---


study he highlighted, but not the first. He described the narrow-minded, avaricious, dishonest lawyers of fiction and real life; the new law school’s founders, he said, aimed ‘to rescue the profession from obloquy such as this, to save it from bitter contumely and scorn’.49 Students should combine early study of first principles with later experience of practice, remedying the defects of English legal education. The university could even perform the functions of the Inns of Court, its lower qualifications admitting lawyers to practise as attorneys and doctorates entitling them to admission as barristers.

Following Blackstone, Sewell argued that legal education was equally beneficial to non-lawyers, to legislators, jury-members, magistrates (most of whom had no legal training), coroners, clergymen, people in business, land owners and those pursuing almost any vocation. He declared a high moral purpose, saying that intellectual and moral training were inseparable and that his students held the ‘sacred trust’ of preserving the public institutions of the colony. Sewell paid fulsome tribute to the recently retired chief justice of the Supreme Court, Sir William à Beckett, who warned against the moral dangers of social dislocation in the gold rush, and whose Tory Anglicanism chimed with Sewell’s. ‘None but rash and unthinking visionaries or selfish and unprincipled egotists are the advocates of a wide-sweeping destruction of time-honoured ordinances and customs’, Sewell had written in defence of the segregated profession in the Victoria Law Times, although in other editorials he argued for reforms in procedure and practice.50

There were discordant notes in this otherwise impressive debut. Sewell expounded the value of law as part of a broad education, but the Melbourne course was, in its conception and through its vital link with the rules for admission to practise, essentially one for would-be lawyers rather than conscientious citizens. The technical detail that made up much of the course would have driven away the merely curious. A focus on what was useful for admission to practise had the best prospects for attracting and keeping students:

49 Sewell, Legal Education, 25.
50 Leading article, Victoria Law Times, 24 May 1856.
intending lawyers were a more likely source of enrolments and fees than the general public. Here, too, as in the rules for admission to practise, Melbourne differed from the University of Sydney, where John Hargrave kept more strictly to the ideal of legal knowledge as a part of general education. He warned law students not to imagine that his lectures would provide their professional education or to think that they would ‘in the least’ assist them to pass their admission exams.51

In an introduction to his lecture, Sewell dwelt on his diffidence and fears of inadequacy in undertaking such a task. To open with a modest disclaimer was a familiar rhetorical device, but Sewell’s anxiety and fears of failure seemed genuinely troubling, as he imagined his ‘bitter humiliation’ if he did not succeed, and urged himself on: ‘To recede would be even more disgraceful than to fail’.52 Perhaps he calculated, with some justification, that the rest of his lecture would dispel any doubts he may have raised about his ability (it was, certainly, a learned and skilful address). Yet, however natural his reaction, it was a curious point to labour at such a time, and a contrast with the confidence that was a hallmark—almost a necessity—of other inaugural lectures, launching untried courses that would prosper only if universities could inspire belief in their value.

Problems soon emerged in Sewell’s classes. His second lecture, on ‘the nature of laws in general’, also survives, but it was a very different production from his first, with none of its polish or oratorical flourishes. An introduction to the branches of the law, forms of government, and statutory interpretation, it was blandly expository. It reads now like a miscellany of information Sewell believed the students should know, but had no gift for explaining.53

Like many of the barrister–lecturers who followed him, Sewell sometimes found his commitments in court made it impossible for him to reach the

53 ibid., ch. 2.
university for classes, and his poor health kept him away at other times. How many lectures he missed was itself a point of contention between Sewell and his students, but cancellations were frequent enough for the council to ask him about them within a couple of months of the start of the course. His explanation was judged satisfactory for the time being, but the controversy went on, and his absences were not the only problem. ‘I might here object to several of his lectures’, one student wrote to the *Herald*, complaining about the cancellations, ‘but I would rather drop the subject’.54

Sewell was defensive, and angry that the students took their complaint to the newspaper rather than to him, but their discontent led to a public meeting and a petition to the council: ‘the continuity of your memorialists’ studies has been destroyed and their task rendered irksome and dispiriting beyond measure’, the students wrote. As evidence of his deficiencies, they pointed to a sharp drop in attendance. The university’s plentiful new source of enrolments threatened to dry up almost as soon as it had begun, but after just five months in the post Sewell resigned, giving ill-health as his reason.55 His practice at the bar declined and he became insolvent in 1862; he had been in failing health for a considerable time when he died two years later. His English biographer recorded that he died unmarried, but this was true only in the sense that his wife Eliza predeceased him. Married to him in Melbourne in 1858, she died, of ‘debility’, in 1861, at the age of forty-two.56

In 1862 the diarist Annie Baxter Dawbin consulted Sewell for advice about a trust fund that she depended on for her income. She went initially in search of another barrister, who proved to be overseas. Told that his colleague Sewell would be at the London Tavern in Elizabeth Street, she met him in his room there and described him ‘hiccoughing & breaking wind in the most distressing

54 ‘The Law Lectures at the University,’ *Herald*, 20 June 1857; CM, 15 and 25 May 1857; Sewell to Registrar, 19 May 1857, RMC, Law School, 403.
56 *Argus*, 21 April 1862, 6, and 9 November 1864, 5; Eliza Sewell, death certificate, 8 September 1861, Victorian Registry of Births, Deaths and Marriages, registration no. 6156.
manner’. He gave his opinion, but she formed a poor impression of him. ‘He is far gone I think in the drinking line: he looks a complete sot!’ Sewell’s death certificate, completed after a post-mortem examination, provides some corroboration of Dawbin’s guess, identifying cirrhosis of the liver as one of the causes of death.

If, as the post-mortem diagnosis suggests, Sewell’s illness was chronic and deep-seated, it may have contributed to his difficulties at the university. It might possibly be connected, too, with his emigration to Victoria, which was, at first impression, a somewhat puzzling step for him to take in his fifties, apparently well-established in his career. None of his Australian obituarists mentioned a reason for his emigration, but such moves were so common during the gold rush, not least among barristers who had struggled to earn a living in Britain or Ireland, that perhaps it needed no explanation. Sewell’s biographer guessed that he was influenced by the protracted financial troubles that engulfed the family after his father died heavily in debt. This may well be correct, but thirteen years elapsed between his father’s death and his departure for Melbourne. His Oxford background must have been an attraction for the council in choosing him for the law lectureship, but perhaps his reasons for leaving England contained the seeds of his problems at the new university. The university’s first experiment with a law teacher who combined English university credentials with experience of legal practice was a failure, but the combined qualifications were alluring enough to lead to further and ultimately more successful attempts.


58 Richard Clarke Sewell, death certificate, 7 November 1864, Victorian Registry of Births, Deaths and Marriages, registration no. 8775.

The course and the admission rules

The judges’ recognition of the new law course in 1857 established an interdependent, if unequal, relationship between the Supreme Court and the university. The course depended partly, even largely, on the admission rules for enrolments, while the judges could promote higher standards for the profession, and more selective entry, through the agency of the university. Cross-membership of the court and the university council furthered these ends. The relationship continued until 1905, when power over admission to the profession shifted to the new Council of Legal Education (on which the judges were nevertheless well-represented).

After the tightening of admission requirements in 1853 and the incorporation of the law course into the rules in 1857, the judges faced a period of concerted calls for lower barriers to entry to the profession. They were, perhaps, a distant echo of the calls for open access that had such dramatic effects in the United States, and of the less effective campaign in Canada in the early 1850s. In Victoria, too, critics of the existing rules had affiliations with wider populist movements that were cast as attacks on entrenched privilege. Their parliamentary leader was Wilson Gray, himself a barrister and president of the quasi-parliamentary Land Convention that agitated powerfully for free selection of Crown land for small farms in the late 1850s. Gray proposed legislation to abolish the restrictive three-year rule on work in trade or business, and to allow solicitors to apply for admission as barristers. The rules offended the sense of freedom of opportunity that found expression in his land policy. He linked the question explicitly with the democratisation of the parliament, which had recently abolished property requirements for voting and for membership: under the three-year rule, he maintained, ‘a property qualification might as well be required from every aspirant to the bar’, such was the advantage it gave to those with private means.60

60 Victoria, Parliamentary Debates, Legislative Assembly, 1 November 1861, 255.
Admission fees, too, made entry to the profession difficult. In the 1853 rules, partly reflecting the inflation of prices during the gold rush, the fees rose to fifty guineas for barristers not previously admitted elsewhere, and forty guineas for solicitors. Like the three-year rule, they treated local applicants for the bar particularly harshly; fees for admission of practitioners who had already been admitted elsewhere were much lower (ten guineas for barristers, and five for solicitors).61

Other barristers responded in parliament to Gray’s criticisms. Butler Cole Aspinall had migrated to Victoria in 1854, soon after he was called to the bar in London. In Melbourne he combined journalism and practice as a barrister. His liberal–radical opinions as a member of the lower house aligned him with Gray on some questions, but not in this case. The existing rules preserved the dignity and honour of practitioners, and the well-being of the community, he said.62

The Irish barrister Richard Ireland targeted Gray’s populism: the bill was offered ‘as a sop to democracy’, he said; it would allow the admission of ‘sweeps and shoe-blacks’ as barristers. Showing his awareness of the removal of barriers to entry in the United States (and indirectly attacking Gray, who had worked and studied there), he accused the bill of being American; such measures had had bad effects, he said.63

Gray’s opponents found their safest and ultimately most successful argument in a procedural point. Through the Supreme Court Act, they said, parliament had given the power to make the admission rules to the judges, and it should not interfere with those rules without consulting them. The reformers had a majority in the lower house, which passed the bill, but in the Legislative Council, barrister Thomas Fellows successfully referred it to a select


63 Victoria, Parliamentary Debates, Legislative Assembly, 19 December 1861, 375.
committee, which could seek the opinion of the judges. The committee never reported, and the bill lapsed at the end of the session.64

The judges themselves abandoned the three-year rule in 1865, showing a preference for higher educational prerequisites over such a blunt instrument for guarding the bar against new entrants of the wrong sort. Once it had gone, it was easier to become a barrister than a solicitor. Only intending solicitors had to spend time working as articled clerks before admission. Not only was their work usually unpaid, but (as in England) they generally had to pay their principals a substantial premium in order to be taken on as clerks. In parliament, businessman Donald Melville later complained that the payment of large premiums for articles might even be called blackmail.65 Those intending to become barristers, on the other hand, could hold paying jobs while studying, although they could not work as solicitors or law clerks.

A series of other amendments to the Supreme Court’s rules increased the educational requirements for entry to the profession. The rules that recognised the law course in 1857 gave the students who completed it full exemption from further examination in law subjects, whichever branch of the profession they intended to enter.66 This largesse was short-lived, at least for would-be solicitors. Soon the judges asserted their right to re-examine the products of the law school, but at the same time they took a significant step, and for the first time in Australia made an instalment of university study compulsory for admission.

From 1863 would-be solicitors had to matriculate and pass exams from the first two years of the LLB course, before they could tackle the court’s own exam. The judges also extended the program of broader education they had initially applied (matriculation aside) only to barristers. They required articled clerks to pass not only the law exams of the first two years of the LLB, but the

64 ibid., 4 February 1862, 546.
history exams as well, thus exposing them to ancient history and constitutional history. Indeed, the first year of the LLB course contained no law subjects at this time. It was probably in recognition of this that the judges soon changed the rules to take the prescribed law and history subjects from the second and third years of the law course instead, thus drawing in more law while still retaining history.67

For aspiring barristers, university study remained for the time being merely an alternative, albeit an attractive one, to self-teaching and examination under the admission rules. From 1865 they were required to enrol at the court as students-at-law. They were not allowed to practise as solicitors, law clerks or clerks of court during their notional studentship, but a perfunctory requirement to sit in court for eight days in the legal term preceding admission was easily satisfied, and the rest of their time was largely their own. The full LLB course reduced the studentship to one year; arts graduates and students who passed four law exams from the LLB course (omitting the arts component of the degree course) did two years; others did four years, and then sat the court’s exam.68

Then in 1872 the judges extended their unusually early enthusiasm for university training, taking it a step further for barristers than for solicitors by requiring all students heading for admission to the bar, and not already admitted elsewhere, to graduate with a full bachelor’s degree in law from the University of Melbourne, or some other university recognised by it. At the same time, they allowed graduates in law or arts to serve a shorter period under articles—three years instead of the usual five—before becoming solicitors. Alfred Deakin, the future prime minister, was one of the last to enrol as a student-at-law before the new rules came into force, and thus one of the last to be admitted as a barrister without an LLB. Only sixteen when he gave the necessary notice to commence


his studentship in 1872, he completed the law subjects at the university, but not the full degree course.\textsuperscript{69}

With these changes, the court made at least some university study compulsory for all locally trained candidates for admission as barristers or solicitors, and abandoned its role as an examining body for barristers, handing responsibility for their assessment entirely to the university. For the period, and for a common-law jurisdiction, the step was highly unusual. In New South Wales university study was not compulsory for admission until 1966, and even then only in the sense that the University of Sydney hosted teaching (by a separate lecturing staff) for the admission-board examinations that were an alternative to obtaining a university degree. As late as 1927, no state in the United States required attendance at law school as a prerequisite for admission to practise. In England and Wales the professional organisations of barristers and solicitors dominated legal training. Even in 2009, while a university degree (not necessarily a law degree) was required for most would-be solicitors in England, their compulsory academic legal training could be obtained at a range of institutions, including universities and the College of Law originally established by the solicitors’ Law Society (but now independent).\textsuperscript{70}

The judges’ motives in making these changes are now difficult to recover. During part, at least, of the nineteenth century, the judges kept detailed minutes of the meetings at which they discussed such matters as the court’s rules. Transcripts of these minutes from 1892 and 1900 survive in the papers of Sir David Derham, who, while professor of jurisprudence, consulted them in the 1950s in the course of research on the history of legal education.\textsuperscript{71} Since then, however, the originals have been lost, and efforts by the staff of the Supreme

\textsuperscript{69} Rules of the Supreme Court, 3 December 1872, \textit{Victoria Government Gazette}, 24 January 1873, 129–33; Admission of Barristers Files, PROV, VPRS 1356/P0/2, no. 153.


Court to locate them have been unsuccessful. In the absence of other sources, the admission rules have to speak for themselves, and the intentions that gave rise to them must be guessed from their content and their effects. Some of the alterations in the rules provoked discussion in newspapers and legal journals, but few aroused the level of interest or criticism that surrounded the three-year rule in the 1850s (fusion of the two branches of the profession was an exception). The leading parliamentarian with an interest in freer access to the profession was removed from the scene when Wilson Gray left Victoria in 1862. While the politics of the 1860s and 1870s often centred on questions of privilege, professional status rarely figured. Rights to land and the power of the parliament’s oligarchic upper house were far greater issues.

It would be easy to guess that Barry’s solicitude for the university to which he devoted such energy was a reason for the court’s indirect support of the law course, which gained students from the court’s insistence that study there would be not merely a helpful option but compulsory. The university also had a friend in Sir William Stawell, the chief justice, who was involved, like Barry, in the gestation of the plan to expand the teaching staff and establish the law faculty, implemented just six months after the judges made the LLB compulsory for entry to the bar. Personal links were crucial when a similar step was taken in South Australia a decade later. The country’s third university, Adelaide, refused to open a law school unless enrolments were ensured by making university study a condition of admission to practise. Its vice-chancellor was in the right place to change the admission rules: he was the chief justice. The new law school opened in 1883, and all aspiring lawyers had to attend its classes.72

Yet, as in 1857, a favour for the university was at most only part of the story. The judges initially proposed a somewhat different version of the 1872 rules, under which barristers would have to hold a degree in either arts or law, and all candidates, including law graduates, would still have to pass the court’s admission exam. The proposals were circulated to the members of the bar, who asked for amendments at a meeting with the attorney-general. The barristers,

72 Castles, Ligertwood and Kelly, Law on North Terrace, 11.
not the judges, made the key proposal that the LLB and the one-year studentship, without further examination, would be the sole form of local training for the bar. The *Australian Jurist* was sceptical: limiting the qualification to the LLB would be ‘too narrow to be acceptable to the public’, and it would cause problems for reciprocity with other Australian jurisdictions, which depended on rough equivalence of admission standards. The public showed little interest in the changes, if the newspapers are any guide, but reciprocal admission remained a recurring problem.

The barristers were no more explicit about their reasons than the judges. Only circumstantial indications remain. One spur to action was public criticism of a loophole in the 1865 rules, under which arts graduates could be admitted as barristers after a two-year studentship and without passing any law exams at all. Another was the continuing debate about standards of legal education in England. There, advocates of reform in legal education had been arguing for compulsory study before admission for more than twenty years, and it was in 1872 that passing an exam became a prerequisite for admission to the bar in London. The teaching that prepared candidates for this exam was provided by the Inns of Court, not by a university, just as the solicitors’ Law Society had run lectures and compulsory exams for articled clerks since the 1830s.

Nevertheless, the trend was unmistakeably towards increasing requirements for study and examination. To the extent that Victorian lawyers caught this trend, the teaching needed to implement it could be provided only by the university, not by the small local profession. Growing interest in reform to provide better training, the local conditions that made the university the only viable law teaching institution, and the personal connections of two of the judges combined to produce the happy side-effect, for the university, of guaranteeing the enrolments of its law school.

---

73 *Australian Jurist*, 8 October 1872, xliii.

74 ‘A Royal Road to the Bar,’ *Australian Jurist*, 24 July 1871, xlii; *Argus*, 11 December 1871, 5.

The answers to some central questions remain unclear. Did the changing educational prescriptions open the profession on meritocratic grounds, giving access to those who passed its academic test? Did they perhaps redefine its exclusivity, replacing or supplementing the financial demands of articling and the three-year bar studentship with the expense of university study? Comparable jurisdictions elsewhere provide examples of both kinds. In the United States, rising educational requirements for both bar admission and law school entry have been interpreted by many writers (in whole or part) as instruments of exclusion. This reading remains well-established: ‘the bar hoped that raising law school standards would help limit the supply of practitioners, particularly those who were of disfavored social and ethnic minority groups’, Laura Appleman wrote in 2005. But other studies have indicated a different result, based partly on regional variation. ‘The rise of law schools democratized the profession’, Stephen Lilley wrote in 2007, citing ceremonial addresses to law students and an earlier study of the Philadelphia bench and bar.

After the system had changed, following the amalgamation of the two branches of the profession in 1891, a royal commission on law reform commented on the way the rules had operated. It concluded that they allowed the admission of some of Melbourne’s ablest lawyers, ‘who were able by their own exertions to defray the expense of their University course, but who would have been quite unable to pay a large sum for their articles, and spend three years in a lawyer’s office without pay, and without liberty to engage in other occupations.’ Henry Higgins, who chaired the royal commission, had good reason to know the truth of this: he became a barrister by working his way through university in the 1870s as a teacher and private tutor. Other law students who supported themselves by working as teachers or in government

---


jobs before going to the bar included Alfred Deakin, Edward Carlile (later Victorian parliamentary draftsman), and future judges George Webb, William Irvine, Isaac Isaacs and Frank Gavan Duffy. The Law Students’ Society journal, the *Summons*, corroborated the truth of the commission’s summary.\(^{79}\)

There were limits to the accessibility of the bar. From 1865, barristers, like solicitors, had to matriculate, a requirement that excluded the bulk of students, who never reached secondary school. Prospects for a career as a barrister depended on more than just hard work, and the club-like atmosphere of the bar in colonial Melbourne made the task of working-class aspirants doubly difficult. One of the few who succeeded was John Mackey, who was said to have taught himself to read and write, and supported himself through university in the 1880s with work in the public service and as a private tutor. Exceptionally he appears to have paid his own way as a student at one of the university’s residential colleges, Ormond. But even he made his career more as a member of parliament, government minister and university teacher (he lectured in equity for more than twenty years) than as a barrister. As an MP, he introduced the bill that enabled women to be admitted to practise as lawyers in Victoria.\(^{80}\)

In 1863 there were just over 300 solicitors in practice in Victoria, most of them (about 58 per cent) in Melbourne. Forty-five barristers listed themselves in the comprehensive local directory, a fair indication of the number in private practice in the city. By 1891, the number of solicitors had risen to something over 450, now (like the general population) more concentrated in Melbourne, which accounted for two-thirds. The directory listed 113 Melbourne barristers.\(^{81}\)

The rate of growth seems to have been much faster for barristers than solicitors, although the figures are so approximate that calculations are only

---


rough guesses. If true, the pattern would bear out the royal commission’s story of easier access to the bar. A more definite trend is that the profession was growing more slowly than the population, which doubled between 1863 and 1891. In the United States, by contrast, the legal profession grew at a much faster rate than the population between 1870 and 1890 (initially at twice the rate of population growth).82 The growth of any profession is hastened or slowed by many things, but in Victoria one obvious suspect is the admission rules: the educational requirements made legal practice more difficult to enter.

Conclusion

From its inception, teaching in Melbourne’s new law course survived without interruption and with steadily increasing enrolments. While this continuity was hardly exceptional, it was nonetheless noteworthy. In the United States, on Alfred Reed’s figures, of the thirty college or university law schools that were established between the Revolution and 1860, only eighteen operated continuously during that period.83 Among the universities where law teaching was interrupted or halted permanently were Columbia, Pennsylvania, Princeton, Sydney and Toronto. Similar difficulties also affected the Law Society of Upper Canada’s school at Osgoode Hall.

Diploma privilege, that ‘short cut to the bar through golden gates’, as a leading American critic, Lewis Delafield, called it, was probably the most important reason for this continuity.84 Once established in Victoria, it was gradually adopted in other Australian jurisdictions, leaving a landscape for legal education that differed significantly from the United States. There, diploma privilege was granted by several states in the 1850s, after its first, short-lived appearance in Virginia; at its peak in the 1880s, it was in force in seventeen

---


84 ibid., 267.
jurisdictions. But critics including the American Bar Association attacked the privilege, arguing, among other things, that written bar exams ensured a higher standard of education.

Opposition also came, perhaps surprisingly, from law schools. Some that aimed to be leaders in a state-wide education market feared their competitive advantage would be eroded if all law schools could certify their graduates for admission on an equal footing. In Michigan diploma privilege was abolished at the request of the University of Michigan law school, which hoped to regain the selling-point of being best able to prepare students for the state bar exam. As Alfred Reed put it, ‘in several states schools that have found they could not monopolize the privilege have taken the lead in asking for its abolition’. Harvard refused to seek it on the ground of its status as ‘a national school of law’, as its president wrote in 1878. The privilege usually extended only to the law schools of the state in question, discriminating against out-of-state schools that sought to prepare students for practice across the country. By 1930 all states had bar admission exams, and diploma privilege was in decline.

In Australia the problem of competition between universities holding diploma privilege did not yet arise, and no law school attempted to position itself as a national school until the late twentieth century. It was not until Victoria’s Council of Legal Education began teaching its own course in 1962 that any state had more than one law school. In this setting diploma privilege was a boon to the universities. Once recognition of the Melbourne course became compulsion, and all new lawyers had to study at the university, the law school had an assurance of enrolments that few of its American counterparts could match. Visiting the United States in 1937, Melbourne’s dean, Kenneth Bailey, found this advantage was coveted by his American colleagues. ‘The

---

86 Reed, Training for the Public Profession of the Law, 266.
87 ibid.; Brown, Legal Education at Michigan, 280–1, 731.
89 Burrage, Revolution and the Making of the Contemporary Legal Profession, 303–4.
position of the University of Melbourne,’ he wrote, ‘maintaining the only law school in the jurisdiction, with “diploma privilege” for its graduates, was greatly envied wherever the writer went.’ It was a rare case in which the usual Australian envy of the best American law schools was turned on its head.

Influences other than this privileged position also left the Melbourne course well placed to attract students and survive. It suited the profession’s interest in raising standards and barriers to entry. In its early years, it was easier to enter than the degree courses that (after the university’s first year) demanded matriculation, and it probably benefited from a trend among lawyers to seek clear demarcation of professional status (clearer, perhaps, than clerkship alone would provide). It was pitched to a literate and prosperous community. Through the dual roles of its staff, it straddled the academic realm of the university and the professional world of the city, a divide signified by the distance between the campus and the centre of Melbourne and later by the movement of law classes back and forth between the two locations. It readily found teachers among practising lawyers by rewarding them with a salary, a share of the students’ fees, and the added status that a university lectureship could bring. Absent some of these factors, and the law school might have experienced the same interruptions as some of its counterparts elsewhere. The security of its existence was one of the most significant, if sometimes inconspicuous, features of its history.

---

The law students

Beginning with the thirty-three students who saw out the first year of teaching in 1857, law enrolments slowly grew, reaching fifty for the first time in 1860 and one hundred in 1891, before dipping in response to hard times and changes in the professional admission rules. The numbers were always sufficient to ensure viability. When the LLB suffered a near-death experience in the early 1890s, thanks to changes in the rules for entry to the profession, what was at stake was the kind of law course the university would offer, not the survival of the law school itself. In the twentieth century only war and economic depression interrupted the upward trend of enrolments, which reached 200 in 1919 and 300 in 1920 as students took up studies delayed by war. Numbers remained between 300 and 350 for most of the 1920s and 1930s, with slight dips after the post-war bulge worked its way through the course and again between 1930 and 1933. The cycle of shrinking enrolments in wartime followed by a flood of returning students was repeated between 1940 and 1946; a year after the war ended, student numbers reached 447.¹

The law school accommodated these growing numbers of students with difficulty but, so far, without any suggestion of imposing an entrance quota. Yale had limited numbers in its law course in 1927, becoming the first

¹ Approximate enrolment figures derived from Statistics of the Colony of Victoria (VPLA), Statistical Register of Victoria (VPLA) and Dean’s Report, 1946, RC, 1946/288. Variations in the basis on which enrolments were calculated in this period preclude tabulation of exact figures.
American law school to do so.² The nature of the Melbourne course made such a step a difficult one. A university with a monopoly on professional training, and particularly a state university dependent on government funding, could not exclude students without facing the criticism that it was barring them from their chosen occupations and even shirking its responsibilities to the community. The fact that the profession could be seen as a privileged one added force to an objection that was doubtless shared by some of the teachers themselves. The medical school had operated a quota since 1946, extending the government’s war-time restrictions, but the decisions to impose and later reduce it had been deeply controversial. When a law quota was finally imposed in 1961 (after total enrolments exceed 1200), the staff heard rumours that the judges had accused them of going on strike, and the Supreme Court mobilised support for an alternative law course open to any student who had been refused admission to the university.³

The law school’s two courses divided its students into two distinct groups. Those who studied for a degree and those who sought only a certificate shared many subjects, lectures and exams, but their backgrounds and destinations were often very different. Most of the certificate students were articled clerks who studied part-time, although signing articles of clerkship was not a prerequisite for enrolment in the course. Students occasionally began their studies before their articles, and in the declining years of the certificate course after 1905 the Council of Legal Education required completion of some subjects before the commencement of articles. But the certificate course became so closely identified with its largest group of students that it became known as the articled clerks’ course, and law lectures were scheduled outside business hours to suit their commitments to their employers. Degree students enrolled in these

² Abel, American Lawyers, 59.
subjects too, but combined them with arts subjects that were taught during the day at the university campus, beyond the reach of the clerks.

The distinction between the two courses often paralleled, if it did not exactly match, the division between barristers and solicitors. From 1872 to 1891 the LLB was the sole qualification for admission of locally trained candidates as barristers. Solicitors could also take out the degree, but few did, since the certificate, articles and the Supreme Court’s final exam were all they needed for admission. Even after 1891, when the certificate and the degree were alternative qualifications for both branches of the profession, solicitors initially monopolised the clerks’ course and barristers, if they could afford it, graduated with degrees. Some barristers who were initially unsure of their destination or able to pay only for the clerks’ course later regretted their lack of a degree; Sir George Pape and Sir John Barry were two judges who took out LLBs (by research) decades after they had been students in the 1920s. The law school also allowed students in the clerks’ course to upgrade their qualification to an LLB by topping up their academic record with the necessary additional subjects. The LLB gradually became the qualification of choice for both branches. It made up about three-quarters of the law school’s enrolments in 1912, declined under the economic stress of the Depression to 55 per cent in 1931, and then resumed its rise, leaving the clerks’ course with a moribund 3.5 per cent of enrolments by 1961.4

Student organisations reflected the early prominence and later decline of the articled clerks’ course. The history of these groups is a substantial topic in its own right, and only a brief outline is possible here. Law students formed short-lived debating societies in 1860 and again in 1871, and it was not until 1887 that a lasting organisation emerged. It began life as the Articled Clerks’ Law Debating Society. The first of its two changes of name, in 1890, better described its activities: as the Articled Law Clerks’ Society it debated legal and other topics, held social and sporting events, and lobbied the Supreme Court on

---

issues affecting its members. LLB students were ineligible for membership until 1892, when a third and final change of name created the Law Students’ Society. Its focus, and the locations of its events, eventually moved from the city to the university, where it organised social gatherings, moot courts and an annual theatre-piece, a mock trial.5

Money lay behind the choices made by many students. In 1891, articled clerks paid fees of about £15 15s 0d a year, depending on their choice of subjects, while LLB students paid £25 4s 0d a year, or roughly 30 per cent of average annual earnings in a manufacturing job. A few scholarships lowered the barrier for high achievers: the university awarded one scholarship in law each year in the early 1890s, and there were twenty-five state government exhibitions for university study in 1912, when Robert Menzies, the future prime minister, received one. From 1919 the state government funded a university student loan scheme. Most students, though, had to pay.6

Many got the money from their families, whose incomes were generally well above average. In 1919, as part of a wider survey, the university asked those students who did not pay their own fees about the incomes of those (usually their parents) who supported them. Nearly nine out of ten (88 per cent) reported that their supporters’ incomes were above £200 a year. They were the children of the well-off, even wealthy; average yearly earnings for a man in a manufacturing job in Victoria at the time were £156, and a woman averaged only £65. The pattern remained much the same in 1938, when a new survey indicated that at least 60 per cent of the university’s students came from

5 Minute-books and annual reports of the Law Students’ Society, Supreme Court Library and University of Melbourne Law Library.

households with an income of more than £300 a year, putting them in the top 10 per cent of Victorian households by income.\textsuperscript{7}

Other students earned their fees and living expenses through outside work. The largest single group who worked to pay their way were, of course, the articled clerks, or at least the sub-group of clerks who received wages (many went unpaid for at least part of their clerkships). School teaching and private coaching were other occupations that students managed to fit in around their university commitments. Maurice Blackburn, the future Labor parliamentarian and supporter of civil liberties, worked as a teacher and librarian while he studied (he graduated in law in 1909).\textsuperscript{8} John Latham and Charles Lowe, both later judges and chancellors of the university, also taught their way through the law course, in Latham’s case as a college tutor. Alfred Deakin, the future prime minister, was another teacher–student.

But the achievements of these gifted people were exceptional. When the university surveyed its students in 1919, just over 30 per cent were paying their university expenses partly or wholly from their past or present earnings. About a quarter were in paid employment (the figure for law, if it had been calculated separately, would have been higher, thanks to the presence of the articled clerks). Some 17 per cent—who had returned from the armed forces—had assistance from the Commonwealth government, and another 22 per cent had all or some of their fees paid by scholarships, bursaries or exhibitions, or had free places funded by the state education department.\textsuperscript{9} In all, the university, the state or the Commonwealth helped nearly 40 per cent of the university’s students to pay their fees, although temporary post-war help for returned service-people swelled this figure, and many must have supplemented their awards from paid employment or family help. The rest had to find the money

\textsuperscript{7} Statement Prepared by the Council, October 1919, RC, 1919/241, 7; Vamplew, \textit{Australians: Historical Statistics}, 161; Report of a Survey Made in 1936 of Certain Universities of Britain, the United States, Canada, and South Africa, Sir Raymond Priestley Papers, UMA, 5.


\textsuperscript{9} Statement Prepared by the Council, October 1919, RC, 1919/241, 9–11.
for themselves, from family, private sponsors, or their own exertions. Even free places were no guarantee of university entry; some students had to turn them down because they could not afford the living expenses of full-time study.10

Other collective information about the background or circumstances of the law students is patchy. One aspect, their previous schooling, is available for some of those who enrolled in the nineteenth century and successfully completed the LLB course. Of these students, 145 appear in a University of Melbourne Archives database derived from the matriculation roll, giving details of the schools they attended before coming to the university.

Government-supported primary schools gave most Victorian children their education; from 1872 the Education Department took direct charge of an expanding network of free, state-run schools. Until the state’s first government secondary school, now Melbourne High School, opened in 1905, secondary education was available only at so-called public schools affiliated with churches, at others run as profit-making businesses, or through the extra subjects that some state primary schools offered after hours. All, including the extra subjects at state schools, required payment of fees, except from the winners of the few available scholarships. As late as 1939, 70 per cent of new law graduates from the University of Melbourne had come from non-government schools, and even this figure was low compared with Medicine, where barely one graduate in ten came from a state school.11

Of the primary and secondary schools attended by the 145 nineteenth-century LLB graduates in the matriculation database, the most common were the large Protestant public schools. Melbourne Grammar was the school attended by the largest number of students (twenty-three), followed by Scotch College (twenty-one) and Wesley College (thirteen). The most noticeable feature of the matriculation data, however, is the profusion of different schools

---


through which the students had passed. These were only three of the eighty-eight schools and private tutors named, not including those students (five in all) who were educated at home for part of their schooling. Not counting church-affiliated public schools, there were 132 private schools in Victoria in 1854.\(^\text{12}\) They and their successors educated many of the law students, sometimes taking them through to matriculation and sometimes preparing them for a few, final years at a larger and better-known school before entry to the university.

Secondary education was financially demanding and socially selective, but there was at least a range of paths by which it could be reached.

Education at the prominent and (for students not on scholarships) expensive public schools was sometimes followed by membership of one of the university’s residential colleges, affiliated with the university but in no sense constitutive of it in the manner of Oxford or Cambridge. The life of many college students was the antithesis of that of the articled clerks: centred on the campus, devoted, in theory at least, to full-time study, and tied to the ethos and social standing of the university’s degree courses. Fifty-two of the 160 law graduates named in the university’s 1896 calendar were college members. This proportion matched the representation of college students in the university’s total enrolment for 1886, a high point for the colleges, but no articled clerk was likely to be a college student.\(^\text{13}\)

Useful though the matriculation data is, it covers only a small sample of the university’s law students. Not all LLB graduates appear in the database; the university had awarded 212 LLBs by 1896, some of them, without examination, to graduates of other universities, and others to students who are missing from the database.\(^\text{14}\) Most students who enrolled before 1867 did not matriculate and are excluded from the database for that reason. Even after that date, most studied for the articulated clerks’ certificate, not for the LLB. The exact proportions are unclear until the dean began providing an annual breakdown of

\(^{12}\) Selleck, The Shop, 54.

\(^{13}\) Selleck, The Shop, 240.

\(^{14}\) University of Melbourne, Calendar, 1896, 299.
enrolments in 1904, but comparison of the numbers of students attending classes with the numbers of graduates gives at least a rough indication of the disproportion. In 1879, for example, seven LLB degrees were conferred, but fifty-one students were attending lectures. The admission rules shrank the degree course almost to nothing in the 1890s, but what they took away then they gave back in the early 1900s, when fresh changes contributed to a now inexorable rise in the popularity of the LLB. Degree students outnumbered articled clerks in 1906, and the dean commented on the novelty of the situation.15

Notwithstanding the rhetoric in Sewell’s inaugural lecture about law as part of a gentlemanly education, the structure of the certificate course suited students who were already employed rather than those who studied full-time. Their varied backgrounds and destinations show that the course was undertaken by more than young students on their way to becoming lawyers, although such people made up the bulk of the classes. Among the first group to be awarded law certificates by the university, in April 1859, George Bartrop became a clerk of court, a barrister and a long-serving police magistrate in Melbourne. Edmund FitzGibbon was already the town clerk of Melbourne when he enrolled in the second intake of students, who received their certificates in May 1860. He was admitted to practise as a barrister, but law was only an interest or an additional qualification for him, and he stayed in public administration, remaining town clerk for more than thirty years before working for another fourteen years as the first chairman of the Melbourne and Metropolitan Board of Works.16

No names in the matriculation database indicate members of Victoria’s sizeable Chinese community. When the children of earlier migrants enrolled from the 1890s onwards, it was initially for the articled clerks’ certificate rather


than the degree. Edward Ni Gan, whose father was Chinese, completed the
articled clerks’ course in the 1890s and practised as a solicitor in Bendigo;
William Ah Ket, whose father also migrated from China, won the Supreme
Court prize for articulated clerks in 1902 and was president of the Law Students’
Society in 1907. A prominent barrister, he was one of three representative
former students who supported the toast to retired dean William Harrison
Moore at an LSS dinner in his honour in 1929 (the others were Owen Dixon,
the future chief justice, and Kenneth Bailey, the future dean of the law
faculty).17

Most of the students came from Melbourne, but a few came from other
parts of Australia, to take advantage of the law course before an equivalent was
available to them at home. Law students in the incomplete matriculation
database attended only one identifiable school outside Victoria, Brisbane
Grammar. A small group of notable Queenslanders made the long journey to
Melbourne before the University of Sydney began offering a comparable course
in 1890 and the University of Queensland’s law school opened in 1936.18

A string of scholarships brought Thomas Byrnes from Bowen Primary
School in northern Queensland to Melbourne; he was briefly premier of
Queensland before his early death in 1898. Littleton Groom, another Melbourne
graduate from Queensland, became a federal politician. The most notable of the
Queenslanders among the nineteenth-century graduates was Thomas Joseph
Ryan, who gained his LLB in 1899 as an external student, after moving north
from Victoria, where he spent his early years. Premier in 1915–19, he was a key
figure in Queensland political history, and when he moved to federal politics he

17 Bendigo Advertiser, 20 April 1897; John Lack, ‘Ah Ket, William (1876–1936),’ ADB,
http://www.adb.online.anu.edu.au/biogs/A070021b.htm; Melbourne University Magazine 1, no. 1 (1907), 20; ‘Law Students’ Society. Dinner to Sir Harrison Moore,’ Farrago, 23 April 1929, 2.

18 Malcolm I. Thomis, A Place of Light and Learning: The University of Queensland’s First
Seventy-Five Years (Brisbane: University of Queensland Press, 1985), 130–2.
became a potential leader of the Australian Labor Party; premature death cut short his career in 1921.19

Until the late 1890s all the university’s law students were male. The exclusion of women from the university as a whole ended in 1880, and at Melbourne women law students did not pass through a period of informal or segregated study, as they did at Oxford and Cambridge.20 But informal barriers and, most importantly, discouragement from entry to the profession deterred women from enrolling in law for another seventeen years, although there was nothing in university statutes or council resolutions to stop them. They joined the male LLB students in arts subjects long before then, with the result that women studied jurisprudence before they studied law. In 1888 Louisa Wilson, one of the early residents of the Trinity College women’s hostel (later Janet Clarke Hall), was one of the students who petitioned for lectures in jurisprudence, at that time still an arts subject, to be held at the university rather than the law courts.21

Family encouragement was a crucial adjunct to personal determination for many of the women who took the new, open rules of the university at their word and enrolled in its courses. The first woman to enrol in the law course, Flos Greig, followed two sisters to university (they had graduated in medicine), and another sister graduated in law after her. Anna Brennan, who graduated in 1909, came from a farming family at Emu Creek, near Bendigo, whose members supported each other’s education in turn. Her brothers, two of whom became lawyers, encouraged her to study for a professional career. Joan Lazarus undertook the articled clerks’ course while articled to her father.22


21 Robertson and others to Council, 4 May 1888, RC, 1888/27.

When Greig enrolled in 1897, the university had long settled the question of the right of women to be students, but whether the law barred them from practice as barristers and solicitors was yet to be conclusively determined. Male students debated women’s entry to the profession, reprising many of the arguments earlier used for or against admission of women to the university but adding a twist distinctive to legal practice. Women depicted as emotional, unintelligent and flighty could not make good lawyers, it was said: ‘The first alarming feature of the innovation would be the substitution of emotion for pure reason, as the groundwork of all legal argument. What chance could the less favoured male counsel have despite all his erudition against an adversary with smiles and tears, and blushes at her command?’

Common assumptions and familiar jokes reassured and bonded male lawyers against the threat of change, but they were far from universally held. In 1897, doubtless in response to Greig’s arrival, the all-male Law Students’ Society considered whether women should be admitted to practise, and decided in favour by sixteen votes to ten.

On Greig’s graduation in 1903, second in her class and with third-class honours, whether a woman would be admitted to practise became a pressing question. In many other common-law jurisdictions—the United States, Canada, South Africa and Western Australia among them—women turned to litigation, to force a decision from the courts on the question of whether ambiguous admission laws allowed their entry to the profession. In Victoria, too, the question could have been treated as one of statutory interpretation. The legislation and rules of court governing admission used masculine pronouns, but without expressly excluding women, and in such a case general principles


24 Notice of meeting and minutes, 22 April 1897, Law Students’ Society Minute Book, vol. 1, Supreme Court Library.
of interpretation dictated that the provisions should apply equally to both genders.25

Yet litigation, expensive and uncertain, turned out to be unnecessary. There was sufficient political support for any doubt about the status of women applicants to be resolved in their favour by a special act of parliament, which was passed in 1903. The process was much slower in New South Wales. The first woman to graduate from an Australian law school was Ada Evans, at the University of Sydney in 1902, but, despite her persistent efforts, she was not allowed to be admitted to practise until legislation was enacted in 1918.26

The ease with which the Victorian bill passed is surprising when it is compared with the parliament’s record on the key issue for women’s rights at the time, the extension of the right to vote. Victoria was the last jurisdiction in Australia to give women the vote, in 1908, after the failure of successive bills over the course of nearly twenty years. The upper house, still elected on a restrictive franchise and dominated by conservatives, had been a stronghold of resistance to women’s voting rights, but it accepted the admission of women as lawyers with little dissent.27

Greig’s own activism is one reason for this outcome. ‘Towards the conclusion of my course’, she said, ‘I had my attention directed to the many obstacles in the path of my full success. I resolved to remove them. In April, 1903, through my efforts, and the efforts of my friends, an Act of Parliament was passed’.28 She was an effective and articulate advocate, as she showed in an extended article she wrote on the admission of women in 1909. The role of John Mackey is also significant. One of Greig’s lecturers, he was a new member of

25 Mary Jane Mossman, The First Women Lawyers (Oxford: Hart Publishing, 2006), 40–54; Legal Profession Practice Act 1891 (Vic.), s. 11; Rules for Admission of Barristers and Solicitors, Victoria Government Gazette, 16 December 1892, 4808; Acts Interpretation Act 1890 (Vic.), s. 5.
the lower house when he introduced the bill for the admission of women, but he rapidly gained authority, and he became a minister in 1904. His bill, presented as moderate and logical, found general support in parliament and managed not to rouse the opposition that defeated a similar measure nine years earlier. In comparable jurisdictions, the goal of entry to the profession was sometimes kept separate from wider aims for equality, partly as a tactic to placate wavering male politicians and partly as a response by women lawyers who did not see themselves as part of a wider movement. In Victoria, too, admission of women was negotiated as a contained and unthreatening modification of gender roles.29

Male students found admission of women to the profession less troubling than their admission to the Law Students’ Society itself. The all-male members debated this question in 1913, and the leading advocates on each side then put their cases in the *Melbourne University Magazine*. ‘Equity’ (who chose a surprising pen-name, but presumably saw exclusion of women as equity for men) argued that the presence of women would change the atmosphere of the students’ gatherings, taking away the freedom men enjoyed in an all-male social group: ‘Members will be extremely careful to let nothing escape their lips which were better unsaid in the circumstances’. Apart from the constraints of propriety in the presence of women, who had to be protected from the men’s grosser natures, there was the problem of nerves for younger members who spoke in the society’s moots. ‘A man doesn’t mind very much if he makes a fool of himself in front of men; but no man cares to risk it before women.’30

‘Quo Vadit’, who supported the admission of women as members, put forward a case based on rights, equality and higher authority. Women were admitted to the university and to the profession, he said, so the LSS should not exclude them. He unknowingly took up a theme from many common-law authors...


jurisdictions, where women’s assimilation to professional culture and acceptance of dominant ideas in the profession were features of the process of gaining admission, when he reassured his opponents that a woman lawyer would have to act like a man: ‘she will have to regard herself as one of those with whom most of her work will be done, and amongst whom most of her time will be spent. In other words, when at Rome, she will have to do as they do in Rome.’

‘Quo Vadit’ and his supporters prevailed in the debate, albeit narrowly. The meeting voted by a majority of one to allow women to become members, but the minority threatened to counter-attack and reverse the decision. In the absence of LSS minutes for the period, later events are hard to trace, but women appear not to have become active in the society until the 1920s. The number of women in the law course remained so small—still only 8 per cent in 1950, well below the campus-wide figure of 22 per cent—that the LSS remained largely a male preserve.

Yet there were notable exceptions, particularly during World War II. Women made up nearly a quarter of law enrolments in 1942, and they were temporarily allowed new responsibilities and opportunities in the university, much as was happening outside. Airlie Smith, who had won the Supreme Court prize for the top honours student before the war, became president of the Law Students’ Society in 1941 and edited its scholarly journal, Res Judicatae, in 1942–43. While working at the state parliamentary draftsman’s office in 1943, she tutored in jurisprudence, in a professor’s absence on war service. Three of the five counsel for the LSS moot court in July 1942 were women.

It was one thing for a woman to be admitted to practise (Greig became the first in Australia), but another for her to find a career as a lawyer. Greig worked


33 Dean’s Report, 1942, RC, 1942/176, 15; Paton to Johnston, 5 July 1943, and Smith to Paton, 3 June 1943, HCP, box 3, UM 420/38; Notice of Law Students’ Society meeting, 6 July 1942, HCP, box 1, UM 420/16.
as a solicitor, initially as a sole practitioner, but apparently business did not prosper. During World War I she was employed at two solicitors’ firms in Melbourne, standing in for men who had left for the armed services, and in the 1930s she worked as an employee in a solicitor’s office in country Victoria. Among the other early women law students, Anna Brennan, the second woman admitted to practise in Victoria, had a long career as a solicitor and in community organisations; Christian Jollie Smith (LLB 1911) became a solicitor, but in 1918 was reportedly Melbourne’s first woman taxi-driver, and then became a founding committee-member of the Communist Party of Australia and a successful labour lawyer in Sydney. Joan Lazarus (later Rosanove), who completed the articled clerks’ course in 1917, became the first woman to sign the Victorian bar roll and the first to become a Victorian Queen’s Counsel. Like their male counterparts, some moved in and out of the profession or worked elsewhere. Gladys Hain (LLB 1910) was successively a solicitor, a journalist and then a barrister; Lesbia Keogh (later Harford), LLB 1916, is best known as a poet and left-wing activist; and Alice Hoy (LLB 1927) became principal of the secondary teacher training centre at the University of Melbourne.  

Well-known graduates connected the law school to elite strata of Australian society in politics, the law and (less often) business. Their profiles grew when the national institutions created by Federation provided a wider stage for careers that would not previously have reached much beyond the confines of one colony. Repeating a familiar pattern in other legislatures, lawyers were well represented in the federal parliament, making up 27 per cent of its membership in 1901. The concentration of lawyers in the federal conventions of the 1890s was even greater: nearly half the members of the convention of 1897–98 were lawyers, and of the ten Victorian delegates, five were former law school students.  

---

34 For Greig, Brennan, Smith, Rosanove, Hain, Harford and Hoy: ADB.

contributed to a high representation of former Melbourne students among the justices of the High Court. For a decade from 1920, four of the seven justices had studied at Melbourne (though one, Hayden Starke, was not a graduate, having completed the articled clerks’ course); from 1930 to 1964, four successive chief justices of the court were alumni.

The prominence of lawyers in government and of university graduates in superior courts is familiar in differing ways in England and North America, but there is something distinctive about the Victorian history. In the nineteenth and early twentieth centuries, English judges were typically university graduates (most often of Oxford or Cambridge), but their degrees were rarely in law.36 They generally studied other disciplines before turning to law when they left university and trained to become barristers. Teachers of law in English universities complained about the low status of their students and courses. In 1852 Henry Maine, regius professor of civil law at Cambridge, noted the widespread impression ‘that the inferior degrees in Law are attainable with undue facility’: ‘it has tended to cover the whole Faculty with a discredit which is most assuredly undeserved, but which it is beyond the power of a Professor to remove by his single-handed exertions’.37 Such laments persisted into the twentieth century. As late as 1960, two leading academic lawyers, F. H. Lawson and R.F.V. Heuston, were still able to remark on the low standing of law faculties, although by then they were rapidly gaining in enrolments and reputation.38

Such a comment was unlikely to be heard in the United States, where the number of law graduates in politics influenced not only the history of government but also the law schools themselves. As early as the mid-nineteenth century, the training of future leaders both in the judiciary and in politics became part of the civic purpose that some law schools saw themselves as

36 Abel-Smith and Stevens, Lawyers and the Courts, 168.
fulfilling. In his 1921 conspectus of American legal education, Alfred Reed wrote: ‘the inherent connection between law and politics has made the law school the nearest thing to a training ground for the profession of politics that we possess’. Similar observations apply to nineteenth-century Canada, although the rise of lawyers as business advisers by the early twentieth century has been seen to undercut the nexus between lawyers and political leadership.

A disproportionate number of politicians were lawyers, but had they studied at law school? In 1891, 80 per cent of American lawyers ‘entered practice without any law school training’, and the proportion of practising lawyers without a law degree was still 38 per cent in 1949 (some of these, however, had attended law school without graduating). Perhaps attendance at law school was more common among holders of public office than in the profession overall; even so, lawyers in government were not likely to be law graduates. In Victoria, by contrast, the nature of the admission rules was such that the many lawyers in parliament, if trained locally after 1872, had not only studied at university but (unlike their English counterparts) had studied law. The university’s founders once hoped it would socialise the elite of coming generations. The law school was at first incidental to their educational mission, focused on the arts and sciences, but by the time of Federation it had become the faculty most likely to produce holders of high public office, technocrats rather than philosopher-kings.

Fond though the law school was of its famous graduates (they still appear prominently in the history section of its website), they were a small minority of its former students. Its main work was the training of the ordinary practitioners who made up the bulk of the profession and, increasingly in the twentieth century, those who used their legal training in other callings. The different

40 Reed, Training for the Public Profession of the Law, 296.
42 Abel, American Lawyers, 41, 52.
demands that the legal elite and the average practitioner might put on the law course became a point of contention in the 1930s and 1940s, to such an extent that the idea of a single law school for all was called into question.

**The early curriculum**

Sewell’s inaugural lecture was a manifesto, of a kind, for the new course, but it was the curriculum that made the university’s intentions for the law school concrete. Redmond Barry, as the council member tasked with the establishment of the course, must have had a significant role in its design, but the outline was not settled until after Sewell was appointed, suggesting that he, too, was probably involved. The outcome was a curriculum that gestured towards the broad, Blackstonian education that Sewell foreshadowed but that focussed above all on preparation for legal practice.

The outline of the Melbourne course showed the influence of the admission rules and was probably drafted with them in mind. It included all the law subjects that the rules prescribed. Throughout the law school’s history, the desire to retain certification for admission to practise constrained choices about the curriculum and caused the faculty to take constant glances over its shoulder at the rules as it reviewed its subjects. Despite this, the course went beyond the Supreme Court’s prescriptions in ways that hinted at its promoters’ ideas about the nature of law teaching in the new university. The law subjects in the Supreme Court rules were strictly practical, any wider intellectual preparation being confined to the general-knowledge papers. The university course, on the other hand, began with a wide-ranging introduction covering the study of law, the nature of laws in general, written law and rules for interpretation, the laws of England, and constitutional law. All this was squeezed into first term, along with private rights, rights and duties of husband and wife, parent and child, guardian and ward, master and servant, and corporations. The outline faithfully
followed Blackstone’s choice of constitutional law and the law of persons as foundational topics for the study of law.\footnote{CM, 12 March 1857.}

The remainder of the first year was devoted to real property, personal property and wills. The subjects of the second and final year were modelled on the Supreme Court’s prescriptions of common-law pleading and practice, criminal law, and equity, but with a distinctive emphasis on technical and practical aspects. Pleading, evidence and practice in common law, criminal law and equity took up nearly half of the students’ time overall. The doctrinal subjects that later became the core of the course—property, contract, succession and so on—were confined to the first year (with the exception of criminal law). Tort, still emerging as a distinct subject under that name, was present only as part of common-law pleading and practice; it did not appear in the Harvard curriculum as a separate subject until 1870.\footnote{Harvard Law School Association, \textit{The Centennial History of the Harvard Law School, 1817–1917} (Cambridge, Mass.: Harvard Law School, 1918), 74–6.}

Notably different from the general education provided by law schools at English universities, this approach reflected the purposes of the Melbourne course and its most promising market, dominated by intending practitioners. The university’s second reader in law, Henry Chapman, told his students that he intended to give ‘much more ample development to the used than to the unused parts of law, so as to render these lectures a practical introduction to the business that comes most frequently before our courts’.\footnote{Chapman Lectures, Note-Taking, 9 and 11 March 1864, MLS.} The choice of topics also owed something to the importance of procedure in the period before the abolition of the forms of action strengthened the distinction between procedural and substantive law.

Comparison with John Hargrave’s lectures at the University of Sydney, which began two years later, emphasises the broader scope forced on the Melbourne course by its link with certification for practice. In his introductory lecture, Hargrave followed the well-trodden path to Blackstone and repeated,
like Sewell and others, the familiar argument about the value of law as part of a
general education. But he intended to speak about general jurisprudence (the
title of his readership) ‘only so far as its operation is observed in the practical
business of our daily life’. His disclaimer of any intention to prepare students
for legal practice affected not so much his choice of topics as the length and
degree of detail of his classes: in his course for first-year students he covered in
two terms of weekly lectures much the same ground as the Melbourne
curriculum covered in three lectures a week over a full academic year. Hargrave
planned to take second-year students through the topics of forensic rhetoric, the
chief rules of evidence, and further details of equity jurisprudence and practice,
but in one term of weekly lectures. The similarities to the second year of the
Melbourne course are noticeable, but the result was, as Hargrave intended, ‘a
popular exposition’, not training for practitioners.

All the Melbourne subjects were compulsory. The law school’s single
lecturer could hardly offer students a selection, certainly, but the pattern was a
lasting one. Even after the teaching staff grew, the course included none of the
specialised, optional subjects that became a feature of American law schools.
The first such law subject did not appear in the Melbourne curriculum until
1931, although LLB students had long made their own choice of arts subjects as
part of their studies. The invisible hand of the admission rules was at work here,
as the need to cover the range of subjects expected by the admitting authorities
limited the university’s freedom of movement. The curriculum was sequential
from the start, partly thanks to its use of Blackstone’s plan of topics. Unlike
some other law schools (most notably Harvard), Melbourne never passed
through an early phase in which students could take their subjects in whatever
order they chose.

At Harvard the absence of compulsory exams until 1870 and the lack of a
direct link with professional admission gave more scope for students to follow
their own interests. Its curriculum in the 1850s and 1860s comprised twenty-

---

47 ibid., iii.
seven subjects, including such specialties (offered occasionally) as parliamentary law.\footnote{Harvard Law School Association, \textit{Centennial History}, 74–5.} Melbourne had more in common with the foundation course at the University of Michigan, a state university like itself. It covered a similar field and also incorporated evidence and procedure, if not in as much detail. Constitutional law was entirely absent from the first Michigan course; it later became optional at Harvard, as analytical jurisprudence turned away from a branch of law that was linked closely with politics.\footnote{Brown, \textit{Legal Education at Michigan}, 480–1; Robert W. Gordon, ‘Professors and Policymakers: Yale Law School Faculty in the New Deal and After,’ in \textit{History of the Yale Law School: The Tercentennial Lectures}, ed. Kronman, 79–80.} Melbourne, like Yale, retained and expanded the study of constitutional law. Both favoured conceptions of law as a social science, an approach to which the political aspect of constitutional law lent itself.\footnote{Mark Bartholomew, ‘Legal Separation: The Relationship between the Law School and the Central University in the Late Nineteenth Century,’ \textit{Journal of Legal Education} 53 (2003): 385–6.}

Notwithstanding the weight they gave to practice and procedure, the approach of Sewell and his successors was not purely vocational. ‘The object of these lectures’, Chapman announced to his class in 1861, ‘is to induce students to adopt such a course of study as will 	extit{elevate their views} above the mere practice of the law as a trade. Hence they are invited without neglect of practice to make themselves familiar with the principles of the law and also with its historical development.’ Chapman tempered this ideal with awareness of who actually attended his classes. ‘I presume that by far the greater number of those who attend the law lectures do so with the intention of adopting the law as their profession’, he told his students, ‘but I am not without a hope that some will so attend as a necessary part of the education of a gentleman’.\footnote{Chapman Lectures, 12 April 1861 and 7 March 1864, MLS.}

Chapman’s lecture notes give the first extended record of what the early lectures were like, what they covered and how a teacher approached them. The appointment of Chapman was Barry’s initiative, to fill the gap left by Sewell’s resignation part-way through the law school’s first year. He was another
barrister, but different from Sewell in background and temperament, and better suited to his task at the university. He did not have his predecessor’s deep scholarship—he lacked a university degree—but he was more gregarious and widely connected, working not only in the law but in journalism, politics and business.52

Born in England, Chapman spent eleven years as a merchant in Canada, where he became increasingly involved in liberal–radical politics, established a newspaper and studied law, in the civil-law system of Quebec. He returned to London as an agent and lobbyist for the liberal members of the legislature of Lower Canada. The establishment of self-government there in the 1840s, which Chapman advocated, was repeated in the eastern colonies of Australia in the 1850s. He drew on his experience of the system in a monograph on responsible government in 1854.

The roots of Chapman’s teaching lay not in academic research, as Sewell’s had, but in wide experience and in fluent and knowledgeable journalism. He published extensively on politics and economics as a journalist and pamphlet-writer in the 1830s, and was called to the bar in London in 1840. Plans for the colonisation of New Zealand became a special interest of his, promoted in a new journal he established. This connection led in 1843 to his appointment as a judge of the Supreme Court in Wellington, from where he moved to another colonial appointment, as colonial secretary of Van Diemen’s Land, in 1852. After his dismissal for opposing convict transportation, he established himself as a barrister in Melbourne, where he was involved in a range of local businesses, from banking to coal-mining.

His election to Victoria’s Legislative Council led to the achievement for which he is best known in Australia, his drafting of the act that introduced the secret ballot. He was the intermediary for the formation of a new government in 1858 and could have become premier himself, but he chose instead to be attorney-general for a second time, evidently cautious about his electoral

support. His broken parliamentary career included several defeats at the polls, where he was backed by ‘the advocates of a liberal and progressive system of government’, in the words of one reporter.\textsuperscript{53} His appointment as attorney-general forced his resignation as reader in law in 1858, but he returned two years later, only to resign again to become an acting judge in 1862. His third, brief period as reader, from October 1863 to March 1864, ended when he returned to New Zealand, where he served as a judge of the Supreme Court.

Chapman’s surviving notes date from 1860 onwards and cover many topics of the first year of the course, including contracts, personal property, the court system and an introduction to constitutional law. His lecture notes on contract had nothing to say about the general principles of formation and content that loomed large for later teachers, but (like contemporary treatises) concentrated on particular kinds of contracts and the varied grounds of incapacity and illegality. His coverage of personal property was likewise taxonomic rather than analytic, cataloguing forms of property and ways of acquiring title.

He came into his own when introducing the students to constitutional law, a topic closer to his own interests and experience. His outline of the constitution of England—‘the country of our birth’, as he described it to his students—was set in the context of a wider view of constitutional principles. It included an extended discussion of the constitutional law of the United States, including its state constitutions. Chapman was lecturing on the American constitution on 12 April 1861, the day fighting began in the American Civil War (but long before that news would reach Melbourne).

His New Zealand background, too, emerged in his lectures. It made him alert to questions of sovereignty in the acquisition of colonies that most Australian lawyers of the period ignored or took for granted. He delivered a lecture to his Melbourne students on the ‘Status of Native races considered in relation to the Sovereignty’, in which he argued, as some judges of Australian courts had until the early 1840s, that Indigenous people retained a limited sovereignty among themselves until they relinquished it by treaty. Chapman did

\begin{footnote}
\textsuperscript{53} ‘Mr. Chapman,’ \textit{Herald}, 7 January 1858.
\end{footnote}
not mention the earlier Australian cases and may not have been aware of them. He relied instead on the general practice of Britain, France and the United States, recorded in his own collection of treaties with Indigenous peoples. From these he attempted to derive a general rule:

the Native Inhabitants retain their Sovereignty and national character in relation to each other and to the discovering nation except in so far as such Sovereignty impairs the Sovereignty of the discovering & occupying nation in relation to its own subjects and other European powers.54

To that extent, the laws and customs of Indigenous peoples remained in force under the law of the colonising power. But Chapman maintained that Indigenous laws and customs repugnant to Christian morality were void, and made another wide exception in the case of title to land. ‘The rights and dominion which native tribes exercise over land’, he said, bore no analogy to a fee simple under English law, leaving them with a right of occupancy in common under the paramount title of the Crown, not exclusive possession. The difficulties of dealing with such a right under English law effectively prevented its sale by Indigenous people to a private purchaser, but it could be extinguished by the Crown through treaty or purchase. Chapman called the right ‘native title’, using an expression common in the New Zealand context (and used too in the United States); it would be more than a century before the phrase entered Australian usage. His second-term exam in 1861 took up these questions, asking students to explain the foundation of the Queen’s title-paramount to the territory of New South Wales and Victoria. Perhaps prompted by John Batman’s attempt in 1835 to buy land around Port Phillip from the Wurundjeri, the original inhabitants of the area, he also questioned them about the effect of a private purchase of land from Aboriginal tribes.55

54 Legal Notes, Chapman, Eichelbaum and Rosenberg Families: Papers, Alexander Turnbull Library, National Library of New Zealand, MS-Papers-8670-047, 16.
55 University of Melbourne, Calendar, 1861–62, cliv.
The questions of colonial sovereignty that Chapman raised were rapidly disappearing from view as Australian lawyers and judges assumed without hesitation that colonial courts had jurisdiction over Aboriginal people, even in cases where no colonists were involved. The earlier cases in which that jurisdiction was questioned or denied were discredited and increasingly forgotten. In Victoria they were briefly recalled to memory in 1860 when two Aboriginal defendants challenged the jurisdiction of the Supreme Court, only to have their arguments rejected out of hand; Richard Sewell appeared as amicus curiae in one of the cases.56 Chapman’s lecture on sovereignty became a dead end in the law school’s teaching until much later in its history. Such issues did not re-emerge in the course (at least with such prominence) until the 1970s, after the first extended analysis of Aboriginal land rights in an Australian court, in *Milirrpum v. Nabalco Pty Ltd*.57

**The degree course to 1927**

The success of the new course soon enabled the university to expand its law program. The ground for this step had already been prepared. The Supreme Court’s new admission rules of 1857 looked ahead by covering not only those who held the certificate showing they had attended the lectures and passed the exams of the two-year course, but also graduates who held a bachelor’s degree in law from the university. At the time the university had made no provision for awarding such a degree, but three years after the law classes began, it fulfilled the expectation in the rules and created an LLB course, whose first graduates received their degrees in 1865. The sparse records of this important change provide few clues to its genesis or motivation. The university’s basic mode of

---


teaching was lecturing and examining for the award of degrees, so this extension of the plan for the certificate course probably appeared a natural one. It also added a more academic strain to the law course, one that would have fitted the professors’ ideas of the university better than the purely professional training course so far offered by the law school. Sending the proposed LLB regulation to the council, the chairman of the professorial board declared that ‘a University Degree should mark somewhat more than a technical education’; the board ensured that LLB students would do two years of compulsory and optional arts subjects before turning to the study of legal doctrine in their final two years.58

To suit the requirements of the degree course, law teaching was rearranged and divided for the first time into four distinct subjects, although they still merged such a wide range of topics that they were called simply Law, parts I to IV. The shape of the original course could be detected in the outline of the new subjects. Part I, like the old first-year lectures, covered the ‘Rights of Persons’ and personal property, but added contracts and torts (under those names for the first time). Real property also remained in the first year of law lectures, in part II, along with wills, conveyancing and intestacy, while practice and procedure again dominated the final-year classes. Part III covered pleading, evidence, procedure, ‘Crown law’ (that is, civil proceedings involving the Crown) and criminal proceedings; part IV was a jurisdictional miscellany embracing equity, insolvency, admiralty and courts of inferior jurisdiction.

The university honoured the professors’ intentions for something more than a merely technical education by requiring LLB students to pass Greek, Latin, the two parts of the combined subject English and Logic, Ancient History, and Constitutional History parts I and II, along with seven other arts subjects that they could choose for themselves. The distinction between the certificate and the degree was thus not made in law subjects, but arts subjects: an LLB graduate was not a certificate student who studied more advanced law subjects

58 Irving to Chairman of Council, 29 October 1860, RMC, Law School, loose item 1; CM, 26 November 1860.
or earned better results, but a law student who completed most of an arts degree. (Constitutional History was at this time an arts subject, as Jurisprudence later was.)

Again, the contrast with the United States is striking. There, earning a law degree meant studying law subjects, and universities (and admitting authorities) broadened the education of law graduates in the liberal arts not by extending the degree curriculum, but through incremental increases in the college study required before entry to law school, from one year to two and then three. Even the expanded law subjects through which some universities introduced more of the social sciences were as a rule taught exclusively in the law school and to law students. As Kenneth Bailey reflected on returning from the United States in 1938,

> Our principle, in recent years especially, has been that of almost inextricable association of the law school with the rest of the University—not only in class-room and library and club-room, but in curriculum as well…In the United States, on the other hand, the principle has been that of strict demarcation in all these respects. Though the law school may be topographically close to its neighbours, ideologically it is a place apart.\(^{59}\)

Melbourne briefly anticipated United States practice in the 1880s, but without success. The LLB students covered so much of the BA course that little remained for them to complete a full arts degree. When in 1882 changes were made in the structure of the BA course, the opportunity was taken to make a full BA a precondition for entry to the LLB course, turning it into a graduate degree. LLB students now faced an extra year of study, spending three years on the BA before covering their law subjects in two years.\(^{60}\) The step was pioneering, indeed premature: the first American university to require a college degree for entry to law was Harvard, in 1895. Yet at Melbourne the university’s

---

\(^{59}\) Bailey, ‘Legal Education in the United States,’ 295.

\(^{60}\) LFM, 31 July 1882, 63; CM, 25 September 1882, 260; Senate Minutes, UMA, 6 December 1882, 307.
governing bodies adopted the new regulation with little or no debate, leaving no record of their reasons for taking such a seemingly momentous step. Probably the change seemed a logical extension of the long-standing inclusion of arts subjects in the LLB course; the dean had mentioned it two years earlier as a desirable reform in legal education. Lower enrolments for the degree (as against the certificate) limited the numbers likely to object. If any did argue that an arts degree was an undesirable barrier to entry, their objections had no effect. The apparent silence on this question is all the more surprising since the LLB was at that time the sole qualification for entry to the bar by candidates not already admitted elsewhere. Graduate entry to the LLB course continued until changes to the professional admission rules made it unsustainable in the mid-1890s.

The LLB curriculum, while constrained by the university’s desire to keep the accreditation provided by the professional admission rules, opened a new field for creativity in what the students were to be taught. Doctrinal law subjects formed a relatively stable core, doubling as the articled clerks’ course, but the penumbra of other subjects that completed the degree course left room for frequent amendment and, as it turned out, contention. The difference between the stable clerks’ course and the more flexible degree curriculum became greater when, between 1885 and 1891 and then from 1905 onwards, the admission rules specified not only the number of university law exams that clerks had to pass, but the names of the subjects as well. The control of the admitting authorities over the content of the LLB course was indirect, exercised through the possibility (never realised) that the degree would no longer be recognised for the purposes of admission, rather than through prescription of subjects by the Supreme Court or, later, the Council of Legal Education.

Law parts I to IV lasted until 1873, when the degree curriculum was redrawn and the teaching staff expanded on the creation of the Faculty of Law.

61 Address on the Amendment of the Law, Hearn Papers, UMA, 3/2/2, 18.
The four ‘technical law’ subjects (as the dean called them) became Property, Obligations, Wrongs (Civil and Criminal) and Procedure, all taught in the last two years of the four-year course. To these were added Constitutional Law, Roman Law, International Law and Jurisprudence, and other, general arts subjects, now without offering the students any choice: English Language and Literature, History of the British Empire, Political Economy, and six first-year subjects covering Greek, Latin, mathematics, ancient history and logic.\textsuperscript{63} The chancellor’s annual report recorded that alterations, together with the appointment of two additional lecturers and three external examiners, would ensure ‘a more comprehensive and philosophical training’. Barry’s overview of the new degree course displayed his liking for its broad and contextualised approach:

while the Classics, Mathematics, and General Literature are to be pursued during the first two years of the course, whereby an acquaintance with those branches of knowledge so necessary for an accomplished lawyer is required, the studies of the last two years are directed exclusively to the attainment of a thorough understanding of the great principles of Roman, Constitutional, International, Common, Statute, and Criminal Law, and of Equity, with the other leading divisions of learning relating to the administration of justice.\textsuperscript{64}

The university’s framework for academic governance greatly influenced the making of changes to the course. By the 1880s, when the first major dispute over the degree curriculum occurred, three bodies were involved. The Faculty of Law proposed changes; it was composed of the law teachers, and any lawyers or judges who were members of the university council. Recommendations went from the faculty to the council, which enacted the university’s statutes and regulations. Vacancies on the council were filled by the senate, composed of the university’s masters and doctoral graduates. It could veto, but

\textsuperscript{63} Hearn to Barry, 14 March 1873, RMC, Law, 200a; University of Melbourne, \textit{Calendar}, 1874–75, 79.

not initiate, changes to university legislation. The professorial board was sidelined in this process, its advisory power over academic matters effectively undercut by the faculty’s direct line to the council.

The conflict began with a plan for extended coverage of some of the subjects prescribed for the LLB. The course had been under review since the death of the faculty’s first dean, William Hearn, in 1888. On the motion of the new dean, Edward Jenks, the faculty proposed to expand the teaching of constitutional law and legal history, turning the subject Constitutional Law into a larger one, Constitutional and Legal History (which, despite its name, would still include constitutional law). Equity would be united awkwardly in one subject with procedure. Jenks saw a clear division between the course’s doctrinal subjects and his own favoured approach to law as ‘a vital part of the scheme of social evolution.’65 ‘I only teach one technical subject’, he told the Argus. ‘Everybody who knows anything of my views knows that my great object is to save as much as possible of a student’s time from merely professional work.’66

Something had to be cut to make space for the extra teaching, so public international law would disappear from the course, leaving only private international law, under the title of the Conflict of Laws. Jenks was a man of strong and sometimes puzzling likes and dislikes, and for some reason he scorned international law. ‘Misled by the name’, he told the Argus, ‘many people are not aware that “international law” bears only the faintest analogy to law usually so termed. Simply, it is diplomatic history, and a school of history is the place for it.’ While he thought it ‘an almost essential element in a modern liberal education’, he believed it did not belong in the law course; constitutional law and history were much more important.67

The faculty backed Jenks’ proposals and voted to delete International Law. The council at first went along with the changes, which were referred to the

66 ‘International Law and the University Senate,’ Argus, 20 May 1890, 9.
67 ibid.
senate for its approval. Jenks, not a Melbourne graduate, was not a senate member, but he attended to put his case. He gave what the newspaper report of the debate called technical reasons (presumably including his argument that international law was not law at all), but added a claim that made nationalists bristle: Jenks, an Englishman, used Australia’s colonial status as a reason for the curriculum change. In the words of the Argus report: “‘We are not a nation,’” observed Professor Jenks placidly, “‘and therefore we don’t require to study public international law’”. 68

To Jenks’ annoyance, he was opposed by supporters of international law including two barristers and future law lecturers, Casimir Woinarski and John Mackey. They lined up against advocates for the faculty, the professor and the new course, among them barristers Leo Cussen and Henry Higgins. The leading defender of the status quo was Thomas McInerney, barrister, LLD graduate of the university and external examiner in Roman Law. International Law should stay in the course, he said:

The mere liking or disliking of the professor for the subject of international law had nothing to do with the case. The only reason that had been offered for the exclusion of the subject was one which was an insult to every Australian, namely, that Australia was not a nation, and therefore did not require international law. 69

This misrepresented Jenks’ argument, which had more to do with the status of international law than with the status of Australia, but it was a promising tactic with strong appeal to national pride. Although Australia had no independent international legal personality, the colonies were affected by international law as part of the British Empire—as when the visit of the Confederate warship Shenandoah entangled Victoria in the tail end of the American Civil War in

68 LFM, 22 August 1889, 101; Argus, 9 May 1890, 5.
69 ‘University of Melbourne,’ Argus, 21 May 1890, 9.
1865—and the colonial governments dealt with foreign states through local consuls and in the negotiation of postal treaties.\textsuperscript{70}

When an initial vote went against him, McInerney rallied more supporters and had it reversed. Faced with his invocation of a coming Australian nation (a federal convention was being planned as he spoke), his opponents fell back on claims that information about international law could be obtained by telegram from London if it was needed and that the people of the colony could learn about it for themselves from textbooks if they chose, but to no avail. The council fell into step with the senate, and in the result Melbourne remained in line with its counterparts elsewhere: in one form or another international law was compulsory in all Australian law schools until World War I.\textsuperscript{71}

If it had been possible to make the subject optional, as it later became, much of the difficulty might have been avoided, but staffing, the requirements of admission to practise, and the relatively short length of the course did not allow the inclusion of any optional law subjects, as distinct from arts subjects, until a second professor was appointed in 1931 (when Public International Law became the first such option). In Jenks’ time, the subject had to be compulsory or else be deleted altogether. This suited Jenks, who did not want to teach the subject under any circumstances, but it forced both sides in the senate debate to extremes, leaving them with only the two alternatives of saying that international law was mandatory or that it should not be taught at all. The problem was compounded when the form in which the issue reached the senate did not allow it to consider what, for Jenks, should have been the main question: whether legal history or international law should be in the course, when he was not willing or able to teach both.

When fighting stopped in the confused trench warfare between Jenks, the senate and the council, the degree course was left with the basic structure it had


had since the introduction of the graduate LLB in 1882, with the exception of the new subject of Constitutional and Legal History. Thanks to a decision of the senate, it was now an arts subject. Degree students and articled clerks continued to study the same law subjects, but LLB candidates had to complete the BA course first, making sure they included both Constitutional and Legal History and Jurisprudence. Their law studies then took two years, during which they tackled Roman Law, Property, Obligations, International Law, Wrongs (which included criminal law), and Equity and Procedure.

The loser in this protracted battle (apart from the cross and disillusioned Jenks) was constitutional law, which disappeared as a separate subject. Shoe-horned into legal history in Arts, it dropped out of the articled clerks’ course altogether, although their knowledge of it was still tested in the Supreme Court’s admission exam. Federation in 1901 made this situation untenable. Jenks was gone, his departure hastened by his quarrels with McInerney and the council. In his place was a new dean, William Harrison Moore, who was making his name as a pre-eminent authority on the constitution of the new Commonwealth. He proposed not only the restoration of the lost subject but a significant expansion. ‘The establishment of the Commonwealth of Australia with an intricate Constitution’, he argued with some exaggeration, ‘is bound to give to Constitutional Law an importance such as it has in the United States and Canada, where an intimate knowledge of the constitution is necessary to every practising lawyer’. 72 Constitutional law and history grew to occupy three subjects, merging with public international law. To make space, jurisprudence was combined with Roman law, Moore making the case that jurisprudence was best taught in the context of a particular system of law. Administrative law appeared in the curriculum for the first time, unusually early in comparison with other Australian universities and with England. Initially combined with private international law, it became a separate subject in 1912. 73

72 LFM, 3 May 1900, 277.
73 University of Melbourne, Calendar, 1902, 110–15, and 1912, 145.
The separation between the law course and the admission exams, which lasted until 1905, made it easier for Moore to expand the more theoretical subjects and leave some of the more practical material to the Supreme Court’s examiners. The new admission rules of 1905 presented a further opportunity when they left Jurisprudence out of the list of subjects prescribed for articled clerks. Moore welcomed the chance to teach a more academic course when the clerks were absent:

in the case of one subject—Jurisprudence (including Roman Law)—I am satisfied that we shall be able to secure a keener interest & a higher standard of work now that the subject is practically confined to students who are proceeding to the Degree of LL.B.; this class of student is able to relate the work done to work which he has done in other departments, notably History and Philosophy.\(^4\)

But this was a matter of teaching practice rather than changes to the curriculum. The heavy apparent weighting towards constitutional law lasted until 1917, when the real content of the three constitutional law and history subjects was more accurately reflected in new names. They became Modern Political Institutions, Sources and History of English and Australian Law, and Constitution of the Commonwealth of Australia.\(^5\)

Modern Political Institutions was a catch-all introduction to the course that, despite its name, reached deep into English constitutional history. Its outline promised details of ‘principles involved in the assemblies of 1295, 1305 &c’, along with more recent constitutional history, public international law and imperial relations.\(^6\) It continued the close links, established by Hearn, between law, history and political economy: it was available in the arts course, just as its predecessor, Constitutional and Legal History, had been. So many arts students enrolled that they made up nearly half the class. Combined with the rising

\(^4\) Dean’s Report, 1907, RC, 1907/11.

\(^5\) LFM, 30 August 1917, 408–9.

\(^6\) Modern Political Institutions printed notes, Sir William Harrison Moore Papers, UMA, 4/2/40.
enrolments from law students, they made the subject a millstone around Moore’s neck, ‘the heaviest subject which the Professor of Law looks after’.77

The subject’s new emphases followed Moore’s interests in the political as well as legal aspects of public law. ‘Gradually, the historical, the political, and comparative aspects of the subject predominated over the legal’, Moore wrote. ‘It has become the nearest approach that we have to a course in Political Science’.78 He reported to the council in 1907:

During the year we have made a beginning in systematically providing books on Political Science for the University Library, & I hope that before long we shall have at any rate a fair working students’ library in that department, which is so closely connected with the work of the Faculty.79

He had earlier urged the council to provide for the systematic teaching of political science, and prepared a memorandum proposing courses on the history of political thought and the functions and structure of the modern state.80

On Moore’s retirement in 1927, the LLB and articled clerks’ courses had settled into a long-established outline. The clerks’ course, prescribed by the admission rules, comprised nine core law subjects: Property, Contract, Sources and History of English and Australian Law, Constitution of the Commonwealth of Australia, Private International Law, Administrative Law, Equity, Wrongs (Civil and Criminal), and Procedure and Evidence. To these the LLB students added Jurisprudence and eight arts subjects, including Modern Political Institutions and Latin.

Contemporary Australian law schools followed a similar pattern. The core doctrinal subjects were largely similar across the different universities, the greatest variation being in the number of arts subjects with which they were combined. At the University of Tasmania, four arts subjects made up the first

77 Report by Professor Moore, March 1925, RC, 1927/368.
78 ibid.
79 Dean’s Report, 1907, RC, 1907/11.
80 Dean’s Report, 1904, and Moore to Registrar, 4 November 1904, both in RC, 1904/31.
year of the LLB course, followed by three years of law. At the University of Adelaide, LLB students studied three arts subjects, of which jurisprudence was one, and nine law subjects, but they could take them in any order. The new law school at the University of Western Australia, established in 1927, required its students to pass six arts subjects and an introduction to law in their first two years, after which they spent two years on the remaining eight law subjects. The University of Sydney, unique at the time in having two professors of law, prescribed the fullest and longest course: a full first year of arts (or seven subjects) followed by the Elements of Political Science and nineteen law subjects over a further four years.\footnote{University of Tasmania, Calendar, 1927, 68–9; University of Adelaide, Calendar, 1927, 187; University of Western Australia, Calendar, 1927, 117–18; University of Sydney, Calendar, 1927, 53–4.}

The Sydney law school, aided by the transformational Challis bequest that funded the appointment of its first professor in 1890 (along with a number of other professorial chairs in the university), offered the most up-to-date technical legal subjects by Australian standards, including divorce law, company law (as part of Equity) and legal ethics (a course of instruction without an exam). Compared with this, Melbourne was beginning to look dowdy, even retrograde. The retirement of the long-serving Moore after thirty-four years as dean presented opportunities for renewal, through expansion of the teaching staff and reform of the course. The direction those reforms should take soon sparked protracted disagreement over both the law school’s curriculum and its role, intensified by its position as one of the gatekeepers of the profession.
The admission rules

In 1905 the law school gained a monopoly over examining students for admission to practise, with lasting consequences for its relationship with the profession. The university took on this role—or rather the Supreme Court vacated the field—as an indirect consequence of the amalgamation of the two branches of the Victorian legal profession. An outline of that background helps to explain how the university, seemingly by chance rather than design, found itself in this position, setting the stage for a protracted dispute over the law curriculum in the 1930s and 1940s.

Discussion of the merging of the two branches of the profession in New South Wales and Victoria was almost as old as the division itself, but it grew in the 1860s and 1870s as the divided profession appeared increasingly expensive and inefficient. These calls for reform met opposition from practitioners, particularly from solicitors and senior barristers. Many solicitors opposed both outright fusion and the simpler expedient of granting reciprocal rights of practice, fearing competition from junior barristers if advocates could deal directly with clients. It was the poaching of solicitors’ work by barristers, rather than court advocacy by solicitors, that many foresaw as the most significant outcome of amalgamation.1

When an amalgamation act was finally passed in 1891, the Victorian parliament had to confront the problem of establishing a single admission standard in place of what had previously been separate examinations for the two branches. It opted to use the more elaborate rules for solicitors (incorporating compulsory apprenticeship and an additional final exam) as the model. Candidates for entry to the new, fused profession would have to complete prescribed subjects at the university, work as articled clerks and pass a final admission exam set by the Supreme Court’s board of examiners. The required period of work under articles was reduced from five years to three, perhaps as a concession to barristers previously required to undergo a studentship of only one year, or perhaps as a reduction of the barrier created by the long period of articling.²

The Law Institute, representing Victoria’s solicitors, formally resolved to give the new law a fair trial. Leading solicitors, however, accepted a boycott imposed by senior barristers, effectively joining forces against junior barristers who had less to lose from the end of the monopoly on advocacy in the Supreme Court and more to gain from working directly with clients. The newly formed Bar Association froze out ‘amalgams’ who combined both kinds of practice, and effectively negatived most of the intended results of amalgamation.³

The new framework for admission to the fused profession brought mixed benefits and disadvantages for the university. On the one hand, by increasing the number of university law subjects prescribed for those who would formerly have been admitted as solicitors, it brought increased enrolments. It also brought forward the law studies of intending barristers, who were no longer required to enrol first in Arts and then complete the full LLB, at this time still a graduate course. ‘The immediate result of this’, in the words of the Summons, ‘was that everyone who would under the old system have become an articled clerk and practically everyone who would have taken up the Arts course with

² Legal Profession Practice Act 1891 (Vic.), s. 11.
the intention of becoming a barrister entered at once for the Law subjects’, tripling the attendance at most lectures.⁴

On the other hand, the act presented a serious problem for the degree course. As the required qualification for barristers, the graduate LLB had effectively served only one branch of the profession. Most students who intended to practise as solicitors could qualify more quickly through the articled clerks’ course, although they had the option of doing the LLB. If the degree course had been prescribed as the single route to admission, as in an earlier fusion bill, it would have taken over, but the 1891 act rejected this option, with the result that merger of the two branches deprived the LLB of its main function. No longer compulsory for barristers, the degree course now had little attraction for anyone whose aim in studying law was to be admitted to practise as quickly and easily as possible.⁵

Fusion bills had been debated for many years, and the likely effect on the law school had long been predicted. Barrister John Box warned in 1885:

An unforeseen result of the proposed amalgamation of the two branches of the legal profession will undoubtedly be the ruin of our Law School. No one will be found ready to enter on a severe course of study for the degree of LL.B. when the object for which such training would be necessary is taken away by the fusion of the profession. The course of study at present prescribed for the solicitors’ branch is a much easier and more elementary one than that which is required from barristers. This course would be the one that all lawyers of the future would pursue, to the great and lasting detriment of legal education, and the death, by inanition and want of students, of the Law School.⁶

The university council agreed and threw its weight behind the opponents of amalgamation. Whatever the bill’s merits as a matter of public policy, it was clearly against the university’s self-interest to have one of its degrees made

⁴ ‘Law Students and University Prizes’, Summons 4, no. 4 (June 1895): 1.
⁵ Forbes, The Divided Legal Profession, 112.
⁶ ‘Topics of the Month’, Melbourne University Review 2, no. 3 (October 1885): 102.
redundant, and it petitioned parliament in opposition. For less obvious reasons, the articled clerks, too, lobbied against amalgamation, voting strongly against it in a meeting of their society and sending their own petition to parliament. Their stated reasons were matters of principle, casting doubt on the ability of each branch to do the other’s work and foreseeing ‘degeneration and confusion in legal matters’. The articled clerks and junior solicitors who together made up the society also faced losing business if the bill went through and barristers (junior barristers in particular) were enabled to deal directly with clients. Any mention of the likely effects on the incomes of different groups of practitioners was omitted, however, from the clerks’ petition, perhaps deemed too mercenary to carry much weight with parliament.

Hopes of greater efficiency and lower legal costs, supported by business groups, prevailed against these objections in parliament, which passed the bill. Once it came into force, the gloomy predictions for the LLB came true. Most students saw no advantage in the long degree course, since the shorter articled clerks’ course covered the same law subjects and prepared them equally well for the admission exams. What was happening was ‘the practical extinction of the L.L.B. degree’, as Harrison Moore put it.

Help for the moribund course came, just as the greatest threat had, from parliament. Having nearly killed the degree, the government revived it by introducing an amendment to the 1891 act, which reduced the length of articles for LLB graduates from three years to two and explicitly recognised their qualification, while still preserving the final admission exam. A group of law students urged the university council to support the bill, saying it would be an inducement to take the LLB degree and raise the educational standard of future barristers (they assumed that intending solicitors would not bother with the degree course). It would also reverse the indirect damage done to the arts course

---

7 CM, 10 August 1891, 303; Articled Law Clerks’ Society, Fourth Annual Report, 1890–91, University of Melbourne Law Library, 8; Articled Law Clerks’ Society, Report and Balance Sheet, 1891, University of Melbourne Law Library, 5.

8 ‘Amalgamation of the Legal Profession’, Summons 1, no. 1 (September 1891): 2.

9 LFM, 18 July 1895, 195.
when it lost the students who used to enrol in the BA as a prerequisite for the LLB.\(^{10}\)

The incentive of shorter articles was a boost, but the graduate LLB course was unsustainable in these circumstances. The faculty proposed to rescue it by uncoupling it from the BA, re-integrating arts subjects into the early years of the LLB, and cutting the overall time until graduation to four years. In short, it would return to something like the course that had been taught in the 1870s and 1880s.\(^{11}\)

Amalgamation also had the unintended consequence of ending the Supreme Court’s admission examination, Victoria’s closest approach to a separate bar exam. It was this exam that students could attempt as an alternative to the university law course from 1857 and that all new solicitors had to pass from 1863. The amateurish and sometimes eccentric papers set by the court’s board of examiners were badly suited to their important role, and the controversies that resulted left them with few defenders when the framework for admission was revised, for other reasons, in the early 1900s. The exams were set without teaching of any kind and initially without giving candidates any guidance as to what was in them, other than the titles of the subjects. The examiners’ goal seemed to be encyclopaedic memorisation, tested by asking random questions about points of detail. When the failure rate reached 80 per cent in 1891, the law students complained to the judges about the ‘petty catch questions’ (‘What is the penalty for shooting a house dove?’ was one example), the lack of information about the exams, and the absence of prescribed texts.\(^{12}\)

At present the startled candidate may, after spending weary months in wandering through the mazes of common and statute law, be confronted with a question like this—‘How is distance measured for the purposes of any Act passed after the Acts Interpretation Act 1890?’ and he will feel

\(^{10}\) CM, 13 August 1894, 206; *Legal Profession Practice Act 1895* (Vic.).

\(^{11}\) LFM, 18 July 1895, 199–200.

\(^{12}\) ‘Final Examinations,’ *Summons* 1, no. 3 (1892): 1.
hurt, after wasting his precious half-hour vainly composing an elaborate answer, to discover that the answer is simply, ‘In a straight line.’

The judges agreed with the students’ objections but rejected their challenge to the results, since the exams were consistent with the loosely drawn rules of court. At least they forced the reluctant board of examiners to prescribe textbooks and to publish past papers for the students’ guidance. Yet the examiners’ ideas about assessment seemed to be beyond reform, and continuing problems provoked more complaints in 1900, about questions that went beyond the scope of the subjects and were too long to answer in the time available. The judges responded by holding an additional exam, and two members of the board of examiners resigned. As Sir John Latham, former chief justice of the High Court, wrote long afterwards, ‘how could anybody set “Common Law” simpliciter as a subject for an examination?’ He judged that the exam was still incompetent when he sat it in 1904, although this did not prevent him winning the prize for the best student.

These shortcomings prepared the ground for the abolition of the admission exam, but it was a problem of a different kind that precipitated the change. By recognising only qualifications that were of equal value to those required in Victoria, the 1891 amalgamation act disrupted the local admission of practitioners who had already qualified elsewhere in Australia or in other parts of the British Empire. The new standard was hard to satisfy, thanks to the stringency of the local combination of university study, articles and final exam, and the Supreme Court raised the barrier still further by giving the equivalence test the strictest possible interpretation.

After an unsuccessful attempt in 1895 left the problem unsolved, a legislative remedy was found eight years later, after a meeting of attorneys-general agreed to implement reciprocal admission. Reform of the framework of

---

14 ‘The August “Final”,’ Summons 10, no. 2 (1900): 6–7; extracts from minutes of Council of Judges, 1892 and 1900, DP, box ‘Law School Expansion’ etc., file ‘Legal Education’; Latham to Derham, 19 August 1957, DP, General Correspondence 1951–64, box 2, file ‘L.’
15 In re Kerin (1892) 18 VLR 215.
the admission rules was discussed in evidence concerning legal education given to a royal commission on the university, and as a result the rigid statutory test for recognition was dropped and replaced with flexible rules based on reciprocal rights of admission. Rather than hand the responsibility of administering the system and making the admission rules back to the Supreme Court, parliament gave it to a new, broader-based entity, a Council of Legal Education, composed of the judges, the attorney-general, the solicitor-general, the dean of the law faculty, and representatives of the university council, the bar and the Law Institute.\(^\text{16}\)

The new council, which controlled admission to the profession for the rest of the twentieth century, was thus a by-product of a by-product, the end result of a chain of consequences starting with amalgamation. With its creation, parliament gave up its experiment, dating from the act of 1891, in prescribing the details of the qualifications for admission to practise. The practical difficulties of framing statutory admission rules were too great, and parliament handed the responsibility back to the lawyers, content to leave judges, profession and university to sort out the problem for themselves.

The council’s rules, made in 1905, preserved two paths to admission and so kept some of the lines of the segregated rules for the divided profession before 1891. Would-be lawyers could either take the LLB degree and then serve as articled clerks for the reduced period of one year (much as barristers had once served as students-at-law) or, like solicitors of old, sign on for a longer period of articles (now four years) and undertake a shorter course at the university at the same time. The content of the shorter articled clerks’ course, unlike the LLB, was prescribed by the Council of Legal Education. On the other hand, as the university royal commission had recommended, the court’s admission exams disappeared, with the consequence recorded by the dean of the law

\(^{16}\) *Legal Profession Practice Act 1895 (Vic.), s. 2; Legal Practitioners Reciprocity Act 1903 (Vic.), ss. 2, 6; Victoria, *Parliamentary Debates*, Legislative Assembly, 18 December 1903, 2120–1 (Fink); Royal Commission on the University of Melbourne, *Final Report, VPLA*, 1904, vol. 2, no. 13, 60; ‘Inter-State Legal Reciprocity,’ *Australian Law Times*, 22 February 1902, cxv–cxvi.
faculty: ‘In all cases the Final Examination has been abolished, so that all the examinations in law are now in the hands of the University’.17

The decision confirmed the divergence between Victoria and New South Wales, where university study remained only one path to legal practice and until the 1960s most students qualified through the exams of the barristers’ and solicitors’ admission boards. This relative ease of entry to the profession helped boost the number of practitioners: New South Wales consistently had more lawyers in proportion to population than Victoria through the twentieth century. Other factors, including the size and structure of the economy, were also involved. Queensland, which also had an admission board system alongside university training until 1970, had fewer lawyers in proportion to population than Victoria.18

Handing sole responsibility for assessment to the university was, like the changes that made university study compulsory for all would-be lawyers by 1872, partly a result of reformist ideas about legal education but largely due to local conditions and accidental side-effects. The university replaced the court’s examiners, supplanting the separate admission exams that were, and would remain, the final hurdle to practice in the United States and Britain. Not only would all lawyers have to study at the university, but it would be the sole judge of their academic fitness to practise.

**The climate of ideas**

How the university exercised this monopoly was influenced by a changing climate of ideas about law and legal education, a climate that intensified disagreements in Victoria between academics and the profession. These ideas figured prominently in curriculum reform in the United States and Canada.


Until the 1930s teachers at the Melbourne Law School rarely articulated an educational philosophy. They deployed an eclectic method whose characteristics emerge most clearly by comparison with approaches debated in the United States. The sharpest contrast was with the scientism associated with Christopher Langdell and the Harvard Law School. Langdell was far from being the first to describe law as a science. The terminology was common enough for Richard Sewell to use it in passing in his inaugural lecture, but Langdell gave it new force by tying it to the university’s role in legal education and to the method of teaching. ‘If law be not a science, a university will consult its own dignity in declining to teach it’, he said. ‘If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises it.’

This was not science based on experiment, but science in a characteristic eighteenth- and nineteenth-century sense of a ‘body of logically coherent, rational, systematized knowledge’. Law was not a chaotic agglomeration of minute rules of practice, but a system of logical principles. The case method that Langdell championed promised to teach the laws of legal science not empirically but from books, and above all from the reported reasons for appellate decisions. Law, he said, ‘could only be taught or learned effectively by means of cases in some form’. As Lawrence Friedman wrote:

Langdell purged from the curriculum whatever touched directly on economic and political questions, whatever was argued, voted on, or fought over. He brought into the classroom a worship of common law and of the best and the brightest among common law judges. He ignored legislation; he despised any decisions that were, in his view, illogical or contrary to fundamental common law principles.

At Melbourne, law teachers took no such rigorous or exhaustive approach. They did not practise the case method, at least not in the exclusive way advocated by Langdell, and the prominence of constitutional and administrative law in their teaching and research denied analytical private-law jurisprudence the dominant role it attained for a time at Harvard. They shared with some of their American colleagues touches of German influence. Historians have noted the significance of German legal scholarship for American legal academics in the nineteenth century, and their admiration for the high prestige of law in German academia. Melbourne’s first dean, William Hearn, encountered German historical scholarship in his teaching of ancient history and drew on it in his book of historical sociology, *The Aryan Household*; his writing on English history, on the other hand, revered supposedly unchanging principles of constitutional liberty and had nothing to do with German scientific history or primary research. His successor, Edward Jenks, an enthusiastic visitor to Germany as a young man, hoped to reshape the university’s LLD degree along European lines and later acquired a wide European readership as editor of a comprehensive digest of English civil law inspired by the German civil code. For the most part, however, Melbourne teachers lectured and examined on the standard secondary texts of English common and statute law, with side-lights from jurisprudence and history.

In the 1920s and 1930s, notably in the United States, law curricula began to be reshaped in response to (and sometimes in reaction against) a cluster of ideas that had as a common element the conception of law as social science. Like the language of legal science (in Langdell’s sense of the self-contained principles of legal doctrine), this terminology had been in use for many years. In the

---


nineteenth century it had a close connection with law through the activities of the National Association for the Promotion of Social Science, which operated in Britain from 1857 to 1886. As its historian, Lawrence Goldman, points out, the association’s purpose was not, or not primarily, academic research, but social reform: ‘to construct an informed public opinion on social questions and instruct parliament in the right course of action’. Its reports and large, quasi-parliamentary meetings collected data and advocated change, in which law often played a central part. The association’s department (or section) of jurisprudence and amendment of the law linked law with the reformist and activist conception of social science. At a meeting of the association in 1860, law reformer James Moncrieff said:

> We are to consider, in this department, jurisprudence as a social science—in other words, we are to consider the law as it stands in its relation to common life. There is a sense in which the science of jurisprudence is nothing but a social science, or, rather, is the embodiment, or ought to be the embodiment, of all social philosophy, as it is the mainspring on which society turns—the power which keeps society together.27

The association inspired similar efforts outside Britain. The American Social Science Association, founded in 1865, was similar to its British counterpart but smaller and less politically successful. It became increasingly academic in orientation and tried unsuccessfully to merge with Johns Hopkins University in 1878. In Victoria the international exhibition of 1880 was the occasion for a Melbourne Social Science Congress, which had its own jurisprudence section, addressed by Hearn as its president. His speech followed the example of the congress’s English model: he spoke about law reform, including his personal project, codification of the law. But that was as far as he

---


took the connection between law and social science. Speaking, as law reformers at meetings of the English association had, about legal education, Hearn said that law was ‘essentially an art, and an art could be learned only by practice’. For the moment, the scientific element of legal study at Melbourne went little further.

As a program of activism rather than study or teaching, the reformist, nineteenth-century conception of social science had little effect within universities, but its later manifestation, anticipated to some extent in the American Social Science Association, had greater potential. In a series of publications in the early decades of the twentieth century, Roscoe Pound argued for a sociological jurisprudence that replaced the ostensibly mechanical operation of legal doctrine with assessment of law’s actual operation and its social effects. In learning and practising this ‘science of social engineering’, as he referred to it, lawyers should profit from interdisciplinary study and empirical research.

Despite the implications of Pound’s ideas for legal education, he did little to implement them during his tenure as dean of the Harvard Law School from 1916 to 1936. Students ranged beyond the law in their first degrees, before entering the graduate law school or in postgraduate study, but not in their law course, although individual professors took a sociological or functional approach in their subjects. Felix Frankfurter was an example, although he claimed the mantle of Langdell for his focus on social problem-solving. ‘The Langdell–Ames contribution to legal education’, he wrote, ‘conceived of law not as a completed, static fund of information but as a dynamic process for the adjustment of controversies, ultimately through judicial tribunals…Courses are merely pedagogical devices for dealing with legal problems.’

---

29 Address on the Amendment of the Law, Hearn Papers, UMA, 3/2/2, 18.
30 Kalman, Legal Realism at Yale, 45.
still contained no compulsory legal history, comparative law, public law or jurisprudence.\textsuperscript{32}

It was elsewhere that teachers tried to implement these and related ideas in a more comprehensive way. Robert Gordon has disarticulated the loose grouping of theories and methods that drove much of this effort at Yale: they included sociological jurisprudence, attention to the functions and effects of law in society, empirical research, interdisciplinary study, and staff interventions in public life through criticism, analysis and expert consultancy.\textsuperscript{33} Legal realism built on such ideas by looking for hidden causes behind the ostensible reasons for legal decisions; empirical research into the actual operation of law, interdisciplinary studies and a special interest in legal process drew on similar motivations. Common to them was a search beyond legal doctrine recorded in appellate decisions and a focus on the context and operation of law.

The most obvious outward signs of these different paradigms were in subjects and curricula. In the 1920s, staff at the Columbia University law school reorganised individual subjects and then whole areas of the course, breaking down the divisions between contract, tort, equity and other subjects, integrating public and private law, adding more statutory sources to their teaching materials and proposing new structures based on functions or transactions rather than the internal logic of legal doctrine. Social science formed the matrix of much of this innovation, supplying introductions to subjects, research data and some of the classifications of the new curriculum. This heady re-imagining of the law course split the Columbia faculty and was successfully implemented only in the areas of jurisprudence and business studies. At Yale fast-moving course changes repeatedly re-made much of the curriculum in the 1930s, introducing such subjects as commercial bank credit and public control of business, while graduates in economics, history and psychiatry joined the staff—though Laura Kalman concluded that the realists at both universities fell far short of their


\textsuperscript{33} Gordon, ‘Professors and Policymakers,’ 84.
objectives. At the University of Michigan a more cautious course review also drew on the social-science theme, proposing to focus on ‘how law works and how it may be improved’ and applying lessons from economics, sociology, biology, political theory and history.

Wider developments affected the reception and implementation of these ideas. The dynamics of admission to the profession were especially significant under the economic stresses of the Depression. In the United States, requirements for legal training and for pre-legal study increased during the 1930s, partly in response to a concerted campaign to reduce competition in the overcrowded profession and partly in a continuing effort to bar ethnic minorities from entry. Developments in university research and teaching had their own social and economic substratum. John Henry Schlegel has highlighted the emergence of an academic legal profession and situated it within a common pattern, the middle-class creation of academic disciplines in the social sciences in the late nineteenth and early twentieth centuries. The paths followed by university teachers and admitting authorities expressed a complex and subtle interaction of guiding ideas, economic interests and social formations.

**Ontario**

Disagreements in Victoria over the nature of legal education are brought into relief by a contemporary debate in another common-law jurisdiction, Ontario. There, too, practitioners and academics disagreed over the form professional training should take, but from an opposite starting-point. In Victoria, the sole university had a monopoly over lecturing and examination for entry to the profession, and the Law Institute pressed for changes in the course; in Ontario,

---

34 Kalman, *Legal Realism at Yale*, 68–96.
only the Law Society’s school at Osgoode Hall was accredited to qualify students for admission, and the pressure for change came from full-time law teachers who sought an expansion of academic preparation for practice and a greater emphasis on law reform and law’s social context.

In Ontario, practitioners had had a central role in regulating entry to the profession since the eighteenth century. From its creation in 1797, the Law Society of Upper Canada controlled the admission of locally trained candidates to the bar, performing a function that in Victoria was exercised by the judges. The early Ontario legal profession was largely fused, but (as in New South Wales) a distinction between barristers and attorneys emerged as the number of lawyers grew. The society relinquished, then regained, authority over attorneys, who from 1857 had to pass a Law Society exam before admission. This examining function expanded in the succeeding years, and in 1876 legislation gave the society full responsibility for the discipline and practice of both branches, under the ultimate control of the judges. Perhaps aided by this centralisation of control in one organisation, fusion of the two branches (in practice if not yet in law) gained ground in this period, and by 1891 only 15 per cent of solicitors were not also admitted as barristers.38

Like the Inns of Court and the Law Society in London, the Law Society of Upper Canada took on educative as well as examining functions. Attendance at lectures became compulsory for trainee barristers in 1854, and the society formally established a law school in 1861. But the initiative was short-lived, and it was not until the society’s third attempt, in 1881, that the school remained in continuous operation; even then, it functioned only on a temporary basis for a further eight years. It had one permanent staff member, the principal, and other teachers were drawn from the profession.39 The structure of the legal

---


profession in Ontario and beliefs about legal training contributed to the fitful early history of the society’s law school. The decentralised profession included many practitioners in regional areas who resisted compulsory training based in Toronto, partly for obvious reasons of convenience and partly through regional factionalism. Some also disagreed with classroom study of the theory or principles of law at the expense of learning through legal practice. This familiar difference of opinion became particularly divisive in the 1930s and 1940s.

Despite these difficulties, it was the Law Society, not the province’s universities, that established itself as the provider of training for admission to the profession. Attempts to set up university law schools whose qualifications were recognised for professional admission failed for more than a century. Two Anglican denominational colleges offered law teaching, King’s College from 1843 and Trinity College from 1853. King’s separated from the Anglican Church to become the secular University of Toronto in 1850, but its chair of law was abolished on the university’s conversion to a federal structure in 1853. Trinity offered a Bachelor of Civil Law degree and included two law lecturers on its staff before its affiliation with the University of Toronto in 1904. Neither, however, was able to qualify students for practice. The Law Society rejected the University of Toronto’s proposals for collaboration, with the result that the few students who studied in the university’s law faculty (re-founded in 1889) had to undertake a second course at the Law Society school before admission. By the start of the twentieth century, the Law Society was firmly established as both the admitting authority and the educational institution

43 Bucknall, ‘Pedants, Practitioners and Prophets,’ 155, 158; Kyer and Bickenbach, The Fiercest Debate, 35–6; Friedland, The University of Toronto, 139–43.
for entry to the profession, roles that none of its Australian counterparts exercised.

Ontario presents a contrast to both the English and Australian professions: like England, it had a professional organisation that controlled entry to practice, but unlike the Inns of Court or the Law Society in London (at least until the establishment of the Law Society’s school under former Melbourne dean Edward Jenks in 1903) the Law Society of Upper Canada operated its own law school, effectively to the exclusion of university law faculties. In part this divergence was a legacy of the establishment of the Law Society, vested from the beginning with power to admit practitioners. Its founding statute had an avowed purpose of supporting the constitution of the colony; lawyers were to perform some of the stabilising function of a social elite that Redmond Barry and others envisaged for the University of Melbourne. In Australia, professional organisations emerged later, after the judges had taken control of professional certification. Unlike its distant cousin the Law Institute of Victoria (established in 1859), the Law Society had the financial capacity to provide both teaching and a home for the profession. Its impressive building, Osgoode Hall, gave its name to the society’s law school.

The gradual expansion of the full-time teaching staff at Osgood Hall led to an academic tone that troubled leading members of the Law Society. In 1935 a committee report of the benchers who governed the society criticised the Osgoode Hall course: ‘the tendency has been to emphasize unduly the academic training at the expense of efficient office training’, it said. The benchers recommended changing the lecture timetable to allow more office-time for the students, who had to work concurrently as articled clerks. They also proposed to shorten the curriculum and reconsider the way teachers used the case method.

Students strongly opposed the change to lecture times, but the report’s recommendations were implemented.\footnote{Bucknall, ‘Pedants, Practitioners and Prophets,’ 199–200; Kyer and Bickenbach, \textit{The Fiercest Debate}, 130–6.}

One of the full-time lecturers at Osgoode Hall, Cecil ‘Caesar’ Wright, confronted the benchers in a sustained campaign to strengthen the academic side of the course. Wright gained a reputation for trenchant, even inflammatory, argument against the educational philosophy of the benchers, but the historians of the conflict, Ian Kyer and Jerome Bickenbach, observe that his conception of legal education, like the benchers’, was practical, albeit in a different sense.

Wright and the other legal academics who insisted that law must be taught in a university setting were classified as advocating a ‘theoretical’ education. But in an important sense, this was precisely what Wright was arguing against: the extralegal sources to be tapped for law’s content were, for Wright, the practical realities of business and everyday social life, not the abstractions of theory.\footnote{Kyer and Bickenbach, \textit{The Fiercest Debate}, 110.}

Wright’s aims included ‘improving the technical branch of our training by some method of supervised and rounded practical work, and with that a teaching of every course with some view of the social purpose that law serves, how it might be improved, how it ought to function’.\footnote{Cecil Wright, ‘Law and the Law Schools,’ \textit{Canadian Bar Review} 16 (1939): 594, quoted in Kyer and Bickenbach, \textit{The Fiercest Debate}, 146.}

When he was assigned to take over Jurisprudence at the start of his teaching career, the subject was dropped after just one unsuccessful year. Wright wrote: ‘Jurisprudence—Thank God—is gone—in fact, I like to think that perhaps I killed it.’\footnote{Kyer and Bickenbach, \textit{The Fiercest Debate}, 101.} Despite (or perhaps because of) the academic emphasis of the Toronto law course, Wright dismissed it: ‘There is no such thing as the University of Toronto Law School. What poses under that name is in reality nothing more nor less than a department of the Faculty of Arts.’ Yet when he wrote this in 1935, the university was offering a combined LLB–BA (Hons)
course together with postgraduate law degrees, and the *University of Toronto Law Journal* had just been established, signs of the department’s growing standing.\footnote{ibid., 150.}

When Wright became dean of Osgoode Hall Law School in March 1948, he moved quickly to implement his ideas. He proposed a law school of full-time students with more full-time teaching staff and full academic freedom from Law Society control, but the society rejected his plans.\footnote{Bucknall, ‘Pedants, Practitioners and Prophets,’ 210; Kyer and Bickenbach, *The Fiercest Debate*, 194–5, 202–4.} Less than a year after his appointment, Wright and three of his colleagues resigned and took their protest to the newspapers: the *Globe and Mail* published a front-page story with the headline, ‘Hall Pushed Back 25 Years, Osgoode Dean Says, Quits’.\footnote{Kyer and Bickenbach, *The Fiercest Debate*, 211.} Wright became dean of the University of Toronto law school, where he was joined by two of the colleagues who had resigned with him from Osgoode Hall.

The University of Toronto was well placed to offer a course that situated law in its social context; indeed, the organisation of the university’s law teaching made it almost inevitable. An honours program in law began in the department of political economy in 1927, led by the historian W.P.M. Kennedy. The program became a department in the arts faculty in 1930 and an independent law school in 1941.\footnote{Friedland, *The University of Toronto*, 306.} Kennedy initially disclaimed any intention of preparing students for practice, but by 1938 he promoted the course to those who intended to practise law, as well as those heading for public administration or business.\footnote{Kyer and Bickenbach, *The Fiercest Debate*, 115–16, 148.} Its students still had to undertake the Osgoode Hall course before they could enter the profession, but graduates in any discipline received credit for their degrees in the form of a shorter period under articles.

As Kennedy put it, the *raison d’être* of the Toronto course was the study of law as a social science, a process of social engineering, in which the knowledge of practical work—to which bi-monthly moot
courts, attended by practising lawyers, contribute—is deepened by an educational purpose, by an inquiry into the social worth of legal doctrines, and, above all, by a critical attempt to find out if law in its various aspects is in reality serving the end of society.55

The curriculum incorporated doctrinal subjects (including industrial law and municipal law), but its most distinctive feature was its wide coverage of other subjects, including four philosophy units and two on political science.

Under Wright’s deanship, the faculty turned still further towards training for entry to the profession, with consequences for the orientation inherited from the combined-degree program. A new, freestanding LLB course reflected Wright’s interests. Its focus was almost entirely on legal doctrine rather than theory or social science (although it did include jurisprudence and a comparative study of the civil law of Quebec), and it was supplemented by ‘group work conducted by members of the practising bar concerned with problems of practice and pleading in the courts, conveyancing, incorporation of companies, etc.’56 The history, political science and philosophy that made up a major part of Kennedy’s combined course were left to the law program in Arts (from which students could transfer to the LLB). The need for students to finish their professional studies with the complete Osgoode Hall course was a serious problem for the university’s law school, and enrolments stagnated. It was not until 1957, when rising student numbers swelled the cost of running the Osgoode Hall school, that a compromise with the Law Society gave Toronto and other universities equal recognition in training for admission to practise. Students could undertake their first course at any law school. They then enrolled in a bar admission course, combined with articles, at Osgoode Hall.57

This disagreement over practical training, full-time study and the place of apprenticeship had strong parallels in Victoria, but how much teachers in

56 Kyer and Bickenbach, The Fiercest Debate, 226.
57 ibid., 260–3.
Melbourne knew of the arguments in Toronto, and vice versa, is hard to say. As editor of the *Canadian Bar Review*, Cecil Wright wrote to Melbourne’s professor of jurisprudence, George Paton, in 1935, asking him to write an article; Paton became a regular contributor, but not on the topic of legal education.58 Kenneth Bailey visited Canadian law schools briefly in 1937, but on his return wrote almost exclusively about the United States. Talking about his trip, he mentioned Canada only as a point of contrast: the Australian system of professional admission after a university law course and office training, without further examination, was almost unknown there, he said.59 The example of Ontario offered more to the Law Institute as it advocated greater involvement for practitioners in legal training, but it preferred to cite English models. The imperial centre was a more powerful reference point than another former colony.

**The struggle for the curriculum**

Events in the United States and Canada suggest three important themes in the interpretation of changing common-law curricula in the 1930s and 1940s. The first is the spread of social science, functionalism and realism in the conceptualisation of law and its teaching. Significant as these ideas were in their own right, they gained traction through a second development: the growth of legal academia. The numbers of professional law teachers grew fastest, by far, in the United States, but their increasing presence from a smaller base was also a factor in Canada and Australia. The appointment of more full-time staff, both actual and projected, was central to the disputes at Osgoode Hall, and the appointment of a second professor prompted curriculum reform at Melbourne. Finally, developments in the profession created a charged environment for alterations in the pattern of legal training. The pressure, actual or perceived, of numbers in the profession during the Depression created an incentive to raise

---

58 ibid., 138.
barriers to entry, while practitioners’ ideals of scholarly or practical training influenced both the tone and the aims of their interactions with universities. Where one institution held a monopoly over education for admission to practise, as in Ontario and Victoria, the stakes in curriculum change were higher and the interest of professional bodies more intense.

American ideas linking law and sociology found an interested, if not initially very active, audience in Melbourne. After visiting the United States in 1911, Harrison Moore wrote appreciatively of efforts at Columbia to ‘link as closely as possible the study of the law with political science’ and to encourage ‘economic and sociological studies’ by students and staff. He noted, too, the ‘profound interest’ of Roscoe Pound’s writings on sociological jurisprudence.60 But he pursued these ideas through his advocacy of the study of political science and, to a lesser extent, in his teaching of constitutional and administrative law, not in any overall planning of the law curriculum.

Under Moore’s successor as dean, Kenneth Bailey, the idea of law as social science inspired attempts to organise the Melbourne degree course into a different and more coherent shape. Bailey wanted to extend the contextual study of law both in the doctrinal subjects of the course and in the arts subjects studied by the degree students. In doing so he drew not only on social science but also on the older tradition that law was, if not a branch of the liberal arts, then at least an affiliate. He aimed both ‘to teach the technical rules of law in a setting of social studies’ and ‘to maintain the liberal and cultured tradition of the profession’. As Bailey put it, ‘we systematized and extended the social science background of the course as a whole’; the changes were an attempt ‘to use Law itself more fully as a medium of education and culture’.61

In 1931 the appointment of George Paton as professor of jurisprudence added a second full-time teacher to the law school’s staff. The necessary


reallocation of subjects became the occasion for a complete review of the curriculum. Paton shared Bailey’s approach, and within a few months of his arrival the faculty adopted a new plan for the degree course. The introductory subjects that students had been able to choose from anywhere in the arts course disappeared, replaced by more focused preparation for legal study: economics, British history (Bailey wanted political science, but the faculty traditionalists prevailed), and French, Latin or psychology. Legal history and Roman law were extracted from larger subjects and became compulsory in their own right. Later-year students supplemented the familiar doctrinal subjects with one of five pairs of options, including logic, political science, economics, and international relations (in which public international law appeared as a separate subject for the first time). Bailey and Paton even had discussions with the Council of Legal Education about abolishing the articled clerks’ course, the logical conclusion of their insistence on a broad, academic education, but without success.62

The new course was more jurisprudential, less professional and vocational, and directed more towards the social and theoretical context of law. The core doctrinal subjects remained, but the defined options and the new compulsory subjects reshaped their setting. Bailey estimated that, as a result, the degree students spent 42 per cent of their time on private law, 10 per cent on public law, 28 per cent on the social sciences and 20 per cent on the history and theory of the law.63

In United States law schools, teaching that treated law as an instrument of social change provoked a sometimes hostile response from outside the university. It was in the law schools of private rather than public universities that such an approach flourished, partly for this reason. As William Johnson observed:

Universities like Yale, Columbia and Johns Hopkins provided a more congenial environment for the development of the reform impulse

62 LFM, 18 September 1931, 194, and 20 May 1932, 211–12; Minute of Informal Discussions, 15 October 1931, FLC, box 1, file ‘Legal Education.’
63 LFM, 7 June 1940, 420.
because they were not, like the University of Wisconsin College of Law, subject to such direct and intense pressures from the business community to concentrate on the traditional curriculum.\textsuperscript{64}

In Melbourne the profession, rather than the business community, lobbied the university, but the pattern of community pressure in support of a pragmatic curriculum was similar. In one of his first public statements as dean, Bailey foresaw conflict between the aims of the university and the profession in implementing his ideas. ‘In any clash between these interests, those of the University must be considered paramount,’ he told the Law Students’ Society a few months after becoming professor. This was not only because the law faculty was part of the university, he said, but so that law would remain a learned profession, ‘and that its members might be better fitted to be leaders of the community’.\textsuperscript{65}

The Law Institute had been advocating change in the law course for several years. Its journal supported the law school, welcomed the appointment of the second professor and recognised the value of the ‘cultural studies’ in the course, but it wanted to bring the training of lawyers ‘more into line with the requirements of practice’.\textsuperscript{66} It had been trying since at least 1928 to have accounting made a prerequisite either for the LLB or for admission to practise. Most of all, it wanted the law school to expand the teaching of subjects it neglected, notably company law, bankruptcy and conveyancing. The practical slant of the institute’s program sounded progressive, and it chimed with others’ criticisms of traditional lectures. ‘The student, under the present system, simply becomes a diligent note-taker’, one anonymous graduate complained, ‘with no training in the practical analysis of legal problems’; there should be more reasoning aloud, the graduate said, and practice in dealing with problems.\textsuperscript{67}

\textsuperscript{64} Johnson, \textit{Schooled Lawyers}, 165.

\textsuperscript{65} ‘Professor Bailey on Legal Education,’ \textit{Farrago}, 8 May 1928, 1.

\textsuperscript{66} ‘The University Law Course,’ \textit{Law Institute Journal} 1, no. 5 (1927): 73.

\textsuperscript{67} ‘LLB,’ ‘The Inadequacy of the Law School,’ \textit{Law Institute Journal} 2, no. 2 (1928): 32.
The institute’s platform drew on the English tradition of office-training, but the stress on practical experience was shared by some of the American advocates of functional theories, who sought law’s effects and actual operation rather than its self-declared doctrines. The American realist, Jerome Frank, wrote in 1933:

The Law Student should learn, while in school, the art of legal practice. And to that end, the law schools should boldly, not slyly and evasively, repudiate the false dogmas of Langdell. They must decide not to exclude, as did Langdell—but to include—the methods of learning law by work in the lawyer’s office and attendance at the proceedings of the courts of justice…They must repudiate the absurd notion that the heart of a law school is its library.68

The law school’s critics may not have known it, but they had an affinity with some of the more radical academic lawyers overseas.

As the conflict developed, the institute felt its weakness in the faculty, made up of the professors and lecturers, the legal members of the council, and three others chosen by the faculty itself. In the early 1930s the external members were John Behan (warden of the university’s Trinity College), Frederic Eggleston (former state minister and university council member) and barrister P. D. Phillips. Excluded from the curriculum debates in 1931–32, the institute asked for representation; the faculty allowed it to choose a nominee to fill an existing vacancy, and later, in 1941, gave it a designated place.69

Changes to the degree course were primarily a matter for the faculty rather than the Council of Legal Education, since the admission rules recognised the course as a whole without saying anything specific about its contents. But the rules had consequences for the articulated clerks’ course, which shared most of its subjects with the LLB. To maintain a degree of consistency between the two courses and avoid a flight of students away from a longer degree course, Bailey

---

68 Jerome Frank, ‘What Constitutes a Good Legal Education?’, speech to the Section of Legal Education, 1933, quoted in Stevens, Law School, 156–7.
69 LFM, 4 November 1932, 225, 25 May 1934, 247, and 16 May 1941, 460.
and Paton proposed to extend the clerks’ course as well. That meant changing the rules of the Council of Legal Education, so they prepared the way by caucusing with its members and made the proposal more palatable to the Law Institute by agreeing to an extension of the period of articles for graduates to two years. The institute went along with this, although it refused to accept Roman law for articled clerks, which was left out of the so-called office course as a result. The Council of Legal Education blocked the extension to the graduates’ period of apprenticeship.\(^70\)

The institute’s most effective criticism of the course was that it ignored areas of law that were increasingly important in practice. The institute traced the trouble back to the amalgamation of the profession in 1891, when, as the institute saw it, the requirements for the training of solicitors were reduced to match those for barristers. The process continued under the Council of Legal Education:

> Ultimately articles were reduced to one year, new cultural subjects were included in the University course, the Supreme Court examination, which older practitioners look back to as having given them the most valuable part of their qualification, was abolished, and the present most unfortunate state of affairs came into being.\(^71\)

The result was a neglect of training in matters that solicitors needed to be able to deal with: ‘four-fifths of the time formerly given to practical training in an office has gone, for the sake of book reading in Roman law, the history of the law and other topics rarely heard of in Collins Street’.\(^72\) Company law was not given its due weight and taxation was not taught at all. The institute wanted degree students to do three years of articles, one of them concurrent with the final year of the degree course; the articled clerks’ course should take six years.

---

\(^70\) LFM, 16 September 1932, 220–1; Minute of Informal Discussions, 15 October 1931, FLC, box 1, file ‘Legal Education.’


\(^72\) ‘Service in Articles’, *Law Institute Journal* 10, no. 6 (1936): 83.
All students should have to pass a set of exams in practical subjects before they could be admitted to practise.

The councillors of the Law Institute believed in the value of practical training and daily saw in their own offices the importance of subjects that the law school did not teach, but other influences were also at work. Only a minority of Victorian solicitors were members of the institute, and their composition was changing. After parliament gave corporate status to the institute in 1917, it gained a hegemony over the independent regional law associations that had flourished outside Melbourne. Country members joined the institute in increasing numbers, to such an extent that they changed the balance of power in its council in 1932. Coupled with the effects of a protracted fight within the institute over the introduction of compulsory audits and fidelity insurance, this transformed the organisation. As legal historian Rob McQueen observed, ‘from being a largely city-based Institute it had become an almost exclusively rural club in the late 1930s’.73

Cultural divides ran through the debate, separating barristers and solicitors, graduates and articled clerks, and sometimes city and country. ‘The right education and training of solicitors is of much greater importance to the community than that of barristers,’ the institute said, ‘both because of the far greater number of solicitors, and because of the nature of the services they can render to clients’.74 Its president complained that, under the control of the faculty and the Council of Legal Education, ‘solicitors’ education is mutilated in the interests of the degree course at the University and in the interests of the training of barristers’.75 Numerical domination of the profession by solicitors added force to these arguments. By 1938, on the institute’s figures, nearly 90 per cent of Victoria’s 1132 practising lawyers were solicitors, up from about 80

---

73 Rob McQueen, ‘Together We Fall, Divided We Stand: The Victorian Legal Profession in Crisis 1890–1940,’ in Lawyers and Vampires: Cultural Histories of Legal Professions, ed. W. Wesley Pue and David Sugarman (Oxford: Hart Publishing, 2003), 324.

74 Memorandum from Council of Law Institute to Council of Legal Education, September 1936, FLC, box 1, file ‘Legal Education.’

75 LFM, 4 August 1944, 84.
per cent in 1891, when uniform rules for admission to the newly amalgamated profession effectively made entry to the bar more expensive.\textsuperscript{76}

The university’s monopoly gave a sharper edge to practitioners’ disdain for over-educated theoreticians without practical skills. Its curriculum mattered all the more because it was the sole means of entry to the profession. Some of the solicitors’ dislike was reciprocated, although Paton, in particular, was conciliatory throughout, in spite of strong provocation. ‘Possible Compromise with Piesse’ was the heading of a note in his papers and the theme of his dealings with the institute, although without giving up the law school’s monopoly or the ideal of a broad-based course.\textsuperscript{77} Frederic Eggleston deplored the scorn of ‘eminent law teachers’ for both their students and ‘the average efficiency of the Solicitors’ branch of the profession’.\textsuperscript{78} The fact that neither Bailey nor Paton had practised law in Australia diminished the weight that their views carried with the Law Institute. Nor had either worked as an articled clerk; though Australian-born, both were admitted to practise as barristers in England.

In the background, less often articulated, were economic motives, intensified by the slow recovery from the economic depression of the 1930s. Bailey and the Law Institute alike warned of the dangers of over-supply in the profession. As the institute’s president put it,

\begin{quote}
candidates are entering the legal profession at an alarming rate. There is not sufficient work for all … It may not be proper to make admission unduly difficult merely for the purpose of protecting the interests of those already admitted but I suggest we might examine the matter carefully to see whether in many ways admission is not now unduly easy and we may regard it as a duty we owe the community to prevent unwholesome overcrowding.\textsuperscript{79}
\end{quote}

\textsuperscript{76} Above, p. 61; Gubbins to G. Forrest Davies, February 1938, draft, LIV records, UMA, first accession, 10/3/1.

\textsuperscript{77} FLC, box 1, file ‘Legal Education.’

\textsuperscript{78} LFM, 21 April 1939, 364.

\textsuperscript{79} Gubbins to G. Forrest Davies, February 1938, draft, LIV records, UMA, first accession, 10/3/1.
Of the 1132 practising barristers and solicitors in 1938, about a quarter, or 276, had been admitted in the past four years. But neither the university’s nor the profession’s proposals for the law course were a strong response to over-supply. The institute’s urging for an extra year or two of articles (partly at the expense of full-time study) would have raised the barrier to entry, but not to anything like the extent of the reforms advocated by professional organisations in the United States in the same period. There, bar associations and the Association of American Law Schools urged both the introduction of statutory requirements for attendance at law school and the extension of the pre-legal studies required of law students. In Victoria, by contrast, attendance at law school combined with apprenticeship was already compulsory, and the institute’s proposals stood to affect numbers entering the profession only at the margins.

A longer period of articles would have expanded the pool of cheap workers available for solicitors, a pool that was shrinking with the declining popularity of the articled clerks’ course. From 1932 its students worked under articles for five years, but degree students served only a single year. Articled clerks received low wages or none at all. Many paid their employers a substantial fee, or premium, for taking them on. Harold Ford was lucky that the firm who employed him in 1937 waived a premium, ‘which was most unusual’; it could be anything from £50 to £1000. After his first eighteen months, they also paid him ten shillings a week. Russell Boughton’s premium was 100 guineas (£105) in the early 1930s, but at least he was paid £1 a week. When Geoffrey Sawer was looking for articles around the same time, he found a solicitor willing to make a bet with him: if he won the prize for the law school’s top student, he would be paid thirty shillings a week; if not, he would be paid nothing, but would be charged no premium. He won the prize, and a salary. By 1953 payment of wages had become usual, although the rates were still low. Clerks

---

80 ibid.
81 Abel, American Lawyers, 47; Stevens, Law School, 176–80.
82 Chris Maclean, ‘And All the Time He was Learning from Us,’ Law Institute Journal 59, nos 1–2 (1985): 76.
who got articles through the university’s appointments board were paid between £3 and £8 a week; the average was about £5. Once they were admitted to practise, male solicitors could expect to be paid £12 to £15 a week in their first year, or around the minimum legal wage for men; women could expect even less.\(^{83}\)

Melbourne solicitors were less explicit about their need for these willing workers than their counterparts in New Zealand, or perhaps the labour of articled clerks was less important to them. In New Zealand in the 1950s, solicitors openly acknowledged the need for the cheap labour of students to maintain their businesses (although there, since the abolition of articles in the nineteenth century, the students’ presence was not mandatory, but the result of a waning custom under which most law students studied part-time).\(^{84}\) In Victoria it was the general opinion of articled clerks, according to the Law Students’ Society, ‘that use is eagerly made of their services in the performance of routine duties to avoid the employment of salaried clerks’.\(^{85}\) The economic value of a one-year articled clerk would often have been low, but clerks who served for longer periods would have been worth more to their employers.

Bailey defended the practical studies that were already part of the course. ‘Under the general title of “Equity”’, he wrote, ‘the Melbourne student spends almost as much class time on company law, bankruptcy, administration and probate as the student taking the Final Examination of the Law Society in London’.\(^{86}\) But the argument for including branches of the law that were growing in importance was hard to answer. A faculty committee chaired by Bailey took the first steps on the long road towards meeting this demand when


in 1934 it recommended adding teaching in company law and bankruptcy; the lectures were squeezed into Equity, which gradually became a catch-all subject for the study of business structures of all kinds.  

In 1936 the institute took the fight to the Council of Legal Education, which asked the law school to respond with proposals of its own. These emerged at the glacial pace that characterised many of the law school’s curriculum reviews, but a definite plan was ready by 1940, after more discussions with the institute. The faculty was willing to add more practical subjects, such as commercial law, company law, evidence, drafting, taxation, domestic relations and industrial law, but it wanted a fifth year of the course in which to teach them. The report took the call for more practical training and, adopting an old idea of Bailey’s, used it for the faculty’s own purposes, turning it into a plan for tutorials that (the faculty argued) would do a better job of practical training than could be hoped for from longer articles. Few in articles received systematic training, an old grievance of the clerks.

Money would be needed to pay for the extra teaching. The call for new subjects had the support of the Council of Legal Education, which was dominated by the Supreme Court judges and chaired by the chief justice; backing their opinion with a financial commitment, the judges made a donation of £25 000 from the court’s library fund, which held the admission fees paid by practitioners. The donation was used to employ new part-time lecturers and tutors, and was still supplementing the law school’s income nearly fifty years later.

After 1939 the intensifying war overseas led to an uneasy truce in hostilities closer to home. Paton, who served as dean during Bailey’s absence in 1937 and took over permanently in 1943, was willing to compromise, conceding that the course should be rearranged to give ‘greater satisfaction to the solicitors’ branch

87 LFM, 25 May 1934, 250–1, and 22 July 1935, 271.
of the profession’.90 The institute’s president in 1939–40, Alan Moir, supported the expansion of university training and even the abolition of the articled clerks’ course, though he was in a minority on the institute’s council. The Council of Legal Education backed the faculty’s plan to add a year to the course, but the victory counted for little, since implementation had to be postponed for the duration of the war. The council asked the faculty to do what it could to squeeze the additional practical subjects into the existing course, as a temporary measure. In the meantime, teaching in procedure and commercial law was extended, practitioners began taking drafting tutorials in conveyancing, and there was a general reorganisation of subjects.91

The Law Institute regrouped. Blocked by the faculty, it now attacked the university’s monopoly over legal education. For the law school, this was a grave development, although hardly surprising. The institute had long used the English system of solicitors’ training as a model, one that gave universities only a minor role. The institute’s new strategy included adding taxation and accounts to the requirements for admission to practise. It resolved on direct action: it started teaching the courses itself in April 1944, without waiting for anyone’s approval, as ‘the first step towards a reform of the present arrangements, so that the solicitors of Victoria, like the solicitors in England, could themselves decide and control the training for their own profession.’92 ‘We wish you to have no control whatever of the teaching of subjects which we are quite qualified to undertake’, the institute’s president told Paton.93 The small number of practising solicitors on the faculty and the Council of Legal Education was a gnawing grievance, and getting the upper hand in the council became one of its aims.94

---

90 University Survey: Faculty of Law, 1937, RC, 1938/748, 25.
91 Minutes of Meeting of Council of Institute with Members of Faculty, 3 August 1939, LIV records, UMA, first accession, 10/3/1, 12. LFM, 9 August 1940, 426, 429–30, and 25 October 1940, 433–4.
92 LFM, 4 August 1944, 83.
93 Piesse to Paton, 12 September 1944, FLC, box 1, file ‘Legal Education.’
94 Memorandum by Piesse, LFM, 4 August 1944, 84.
The battle lines were not always clearly drawn between the institute and the law school. There were minor differences of opinion among the teaching staff, but they presented a united front, and divisions never reached the level that caused the separation of the Department of Jurisprudence and International Law within Sydney’s law faculty in 1947. The fight at Melbourne was nevertheless one within the faculty as well as outside, since the institute and the supporters of more practical training had their representatives there. Personal connections at the top of the city’s small legal community were strong. No one better embodies these cross-currents than Edmund Piesse, solicitor, long-serving editor of the *Law Institute Journal*, and combative president of the institute from 1942 to 1944.

The presidency of the Law Institute was a surprising close to Piesse’s remarkable career. A graduate in both science and law from the University of Tasmania, as a young man he was part of the successful campaign for the permanent adoption of proportional representation for the state parliament, and then moved into intelligence work, rising to the post of director of military intelligence during World War I. The close study of Australia’s international relations in the Pacific that this entailed became a lifelong interest and the focus of his work in the prime minister’s department after the war. Marginalised under prime minister Billy Hughes, not least because he opposed Hughes’ discrimination against Japan in immigration and trade, Piesse left the government and took up practice as a solicitor, although he continued to write about defence and foreign affairs and remained an active member of groups concerned with Australia’s international relations.95

His second, legal, career overlapped with his first. His classic book, *The Elements of Drafting*, earned a glowing review in the *Law Quarterly Review* from no less an authority than Robert Megarry, the future vice-chancellor of the Supreme Court of England and Wales. It has run to ten editions, remaining in

---

print for sixty years. Piesse himself became a teacher as a result of the institute’s campaign, taking on much of the burden of the drafting tutorials that began in 1941 and delivering lectures on taxation for the institute. The outlines he issued to the students make a small, if very dry, textbook, running to more than a hundred pages.  

As the institute’s representative, Piesse became a member of the law faculty. Paton could sincerely thank him for his great help, and the faculty recorded its ‘deep debt for his public service’ when he died in 1947, but this gratitude must have been sorely tested at times. The aggression of the institute’s statements owed much to Piesse, who had no patience for what he saw as the academic irrelevancies of the degree course. ‘At present the University wallows in antiquities wherever it can find them’, he declared. He wrote to Paton: ‘we are not interested in discussing any difficulty that might cause you to object either to two years’ articles or to wish to lengthen the course to over five years. It is for you to put up a scheme within the limits we want.’ The Law of Property was one of his favourite targets; it spent too much time on English background and not enough on the Torrens system of land titles that dominated dealings in Victoria.

Extended apprenticeship and control by the institute might have had regressive overtones, but Piesse adroitly neutralised them. His program had a forward-looking, nationalist appeal, as hopes for post-war reconstruction dawned.

Let us make a new start with things as they are now, ignore past history as far as we can … and rewrite the lecture courses so that what is now the law in Australia becomes the backbone of the teaching and what happened in earlier centuries on the other side of the world does not

---


97 LFM, 1 August 1947, 212; Paton to Piesse, 14 December 1944, FLC, box 1, file ‘Legal Education.’

98 Memorandum by Piesse, LFM, 4 August 1944, 86.

99 Piesse to Paton, 21 July 1944, FLC, box 1, file ‘Legal Education.’
absorb time that is urgently wanted for instruction in the things we have
to do every day.

The course should be one ‘in the modern, living, law which lawyers apply in
practice’.  

Piesse was no barbarian at the gates. He was not only a friend of Bailey, but
his personal solicitor and a colleague in groups concerned with international
and imperial relations, including the Institute of Pacific Relations and the
Round Table. His background in government and his involvement in external
affairs made him very different from many of the solicitors he was
championing. The contradictions of his stance were obvious to Sir John
Latham, although he was mistaken in assuming that Piesse had an arts degree:
‘I doubt whether he realises how much of his intellectual equipment is due to
his University training in the Faculty of Arts’, Latham wrote to the
chancellor.  

Like many others, Piesse was the subject of vice-chancellor John
Medley’s satirical verse, but the satire was friendly, part of a gentle ribbing of
members of the Boobooks dining club at its 400th meeting. It shows the extent
to which the men in the Boobooks, from the legal profession, the university,
politics and business, identified him with the battle over the curriculum:

My name is Piesse but I wage war
Against the Faculty of Law.
And nothing my excitement stirs
Like sliding down the Barristers.

After Piesse retired as president, the institute’s tone remained belligerent,
although it made a conciliatory gesture by agreeing not to extend the one year
of articles for degree students. For his part, Paton toyed with letting the institute
do some teaching (but under the faculty’s supervision) and thought of
abandoning Roman law, always an irritant to the pragmatic solicitors, in favour

---

100 Memorandum by Piesse, LFM, 4 August 1944, 86.
101 Latham to Lowe, 31 July 1944, NLA, MS 1009/12/947.
1993), 129.
of taxation. ‘This is a retrograde step, but perhaps a polite compromise in the circumstances’, he wrote; in the end, Roman law clung on as an option until 1946.103

The faculty also looked into ways of accommodating the divide between the supposedly practical solicitor and intellectual barrister by differentiating the pass and honours courses, although it was not until 1950 that these changes materialised. In another interim step, it made cuts to fit evidence into the degree course and implemented the concession Paton had offered, by integrating the institute’s classes in taxation, accounts and professional conduct into the lecture program, as subjects to be taken during articles from 1945.104 Bailey, now on leave working for the federal government, warned against tinkering: only an agreed general settlement with the institute would satisfy the pressure for a ‘legal tradesman’s’ course, he wrote.

On the whole matter however I have been bothered by the feeling that we are in danger of moving towards a narrowly technical concept of legal education, at the very moment when other comparable communities are moving steadily towards the more liberal conception of which hitherto we have always been something like pioneers.105

He called on the law school’s tradition, going back to Hearn’s time, of including general background studies in the course.

Behind the scenes, the state and federal chief justices weighed into the debate. The retiring chief justice of the Supreme Court, Sir Frederick Mann, advocated the creation of separate courses for solicitors and barristers. His successor, Sir Edmund Herring, was sympathetic: he suggested a shorter LLB course with two years of articles for solicitors, differentiated from an honours or LLM course with no articles at all for barristers. From the point of view of the chief justices, former barristers who tried to build consensus as chairs of the

103 ‘Possible Compromise with Piesse’, FLC, box 1, file ‘Legal Education’; LFM, 22 March 1946, 172.
104 LFM, 21 September 1945, 137–45.
105 LFM, 21 September 1945, 146, 148.
Council of Legal Education, the scheme had the merit of giving the institute much of what it wanted while confining the effects to one branch of the profession. It had less appeal to the law school; it threatened to undermine the broad education to which Bailey and Paton were committed and to increase costs by multiplying course offerings. When P. D. Phillips urged this solution within the faculty he was unsuccessful.\textsuperscript{106} From the High Court, Sir John Latham, long involved in law school affairs as a member of the faculty and the university council, gave advice on tactics and took an uncompromising line:

\begin{quote}
The Law Institute has, I think, an entirely exaggerated view of the value of articles. I should rather like to see the faculty carry the war into the opposing camp by urging that the present five year period of articles required from articled clerks should be reduced by at least one year.
\end{quote}

He also vetted the faculty’s language, frowning on the word ‘trepidation’: ‘I do not like to see so feminine a word in a report of the Faculty of Law’. Nor should solicitors tutoring in law subjects be called ‘eminent’. ‘The term ought to be confined to quite exceptional people’, Latham thought.\textsuperscript{107}

In 1946, as temporary wartime arrangements ended and the return of students from the armed services increased pressure for a final settlement, the faculty and the institute found a scheme that both would agree to. It succeeded by confining itself to the kind of curriculum details that lent themselves to compromise; both sides let go of their grander plans for structural reform of legal training. The articled clerks’ course took on all the proposed practical subjects, some of which would be taught by the institute. The fact that this left the articled clerks badly overloaded was a problem for another day. As for the degree students, the faculty reluctantly gave up its plan for a five-year course, squeezing some, but not all, of the extra subjects into the four-year course.

\textsuperscript{106} Mann to Paton, 11 February 1944, and note of interview with Chief Justice, 6 September 1944, FLC, box 1, file ‘Legal Education’; Paton to Bailey, 28 October 1944, NAA, M1504/6.

\textsuperscript{107} Latham to Lowe, 31 July 1944, NLA, MS 1009/12/947–8.
instead. Succession, company law and taxation were added to the fourth year, while students would pass others after graduation.108

Throughout the dispute, Bailey and Paton acted consistently to preserve the university’s monopoly over academic certification for practice. The law school may not have sought this role actively, but once it was granted in 1905 its maintenance became a principle of decanal policy as both a warranty of the intellectual training of the profession and a secure source of enrolments. The institute’s demands on the university curriculum could be conceded or compromised, but the faculty argued firmly against the creation of a second, institute-run training school (‘Piesse’s Coaching College’, one faculty member called it), for which the state lacked both the staff and the finance.109 It was not until student numbers overwhelmed the law school in the early 1960s that it supported the opening of alternative law schools.

When the dust settled, much of Bailey’s course of 1932 had altered. Instead of his structured studies in political science, international relations, economics, public administration or philosophy, degree students chose a smaller number of arts subjects for themselves, making room in the course for the new subjects in mercantile law, evidence, succession, company law and taxation. New admission rules completed the modernisation of training, by requiring passes in procedure, accounts and professional conduct before students could begin practice. The Council of Legal Education again rejected the institute’s bid for a longer period of articles, but the institute itself rejected Piesse’s plans for greater supervision to improve the education of articled clerks.110 Training for admission to practise had been reasserted among the sometimes conflicting purposes of the degree, and in future the broad education long valued by the professors would be found in other ways: in the few arts subjects in the law course, in the wider perspectives brought by teachers to their own law subjects

109 Coppel to Paton, 22 June 1944, FLC, box 1, file ‘Legal Education’; LFM, 27 October 1944, 117.
110 Law Institute Council draft minutes, 14 December 1939, LIV records, UMA, first accession, 3/1/180–1, 12; ibid., 17 October 1940, 3/1/191, 8.
(particularly as optional subjects grew in number from the late 1960s), in the increasing popularity of combined degrees, and in revival of the idea of graduate entry to the law course.

Potent changes in the law school’s environment shaped the dispute and its outcomes. Legal functionalism and the rising social sciences offered a framework of ideas on which law teachers could draw to orient and justify their work. Earlier currents of American legal thought had less impact in Australia because of cultural affiliations to England, the difficulty of replicating American (or at least Harvard) teaching methods, and accidents of personal interest among the small number of full-time law teachers. Social science became more influential in Australia than legal scientism had been. One of the keys to its greater sway was the emergence of a law-teaching profession that slowly expanded beyond the few scattered individuals who taught law full-time in the nineteenth century. It was the appointment of the second professor that enabled and motivated reform of the Melbourne curriculum. At Osgoode Hall, teaching by full-time academics to full-time students was more contentious than Cecil Wright’s comparatively conservative curriculum proposals. A research-based and reform-oriented theory of law appealed to the nascent academic profession, linking it to legal practice and the development of public policy but at the same time marking out for the law school a domain of its own.

The stance of the legal profession towards this growing field of academic work was problematic. The tradition of a learned profession underpinned the involvement of the barrister–lecturers who had delivered most of the law school’s teaching since its foundation, and many practitioners (Moir among them) welcomed the commitment to liberal education that made arts subjects an integral part of the LLB. But the growth of an academic discipline that set itself apart from legal practice threatened visions of legal education dominated by the profession and the courts; at the same time, as the number of full-time academics inched upwards, the role of practitioners in legal training faced dilution or even (if anyone projected the trend so far into the future) virtual extinction. The university’s neglect of emerging areas of commercial law
sharpened their criticisms. Friction between practitioners and academics hinted at the negotiation of new roles as university study shifted legal training further from its apprenticeship origins.
Lecturers in law

The law school’s staffing tracked the slow emergence of an academic profession that its curriculum both reflected and promoted. Its earliest teachers, Sewell and Chapman, were barristers for whom lecturing was an attractive sideline—for Sewell, one that continued the university work he had begun in England. Such practitioners made up the majority of the law school’s teachers until after World War II. In 1873 the dean became the faculty’s first, and for nearly sixty years only, full-time teacher. The composition of the staff closely bound the study of law to its practice.

Among Sewell’s immediate successors, law degrees were a rarity: of the eight lecturers appointed before 1880, only two held law degrees, while another three had graduated in arts before admission to practise in England or Ireland. It was not until significant numbers of Australian graduates entered the market for lectureships in the 1880s that law degrees became a normal counterpart to professional qualifications among the law school’s teaching staff. After 1882 no lecturer was appointed without a law degree, such was the effect of compulsory university study and (after 1891, when the LLB was no longer compulsory for barristers) the widespread belief that advocates should be graduates rather than products of the articled clerks’ course.

Down to 1946, a total of 40 people were appointed to part-time lectureships in the law school. All were men. Two women unsuccessfully sought part-time tutorships in the 1920s, and the first to apply for a lectureship was Airlie Smith
DIPLOMA PRIVILEGE (later Airlie Blake), in 1945. It was one of several firsts in her career: among other things, she was the first woman to win the Supreme Court prize for the top law student and the first to become president of the Law Students’ Society. But in 1945 returned servicemen received statutory preference in new appointments, and the senior lectureship went to Arthur Turner, recently released from the navy.¹ The first woman to hold a part-time lectureship in the law school was Rosemary Norris, in 1957, and the first to hold a full-time teaching position was Mary Hiscock, in 1963. The law course itself, admission to the profession and the law school’s largely unstated criteria for eligibility as a staff member limited to a handful the number of women likely to be considered for appointment. As late as 1966, only two women were in practice as barristers in Victoria, although by that time a solicitor (such as Norris) or an academic lawyer (such as Hiscock) might be chosen.²

All but three of the part-time lecturers were barristers; the three solicitors among them were appointed in 1945 to teach newly created professional admission subjects outside the degree course. The assumption that advocates were the more learned branch of the profession (and perhaps that they were best suited to public speaking) had until then produced a rigid exclusion of solicitors. The university sought a barrister when it advertised for its first law lecturer, and the bar remained for decades the sole source of its permanent part-time teaching staff, even if solicitors such as Edmund Piesse were occasionally entrusted with tutoring and incidental lecturing.³

The lecturerships were easily filled. One measure of their attractiveness is the number of applications for each vacancy, which was commonly twenty or thirty when the bar fell on hard times in the 1930s. Another is the high professional standing of the lecturers, 24 of whom later became judges. They included two chief justices of the High Court (Frank Gavan Duffy and John

¹ LFM, 16 July 1920, 464, and 7 February 1927, 94; Applicants for Senior Lectureship, HCP, box 3, file UM 420/43; Re-establishment and Employment Act 1945 (Cth), s. 27.
³ Argus, 20 January 1857, 1.
Latham), one chief justice of the Supreme Court of Victoria (Edmund Herring) and two other High Court judges (Wilfred Fullagar and Douglas Menzies). A lectureship was both an endorsement of a barrister’s expertise and a source of outside income that was compatible with the restrictive etiquette of the bar. A useful adjunct to specialisation in practice, it gave those with scholarly leanings a foothold in the university.

Until the creation of the Faculty of Law in 1873, the appointment of the teaching staff was entirely in the hands of the university council. Its choice gave rise to public controversy in 1862, when it sought to appoint, for the first time, one of the law school’s former students as a lecturer. George Webb studied law while working as the government shorthand writer, winning the exhibition offered by the chancellor to the best student in the first-year law exams. Admitted in 1860, he became one of the first barristers to have been trained through the university course. Ostensibly because of Webb’s lack of experience in practice, Chief Justice Stawell and other council members moved to rescind his appointment to the vacant readership, upon which he resigned, saying that he would not have ‘the moral support or the sympathy of the Council as a whole’. Webb certainly lacked legal experience, but criticism of his appointment also had a political aspect. The *Argus* alleged it was a piece of patronage and part of a complicated scheme said to include Chapman’s appointment as a temporary judge, which it had earlier attacked.

The *Argus* assumed that the university was a branch of the civil service, where selection on personal and political grounds was commonplace. While the council’s selections for academic appointments could certainly be contentious (and hard-fought within the council itself), the politics operating there were separate from the patronage endemic in government departments. Whatever motivated Webb’s selection, it was unlikely to be manoeuvring inside the government. His appointment had been proposed by Alexander Morison and

---

4 Webb to Council, 21 February 1862, RMC, Law School, loose item 1.
Godfrey Howitt, neither of them politicians. Another element of the conspiracy theory was also wrong: Webb was not going to keep his government job, as the newspaper had alleged. His resignation had been a condition of his university appointment. He failed in another application for the readership in 1864 but later became a QC and Victoria’s first locally trained Supreme Court judge.⁶

Inexperience was one potential objection to the council’s selections; personal morality was another. The most famous instance at Melbourne was the case of George Marshall-Hall, whose tenure as professor of music was not renewed in 1900 following protracted controversy over the supposed immorality of his poetry and personal life. In the law school, John Atkins, Barry’s choice to replace Webb in 1862, was forced to resign the following year when another man’s wife sued him for maintenance of her child, claiming he was the father. Publicly acknowledged adultery (Atkins admitted the relationship, while denying paternity) was unacceptable to the council in 1863, although what happened in private was another matter. The university tolerated Barry’s long relationship with Louisa Barrow, whose husband was still alive when he became chancellor.⁷ Time rehabilitated Atkins, and he rejoined the staff in 1874.

Sewell and then Chapman had taught alone, but a second-year class had to be formed for 1858, as the students progressed through the course. Barry duly prompted the university council to appoint a second reader.⁸ It chose Richard Billing, who became the first law teacher to remain on the staff for more than a few years. He stayed until 1882, when he became a County Court judge. Bar tradition remembered him as ‘an able all-round lawyer’, ‘able without being brilliant’, with a taste for the good life and for literature and music; he was a member of the Melbourne Club and built the mansion later known as Labassa,

---

⁶ Serle, The Golden Age, 312; ‘The Law Lectureship at the University,’ Argus, 27 February 1862.


⁸ CM, 28 December 1857.
extravagantly enriched by later owners and now held by the National Trust. He was generous to his students, presenting a gold medal to the best of them each year until the reorganisation of the course in 1873. They reciprocated his goodwill. Objects from the law school’s nineteenth-century history are rare, and none of Billing’s medals can now be traced. An exception is Australia’s earliest surviving example of a silver-mounted emu eggshell cup, a popular showpiece for silversmiths in the second half of the nineteenth century, which was given to Billing by his students in 1859.

For some of the lecturers, their university appointments were only part of a web of community involvement that linked the law school informally to Victoria’s cultural institutions, churches and central government. Frank Dobson, who taught from 1864 until his death thirty-one years later, was the son of a lawyer and the brother of a judge. He travelled from his birthplace in Van Diemen’s Land to England and studied at Cambridge, eventually earning a doctorate in law. After admission to the bar in London, he returned to Australia and practised as a barrister in Melbourne, becoming a Queen’s Counsel. He was a member of parliament, royal commissioner, trustee of the Public Library and National Gallery, and active member of the Church of England.

Professional standing and part-time status gave the law lecturers a degree of autonomy that set them apart from many of their counterparts in other disciplines. The dean explained to the royal commission on the university in 1902:

> The lecturers in the Law School are what we call independent lecturers. They are not responsible to me. The Lecturer in Classics is responsible to the Professor in Classics; the Lecturer in Mathematics is responsible to the Professor in Mathematics; the several demonstrators are responsible to the men in whose departments they are, but in the faculty

---


10 Presentation cup with lid, silver, Powerhouse Museum, Sydney, 85/450.

of law the individual lecturer is the ruler of his work in the same way as
the Professor is the ruler of those subjects he takes charge of.\textsuperscript{12}

Independent lecturers were also appointed in other faculties.\textsuperscript{13} In the law school, the title lasted into the 1990s, still designating practitioners and even the occasional judge who combined teaching with their main work in the profession, much as their predecessors had done in the nineteenth century.

Some of the independent lecturers brought to the law course impressive legal skills and the authority of their rising prominence in the profession—until, as generally happened, they became too busy to keep teaching. Three future judges (Edmund Herring, Charles Gavan Duffy and Wilfred Fullagar) were among the independent lecturers when Kenneth Bailey joined the staff in 1927, and several others followed. As dean, Bailey valued the experience and practical cachet of the independent lecturers:

> When you could get people of that calibre, you brought the young student into touch with not only first-rate persons and first-rate minds, but people with completely active association with some of the biggest work that was going on in the profession.\textsuperscript{14}

There were drawbacks in using practitioners, as Bailey knew:

> of course these men were simply not available for students outside their ordinary class hours, except under special circumstances and at great sacrifice to themselves. It also meant that they were not able really to do anything effective in the publication line from the point of view of the research work of the Law Faculty and Law School.\textsuperscript{15}

Cancelled classes were an inevitable risk of teaching by busy lawyers. P. D. Phillips would occasionally try to tell students of a cancellation by putting an

\textsuperscript{12} Royal Commission on the University of Melbourne, \textit{Minutes of Evidence}, 8.

\textsuperscript{13} Selleck, \textit{The Shop}, 596.

\textsuperscript{14} Interview with Sir Kenneth Bailey, 1971–72, NLA, 1:1/7–8.

\textsuperscript{15} ibid., 1:1/8.
advertisement in the public notices section of the *Argus*, but few would see the warning.16

**William Hearn**

The person who came to personify the early law school for later generations was not one of the law lecturers, but the professor of history and political economy, William Hearn. Although he had been involved with the university’s law teaching from the start, it was only gradually that he settled on law as his disciplinary base in the university. He also figures in the genealogies of the study of history, economics, sociology and political science at Melbourne.17

Hearn’s background in the humanities and social sciences, and his continued teaching in history and political economy, underpinned the disciplinary breadth of the law curriculum. Students undertaking the full LLB course in the 1870s and 1880s could encounter him in as many as seven subjects: History of the British Empire, Jurisprudence, Ancient History, Roman Law, International Law, Constitutional Law, and Political Economy (not to mention Greek and Latin, where he occasionally stood in for the absent professor of classics). Even the articled clerks, enrolled in the smaller quota of university subjects required by the admission rules, spent much of their time in his classes. Jurisprudence, History of the British Empire, Roman Law and Constitutional Law were among their required subjects at different times in this period.18 Hearn continued the liberal acculturation of the clerks that was first established when, in 1863, the judges required intending solicitors to pass not only some of the university’s law exams, but history exams as well.

Hearn was Irish, and retained ‘just a hint of a brogue’, but he was not part of Catholic Ireland; his ancestors were English, and his father was an Anglican

---

16 Peter Wickens, personal communication, July 2005.
clergyman. He was educated at Trinity College, Dublin, where he studied classics, philosophy and law with great success before becoming professor of Greek at the newly established Queen’s College, Galway. While teaching there, he was admitted to practise as a barrister in Dublin.

A professorship at the newly established University of Melbourne must have been an attractive prospect for Hearn, still in his late twenties and supporting a wife and children on an income of about £150 a year in a country he regarded as ‘the weakness, the sting, and the disgrace of Britain’. In its early prosperity, the university offered £1000 a year and free accommodation to its foundation professors. Hearn became an omnibus professor of modern history and literature, political economy and logic. Although the formal scope of his responsibilities was soon reduced to history and political economy, in practice his teaching ranged broadly through the humanities and social sciences. He became an active and sometimes abrasive member of the university’s council, president of its academic board, warden of its senate, and, briefly, chancellor, as well as being a member of the council of its first residential college, Trinity.

Hearn served as an examiner for the law course in 1857 and later delivered some of Chapman’s lectures for him. Once the degree course began, he regularly lectured to the LLB students in their compulsory subjects of Ancient History and Constitutional History. Legally qualified, already involved in the law course and a powerful figure in the university, he was at the centre of events when plans to expand and restructure the university’s law teaching emerged in the early 1870s.

19 J. Steele Robertson, ‘The University of Melbourne,’ Centennial Magazine 1, no. 3 (1888): 145.


The Faculty of Law

Until 1873, law teaching at the university was governed directly by the council and the professorial board; there was no board or committee with special responsibility for law, and no head or administrator to manage the law course, beyond the lecturers and the officials of the university. It was the council that decided on the details of the curriculum and dealt with the students’ complaints about such things as Sewell’s absences and the location of lectures. Other disciplines were in the same position. Not only in law, but elsewhere in the university, there were no faculties to take charge of particular fields of study.

The university was so small—still only 134 students in 1872, of whom 53 were studying law—that such an arrangement had been viable, even natural, but some, Hearn among them, thought the situation was ripe for change by the early 1870s. A council committee investigated the possibility of expanding the law teaching by establishing more subjects and lectureships, and at the same time creating a new body, the faculty, to oversee them.

The council committee referred to this change as the establishment of a school of law, and ‘law school’ and ‘law faculty’ have been sometimes interchangeable terms ever since. The university called its law classes the ‘School of Law’ within a few months of their commencement in 1857, and it has referred to teachers and students in particular disciplines as schools throughout its history. Occasionally it used the expression in other ways. Its early calendars also referred to schools in the Oxford sense of disciplines in honours exams, rather than academic departments. Despite the ambiguous terminology, what the council had in mind in 1872–73 was the creation of the faculty and the attendant reorganisation of the teaching. Hearn called it ‘the scheme for the reorganization of the Law School’.

While the committee was deliberating, Barry broadened the debate by proposing the creation of faculties of arts and medicine as well as law.

---

22 CM, 25 May 1857; Selleck, The Shop, 124.
23 Hearn to Barry, 14 March 1873, RMC, Law, 200a.
hoped for better management of the university’s growing number of part-time lecturers and aimed to regularise the administration of the various schools, but a power shift was involved as well. The establishment of faculties would hand greater responsibility to the academic staff that constituted them, albeit still under the supervision of the council. Watching with interest and some concern were the professors (there were none on the committee or the council), whose influence, with the exception of Hearn, had been undermined by the profession’s weight in the university’s law teaching.24

The convenor of the council committee was George Mackay, barrister, member of parliament and doctor of laws of the universities of Dublin and Melbourne. Its members showed little interest in their task, and they came so infrequently to meetings that Mackay had to write the report by himself, submitting it in draft to the council as his personal opinion and the best the committee could do. He took ‘the modern Law Schools’ of London and Dublin as his models and urged the use of outside examiners (other than the lecturers) in the marking of exams.25 The report itself has not survived, and its contents can only be guessed from Mackay’s covering letter and the resulting statute, which adopted most of its recommendations.

Hearn put the response of the law teachers to Barry. Predictably they liked the plan to establish a faculty: it would give a body dominated by the dean and the lecturers (who were to be increased to four) powers that until now had been in the hands of the council. They hoped to consolidate this control further by limiting faculty membership to the teaching staff. Hearn’s status as dean-in-waiting was clear in their recommendation that the subjects to be taught by the dean, who was to become the law school’s first full-time teacher, should be those he already taught.26

Barry, too, saw Hearn as the obvious candidate for the deanship. He suggested to Hearn that he should add the work of the dean to his existing

25 Mackay to Council, 26 May 1873, RMC, Law School, 403.
26 Hearn to Barry, 14 March 1873, RMC, Law, 200a.
responsibilities as professor of history and political economy, but Hearn refused. He explained some, but not all, of his reasons to the chancellor. History and political economy were ‘something quite different’ from the subjects prescribed for the dean, and no future dean was likely to be able to teach them all, as Hearn could. Only his unusually wide interests had combined knowledge of these disparate fields. Barry was effectively asking him to add the work of a second chair (in the shape of the law teaching) to his existing chair, along with the administrative work of the dean, without increasing his salary. Whatever the compensation, Hearn’s health would not permit it, and even if he had been well enough, he declined to do it.\textsuperscript{27}

It would be different, Hearn wrote, if the deanship could be separated from his existing chair. Then he would be willing to take the new post, an arrangement that would have the advantage of leaving the university in search only of a teacher of history and political economy. Such a person was easier to find, Hearn thought, than a teacher of jurisprudence, Roman law and international law, who would be needed as dean if Hearn refused the appointment.

This was all true, but it was also disingenuous. The scheme had implications, as yet unknown to Barry, for Hearn’s parliamentary ambitions. His career ranged well beyond the confines of the university. He was a journalist, an influential member of the Anglican Church in Melbourne, and chairman of the Australian Freehold Banking Corporation, a bubble company of the land boom, which later collapsed in the depression of the 1890s.\textsuperscript{28} Most of all, parliament drew him like a magnet.

When Hearn ran unsuccessfully for the colony’s lower house, the Legislative Assembly, in 1859, his candidacy set off a reaction at the university. Barry believed that professors should distance themselves from politics. The council adopted a new statute barring professors from membership of

\textsuperscript{27} ibid.

parliament and even of political associations. The professors protested and petitioned the governor to veto the new statute (as he had power to do, under the act of parliament that established the university), but to no avail. The ban on membership of parliament (minus the clause concerning political associations) remained in force until 1968, precluding later professors from emulating Hearn’s career. Melbourne had no later equivalent to Sir John Peden, member and then president of the nominated Legislative Council of New South Wales and architect of its defence against abolition in 1930, all while serving as Challis professor and dean of law at the University of Sydney.

Hearn’s parliamentary hopes were merely deferred, not abandoned. The office of dean gave him a chance to evade the ban on professor–politicians. The statute for the faculty had yet to be drafted, and its details were uncertain, but Hearn proposed to become a dean instead of a professor. If he was no longer a professor, he would no longer be disqualified from membership of parliament. As adopted a few months later, the new statute had this effect. A professor could give up a chair to become dean with no loss of tenure or pay, and without losing a seat on the professorial board (the dean was automatically a member). The council duly appointed Hearn as dean, and he resigned from his chair.

Freed from the restrictions of the university statute, Hearn ran again for parliament in 1874 but was again unsuccessful. It was apparently only now that Barry realised Hearn’s new appointment opened the way for his candidature, but when he protested to Hearn, the dean replied that the ban on professors in parliament no longer applied to him. Other professors asked for the privilege to be extended to them, but to no avail. One of the lecturers in the medical school, James Robertson, told his friend John Castieau, governor of the Melbourne gaol, about the ‘dodge’ that had allowed Hearn to stand, as Castieau

29 Selleck, The Shop, 84.
31 CM, 28 July 1873, 78, and 25 August 1873, 80.
32 Selleck, The Shop, 128; Registrar to professors, 2 December 1876, RC, 1876/35.
recorded in his diary: ‘Professor Hearn’s friends were seized [sic] with a brilliant idea & made him a Dean with all the privileges & responsibilities of a Professor; the change of name had this advantage that Deans were not prohibited from interfering in politics & so Mr Hearn’s candidature’. Hearn remained a professor in substance though not in name. As a later chancellor, Anthony Brownless, put it when Hearn died, ‘though he was not called a Professor, he virtually occupied the position of one, as he had the same salary and the same tenure, though he was not subject to the same restrictions’.

After losing another lower-house election in 1877, Hearn won a seat the following year in the upper house, the Legislative Council. Its members were chosen by a small electorate who qualified to vote mainly on grounds of wealth. There Hearn created for himself a role as unofficial leader of the house, not in the sense of a party leader, but as an expert who would inform and guide the independent-minded members in their response to legislation. He used his knowledge of British precedents in a battle with the lower house over the council’s composition and powers in 1878, and drafted a long and tendentious memorandum setting out the upper house’s side of the case when the government appealed for British intervention. Its argument that the constitutional clashes of the last fifteen years were entirely the assembly’s fault displayed its author’s Tory convictions, now deployed in the parliamentary forum he had long hoped to enter.

Under the new statute, the Faculty of Law consisted of the dean, the lecturers (as yet all part-time) and any lawyers who were members of the university council (whether judges, barristers or solicitors). Membership of the faculty was never limited to the teaching staff, although they generally

---

34 CM, 15 October 1888, 188.
dominated its meetings; its work was linked to the profession through the membership of important outsiders. Formalising this involvement was an advantage of the faculty structure, and not only in law. The university’s first three faculties were all created for professional disciplines, in law, medicine and engineering, where they served the purpose of drawing members of the professions (initially those who were members of the university council) into the operation of their respective schools. In the absence of such a rationale (and perhaps to keep the full-time staff more closely under the eye of the council), the university did not create faculties of arts and science until 1903, nearly fifty years after teaching began in both disciplines.

The statutory function of the Faculty of Law was to advise the council on ‘all questions relating to the Studies, Lectures, and Examinations for Degrees in Laws’, and on the selection of lecturers and external examiners.36 It had a presiding member in the shape of the dean, but the functions of that office went far beyond the mere chairing of its meetings. Under the statute, the dean would ‘subject to the control of the Faculty exercise a general superintendence over the administrative business connected with the Faculty’. In contrast to the law faculty at Oxford, deanless until very recent times, or Cambridge, which still has no dean, the Melbourne faculty was created with a strong executive officer, closely connected both to the teaching staff, as one of their colleagues, and to the central bodies of the university, through membership of the professorial board. In a non-collegiate university such as Melbourne, the deanship brought power within the faculty, and sometimes significant influence beyond it.

The members of the faculty had little direct control over the selection of the dean. Under the university statute that created the faculty, the appointment would be automatic once a chair of law was established. The professor of law would become dean by force of the statute. Until then, the office of dean was a university appointment like any other, and therefore to be filled by the council. It was the council, not the faculty, that appointed Hearn as the first dean.

36 University of Melbourne, Calendar, 1874–75, 53.
The statute was re-written after the creation of the university’s third faculty, Engineering, in 1889. Using the statute for the Faculty of Medicine (created in 1876) as a model, the new, consolidated statute said that the dean of each faculty would be a professor elected by its members. The Faculty of Medicine had had a second professor since 1882, but in Law the single professor was the only eligible candidate. Nevertheless, the faculty duly elected him when the new statute came into force in 1893. Even after the law school gained a second professor in 1931, seniority and availability made the choice of dean automatic until the 1960s, though the faculty continued to vote each year (as university statutes required) to fill the position.37

What this structure meant in practice varied with changing personnel and the dynamics of university politics. From the start, the curriculum was at the core of the faculty’s work, although its control was far from absolute. Its proposals were second-guessed, and often amended in detail, by the council and the senate. Another constant in the faculty’s agendas until the 1960s was the appointment of academic staff below the level of professor, although here, too, the faculty made recommendations and the council made the decisions. Meetings were usually brief and formal. Convened when needed, they averaged less than two per year in the faculty’s first twenty years; in 1875, it took five attempts, and most of the year, before the dean could even muster a quorum. Meetings came to life in the 1880s and 1890s, when members disagreed over course changes, and again in the middle years of the twentieth century, when the faculty served as a deliberative joint committee of staff and members of the profession. Much of the time, however, it merely endorsed decisions that had already been made elsewhere, usually by the teaching staff under the leadership of the dean.

Although the lawyers on the university council were automatically members of the law faculty, their attendance tended to be patchy. In 1903 the composition of other faculties was expanded in a move that coincided with the creation of the faculties of arts and science. Perhaps the university was showing

37 University of Melbourne, Calendar, 1893, 103; LFM, 29 June 1893, 160.
a calculated appreciation of the value of co-opted outsiders as it weathered the storm that followed the embezzlement of much of its funds by its accountant, Frederick Dickson (exposed in 1901). The council could now appoint outside experts to the faculties of arts, science, agriculture and engineering.38

In 1920 a revised statute extended to the law faculty the council’s power to appoint outside members. The independent lecturers, the legal members of the council, and the dean’s excellent connections had until now probably provided sufficient links with the profession and the wider community, or at least with the influential people who mattered most to the law school. In 1920 seven of the eleven members of the faculty were legal members of the council, including two judges (Henry Higgins and Leo Cussen), the chairman of the Herald newspaper group (Theodore Fink, who had headed two royal commissions on education, including the inquiry into the university after the Dickson frauds), the chairman of the National Bank (Sir John Grice, who was also the university’s vice-chancellor), a member of parliament (Agar Wynne), and the speaker of the Legislative Assembly, John Mackey, who was also the lecturer in Equity. The list shows the weight of outsiders in the faculty and the significant number of lawyers on the council—and, incidentally, some of the varied destinations of the law school’s students, since all had studied law at Melbourne. After John Latham resigned from the teaching staff in 1920, he became the first faculty member appointed under the new statute. The appointment was typical of the way the power was used until World War II, not to build new links outside the university but to maintain old ones.39

Edward Jenks

Hearn’s death in 1888 opened the way for a reappraisal of the curious arrangement that had made him dean but no longer a professor. The university council decided to fill his place by appointing a dean who would be professor of

38 University of Melbourne, Calendar, 1904, 118.
39 University of Melbourne, Calendar, 1921, 68; LFM, 22 November 1920, 469.
law in name and not merely in substance. It looked for someone who could
teach the same subjects: jurisprudence, Roman law, constitutional law and
international law.40 Hearn’s influence lingered after his death in this division of
teaching, which also suited the university. Part-time lecturers were more easily
found for other, more doctrinal subjects.

The post was not only the university’s, but Australia’s, first chair of law,
though other universities soon followed. At Sydney, the Challis bequest funded
the appointment of Pitt Cobbett as the university’s first professor of law in
1890, while Adelaide’s full-time law lecturer, Frederick Pennefather, was
promoted to professor in the same year. William Jethro Brown became the first
lecturer in law at the University of Tasmania three years later and was promoted
to professor in 1896.41

There was no established career path to such a small group of positions, and
the backgrounds of the people who held them varied widely. Pennefather had a
BA and an LLM from Cambridge; he was briefly a barrister in England, then a
governor’s private secretary in South Australia and New Zealand, and a lawyer
in Wellington. His predecessor as full-time lecturer at Adelaide, Walter Phillips,
was another barrister and Cambridge graduate, appointed at the age of twenty-
eight.42 Cobbett had a doctorate in civil law from Oxford, had been called to the
bar in London, and worked as a private tutor and author before he came to
Sydney.

At Melbourne the council specified that the new professor should be not
much under thirty and not much over forty. The job was one for an intelligent,
presentable young man with English qualifications and plenty of promise; it
was not until 1947 that the university appointed a law professor who was over
thirty years old or who had completed a doctorate, and not until 1951 that it

40 CM, 15 October 1888, 190.
41 F. C. Hutley, ‘Cobbett, William Pitt (1853–1919)’ ADB,
8; Michael Roe, ‘Brown, William Jethro (1868–1930),’ ADB,
appointed one who did not have an English university degree. No member of the law school staff had an American degree until the 1950s, when a new impetus towards internationalisation began to take a growing number of graduates and teachers to North American universities for research and postgraduate study.

The university advertised the new post in Australia and Britain. A few years before, the council had experimented by advertising overseas only when chairs were not filled by local applicants, but in 1885 it had given up this Australia-first policy and revived its London chair committees. In the case of the chair of law, the Council of Legal Education, which oversaw the training of barristers in London, provided a committee to select a shortlist, and Victoria’s agent-general interviewed the top three candidates. Pitt Cobbett applied from London; John Salmond (later professor at Adelaide, and solicitor-general and judge in New Zealand, but best known for his writing, including *The Law of Torts*) applied from New Zealand.

The committee’s choice was Edward Jenks. His record, at the age of twenty-eight, seemed ideal: first-class honours in law and history at Cambridge, with the chancellor’s medal for law, followed by the prize for the best student in the admission exam of the Inns of Court in 1887, a teaching post at Jesus College, Cambridge, and then a fellowship at King’s College. The son of a London furniture dealer, he had left school and was working as an articled clerk when a legacy from his mother’s estate enabled him to go to Cambridge. Even so, his was no knock-out application. The London committee had difficulty choosing between him and barrister Albert Carter, whom Jenks edged out thanks to his greater teaching experience. When the university council came to make the appointment, Martin Irving, the vice-chancellor (an unpaid deputy to the chancellor, not yet a chief executive along modern lines), pleaded Carter’s

---

43 Wolfgang Friedmann had just turned forty when he was appointed in 1947, and David Derham, appointed in 1951, had degrees from Melbourne. Hearn had Irish, not English, degrees, but he was never a professor of law.

case, despite the London recommendation, but Jenks was appointed by a majority. He took up his new post in 1889.45

Jenks’s time as dean was punctuated and finally terminated by a series of fierce disagreements that owed something to his personality and something to the framework for the governance of the university. He came to Melbourne in the middle of a campaign by the professors against a proposal by the registrar, Edward à Beckett, for the appointment of a principal who would have general authority to manage the university, including its teaching. The plan mutated into one for a salaried vice-chancellor before the professors, joined by a determined Jenks, fought it off as a threat to their own position.46 The professors remained free of the authority of a full-time executive head until Raymond Priestley became vice-chancellor in 1935. In the meantime the axes of power ran through the council (dominated by outside members and headed by the chancellor), the professorial board, and the senate, composed of graduates (many of the teaching staff among them) who held masters’ degrees or doctorates from the university.

Jenks had a keen eye for the way the university was run, who controlled it and, in that sense, what sort of university it was. His ideal was self-government by the teachers. In the same way as he had opposed control by a salaried vice-chancellor, he attacked the interference of poorly qualified council members in academic affairs that they were not competent to administer. He reminded them of the purposes of the university and added that it was known overseas not by their insignificant reputations but by those of its more famous teachers. He published these reflections during the fight over the vice-chancellorship: ‘powerful and important advice but wounding made’, in Richard Selleck’s words.47

Jenks was on the winning side against the proposal to appoint a salaried vice-chancellor, but he had less support when he tried to change the law


46 Selleck, The Shop, 334–42.

47 ibid., 340.
curriculum. Chapter 3 has recounted his unsuccessful campaign to remove public international law from the course. As in his repeated disagreements with à Beckett, personal antagonism gave an acerbic intensity to his contest with Thomas McInerney over the course change. Jenks took such offence at McInerney’s comments to the senate that he refused to speak to him. It took a special meeting of the council and a thinly veiled threat of dismissal to get him to meet McInerney, the external examiner, to discuss the Roman Law exam in 1890.48

When decisions by the senate left Jenks, against his wishes, teaching both International Law and Constitutional and Legal History, he began an escalating campaign of protest. An additional lecturer would now be needed, he said; in a sign both of the level to which relations had sunk and of questionable legal judgement, he began to call on the terms of his contract of employment, saying it would be breached if he had to teach legal history. His unhappiness in Victoria and in a state university run along Melbourne lines, evident in his private letters, probably made him fight even more stubbornly, heedless of the weakness of his position. The law faculty had unanimously agreed to the inclusion of constitutional law in the arts course when the BA was reviewed, and the combined subject of Constitutional and Legal History, which he now refused to teach, had been proposed by Jenks in the first place. When this was pointed out, he replied that he had only offered to teach it if public international law was dropped.49

He took his case to the governor, who had to approve the amendments now being made to the course details in the regulations and, as visitor to the university, was the tribunal of last resort in appeals against its decisions. But all Jenks had to fall back on was his argument about contract, which barrister Henry Higgins comprehensively disposed of in a formal response drafted for

48 CM, 20 November 1890, 177; RC, 1891/28, parts 1 and 2; Council Papers, Appointment of Professors, vol. 3: Jenks, Moore, 311–71, UMA.
49 LFM, 22 August 1889, 101; LFM, 22 October 1889, 105; Jenks to Warden of the Senate, 5 May 1890, RC, 1890/25; Jenks to Council, 24 May 1890, RC, 1890/25; CM, 17 December 1890, 188.
the council. No professor could claim a contract that prevented the university changing its statutes, Higgins wrote, and no such contract existed here. If Jenks thought otherwise, he could sue. Armed with this, and with advice from the attorney-general, the governor approved the new statutes, but Jenks refused to cooperate. Students who came to classes in Constitutional and Legal History found that the professor would lecture only on constitutional law. When the chancellor, alerted by the students, asked what was going on, Jenks told him that he was sticking to his contract.\footnote{CM, 17 December 1890, 189; Jenks to Chancellor, 30 March 1891, RC, 1891/28, part 1.}

Jenks’ intransigence on self-perceived points of principle, and the breakdown of his relations with many in the university, made his job increasingly difficult. Grief also blighted his last year in Melbourne and must have contributed to his decision to leave. His wife died in May 1891; they had been married for nearly a year, and she had just given birth to their son. Although he liked some of the other professors, and privately tried to make the best of the knowledge and ‘all-round capacity’ he gained in his work, he disliked Victoria from the start and was slow to value advantages it offered him, such as a prominence and seniority that he would have had to wait years for in England.\footnote{Jenks to Oscar Browning, 5 February 1890, Browning papers, Cambridge University Library.} His sense of being out of place in the university and the city contrasted oddly with his energy for outreach in university extension lectures, and with his enthusiasm for work on Victoria’s history and constitution. After another skirmish with the council over Constitutional and Legal History (Jenks said he would act as examiner only for additional pay), he resigned in November 1891.\footnote{Selleck, The Shop, 306, 339–40; Jenks to Registrar, 25 September 1891, and CM, 5 October 1891, both in RC, 1891/28, part 1.} After his return to Britain, he was best known as the reforming director of legal studies for the Law Society in London and one of the founders of the Society of Public Teachers of Law, advocating systematic and broad-based legal education in both roles.
In the law school Jenks was largely on his own, with no colleagues on the full-time staff other than professors in other disciplines. His main opponents were not fellow academics but people he probably saw as interlopers, council-members with doubtful standing to pronounce on questions of academic policy and graduates in the senate whose veto over a curriculum designed by the teachers must have rankled. On his arrival he joined forces with the defenders of professorial prerogatives (limited enough at Melbourne, under its powerful council) against executive interference, and each of his later fights began in his resistance to frustration of his plans by the appointed authorities of the university.

Back in England, Jenks warned applicants for his now-vacant chair about the ill-qualified and interfering council, but the university undercut his criticisms, many of which were cogent, by making available a dossier of his correspondence. The sense of duty and the efforts to make the best of things that appeared in his private letters were nowhere to be seen. Instead, his correspondence with à Beckett, McInerney and the council portrayed him as peevish and obsessed with disagreements that, from the other side of the world, must have looked ridiculous. Whatever principles might have been involved in his troubles as dean were lost in the noise of his personal quarrels. The field of applicants for the chair suggested that few if any were deterred by his warnings: John Salmond applied for a second time, now joined by Jethro Brown and barrister Charles Maturin.

Harrison Moore

The selection of the London committee and the council to succeed Jenks was William Harrison Moore. He began work at the university early in 1893. At the age of just twenty-five, Moore appealed to the committee because of his outstanding examination record, his personality and the expectation of successes to come, coupled with a little teaching experience as a tutor at

Cambridge and a private coach in London. Like Jenks, he had gone into the workforce when he left school: in Moore’s case, as a newspaper reporter, following in his father’s footsteps (he continued to use shorthand in later life). He read for the bar and completed the LLB course at the University of London. The prizes he won helped pay his way, and a scholarship took him to Cambridge, where he capped his career as a student with the unusual distinction of first place in both the first and second parts of the law examination, or tripos. Frederic Maitland, rapidly emerging as a pre-eminent legal historian, was one of Moore’s referees. ‘Of all the men who have taken a law degree at Cambridge during the last five years, I think that he is the one most likely to make a good teacher of Law’, Maitland wrote.54

Moore’s tenure of thirty-four years as dean set a record that remains unbroken. He was an able administrator, but the keynote of his deanship was influence rather than reform. After the abolition of the graduate LLB and the expansion of constitutional law teaching in Moore’s first decade, the law school’s syllabus and staffing remained much as they were for twenty years and more. The university’s lack of money in the aftermath of the Dickson frauds, and the disruptions caused by World War I, dampened reform plans, but this stasis was also the result of Moore’s own interests; both Medicine and Engineering secured significant additional funding in 1905–10.55 His genuine concern with the techniques and problems of legal education was conscientious rather than a central focus of his work. They did not engage his curiosity and imagination as they did those of Jenks (‘father of the Society of Public Teachers of Law’, after his return to Britain) or Moore’s successor Kenneth Bailey, who was preoccupied with the curriculum for years, partly because of the campaign waged by the Law Institute against his ideas.56 Nor did Moore write about legal education with the originality or vigour of his contemporary Jethro Brown, who

54 Application from Moore, Council Papers, UMA, Appointment of Professors, vol. 3: Jenks, Moore.
taught successively at Hobart, Sydney, London and Aberystwyth, and was professor at Adelaide for ten years while Moore was at Melbourne.

Moore developed other outlets for his considerable energies. I discuss his research in chapter 7, but one of its offshoots was his work as a barrister and government adviser. Hearn had been a political player through his parliamentary career and his codification campaign, while Jenks had been a close observer rather than a participant, relishing his privileged access to the participants in the 1890 federal conference and becoming an ‘affectionate and admiring friend’ of chief justice George Higinbotham. In Moore’s time the dean became a constitutional adviser to state and federal governments, establishing a pattern that continued under Bailey. The local field of constitutional experts was very small, and Moore had a prominent place thanks to his published writings, but, even so, the authority he acquired was remarkable.

As a barrister he held retainers at different times from the state and federal governments, and appeared in several leading cases from 1905 onwards, among them *Huddart Parker v. Moorehead*, an early test of the Commonwealth parliament’s power over corporations. He shared chambers in the city until the early 1920s and held faculty meetings there. It was as an adviser, though, that he made a distinctive role for himself, coming into his own as World War I generated questions that ideally suited his interests in constitutional and international law. For the first six months of the war, he was heavily engaged in providing advice to the Commonwealth government on points of international law raised by the conflict. He took part in the discussions that led to the abandonment of a referendum on amendment of the constitution in 1915, and worked on the *Imperial Acts Application Act 1922*, the Victorian act that rationalised, for the first time, the miscellany of English statute-law received as

---


Most remarkably, he became a personal adviser to the governor and the governor-general on the exercise of some of their powers. One of the first academics to become an adviser to the monarch’s representatives in Australia, he entered a select group made up until then of judges and politicians. When the defeat of a second referendum on conscription caused a crisis in 1917 (the prime minister had promised to resign if the referendum was defeated, but he had no obvious successor and wanted to remain in office), Moore was one of the few consulted by the governor-general. This was only one of the most sensitive of the several occasions on which he provided advice, becoming the governor’s expert of choice in difficult constitutional questions where research and special knowledge were needed.\footnote{Fitzhardinge, \textit{The Little Digger}, 304; Winterton, introduction to \textit{The Constitution of the Commonwealth of Australia}, xxv; Opinion on Reservation of Bills, 28 March 1921, PROV, VPRS 7571/P1/15.}

Moore’s independence and knowledge of the constitution obviously appealed to those in power, along with his capacity to investigate the more hidden recesses of law and constitutional practice. Both Labor and conservative governments sought him out, but his social position placed him ideally for confidential work for the Anglophile elite: a member of the exclusive Melbourne Club, he had married into the à Beckett family, whose web of connections through Melbourne society was fictionalised in Martin Boyd’s novels. Calm, discreet and judicious, he must have found rewards of his own in the trust placed in him and the questions he became involved in, but what he felt about his work has left little trace.

Kenneth Bailey inherited some of these tasks: ‘they’d got used in Victoria to the services of the Professor of Law at the University for matters that involved unusual researches and the like’, he later said. Bailey’s services for the
state included writing a long memorandum on the charter of legislative independence for the British dominions, the Statute of Westminster 1931, advising the government on disputes between the two houses of the Victorian parliament, and representing Victoria in the High Court in one of the transport regulation cases of the 1930s.\textsuperscript{60}

Moore never shirked his obligations to the law school and the university, but the more mundane work of teaching became irksome to him, and its burden was one of the reasons for his early retirement in 1927 (at sixty instead of the more usual sixty-five). He was unhappy, too, with the way the university was being run, controlled by a rigid oligarchy under the chancellor, Sir John MacFarland, from which Moore was excluded.\textsuperscript{61} It was outwards from the university, towards his involvement in constitutional affairs and, increasingly, international relations, that his energy and imagination turned, and they became the focus of his very active retirement.

**Kenneth Bailey**

Moore’s retirement set off a long-meditated reorganisation of the law school. The range of the eight subjects Moore taught was impressive but unsustainable, and the growth in student numbers after World War I had made the need for another full-time teacher increasingly obvious. A committee of two judges (Leo Cussen, now knighted, and Charles Lowe) and the independent lecturer Robert Gregory reported on future plans. The committee confirmed that a second professor should be appointed, and it adopted Moore’s idea that the two chairs should have new designations, one for jurisprudence and one for public law.\textsuperscript{62} The council agreed but was unable for the moment to do more than rename

\textsuperscript{60} Interview with Sir Kenneth Bailey, 1971–72, NLA, 2:1/2.

\textsuperscript{61} Selleck, *The Shop*, 621.

\textsuperscript{62} Cussen Committee Report, RC, 1927/368; ‘Law School—Present Requirements,’ LFM, 15 May 1919, 431.
Moore’s chair as the chair of jurisprudence, leaving its intended public-law partner to be created when funds were available.

Applicants for the vacant chair included two who later became leading academic lawyers in Britain, F. H. (Harry) Lawson and W. Ivor Jennings (then aged 24), but when Lawson withdrew, the appointment went to Kenneth Bailey. He was the first former student of the university appointed to a chair in the law faculty—a former student, but not yet a graduate of Melbourne, since he interrupted his course after first year to join the army in 1918 and then went to Oxford on a Rhodes scholarship after only one year back in Australia. The son of a bank clerk and much influenced by the strong Methodism of his mother’s family, Bailey had won scholarships to Wesley College and then to the university. At Oxford his first interest was history, but disappointing results led him to revive an earlier plan to do law and then the bar admission exams. Even at that stage, he had an academic career in mind.63

After his return to Melbourne, he became vice-master of Queen’s College at the university, tutored in the law school and lectured in history. He was being considered as a possible master of Queen’s when his appointment to the chair of jurisprudence supervened. He had just turned twenty-nine when the council appointed him at the end of 1927, young enough to repeat Moore’s experience of being mistaken for one of the students (at the registrar’s office, Bailey was told to go and enrol downstairs).64 He was already popular at the university, and to his elders he had the ill-defined but powerful assurance of social and intellectual reliability summed up in the word ‘sound’, as Moore recorded: ‘there are few young men I know whom I regard as at once so stimulating and so sound as he is’.65

Bailey was determined to increase the number of full-time staff and build on Moore’s work, believing, like him, that ‘Law was best studied as one of the

64 Owen Parnaby, Queen’s College, University of Melbourne: A Centenary History (Melbourne: Melbourne University Press, 1990), 155; Interview with Yseult Bailey, 1973, NLA, 1:1/5.
65 CM, 5 December 1927, 349.
social sciences against a social science background’. Reforming the course was one focus of this plan, but the first priority was to appoint another professor, as the Cussen committee had recommended and as the Sydney Law School had done in 1920. Here, help came from what might seem an unlikely source. Since the 1850s, when the Supreme Court began admitting local practitioners, the fees it charged them had been paid into the court’s library fund. The fees were heavy, and concerns about their effect, coupled with a suspicion that they protected practitioners from competition, led parliament to reduce and cap them in 1895. But the Law Students’ Society complained that they remained ‘most burdensome’, and despite the demands of acquisitions for the court’s fine library, a substantial balance accumulated.

Somehow the university and the court agreed in 1930 that the work of the law school was a fitting purpose for the fund. Exactly how this happened is obscure. Bailey, newly appointed, probably lacked the seniority to approach the rather Olympian judges and suggest that they spend their money on the law school. Cussen, a former lecturer and member of the faculty and the council, was probably an intermediary, though he was on leave from the court at the time. Perhaps an interest in legal education on the part of the chief justice, Sir William Irvine, played a part; as premier and attorney-general in 1903, he presided over the creation of the Council of Legal Education, although the impetus had come from the university royal commission. Proposing the grant from the library fund, Irvine ‘referred to the need for maintaining the standard and extending the scope of legal education’, which he and the judges had discussed with ‘the proper authorities’ at the university. ‘This need was recognised by such authorities, but they entirely lacked the money to supply it.’ Possibly, too, the judges feared that the government might draw on the

---

68 Notice of meeting and minutes, 2 December 1897, Law Students’ Society Minute Book, vol. 1, Supreme Court Library.
69 Supreme Court Library Committee Minutes, 8 May 1930, Supreme Court Library.
library fund for its own purposes as money became increasingly scarce in the intensifying depression. The court already had a record of helping the law school by providing prizes for students and venues for lectures.

The outcome was a remarkable donation of £30,000 to create a second chair in the law school, designated as the chair of public law. The subjects to be taught by the new professor suited Bailey, so he indicated an interest in taking the new post, adding some information about his experience in constitutional and international law to reassure the university about appointing a professor of public law who had so recently been chosen as a professor of jurisprudence. The university was receptive, and Bailey moved to the chair of public law. He also secured an increased salary: the professor of public law was paid more than his colleague, a premium that was still attached to the chair in the 1950s.70

Bailey’s translation to the new chair left the university looking for a professor of jurisprudence. It chose what was becoming a recognisable type: a young man with little professional or teaching experience, but an outstanding academic record, promise for the future, and a reassuring social background. George Paton was the son of a moderator of the Presbyterian Church, a Melbourne graduate in arts, and an athlete and Rhodes scholar like Bailey. At Oxford he won first-class honours in his undergraduate degree, and in 1929, the year before he applied for the chair, completed his BCL and was called to the bar in London. He was an assistant lecturer in law at the London School of Economics; he had published nothing. Nine of the thirteen applicants for the chair were under thirty, and Paton was only twenty-seven when he applied.71

Bailey chaired the university’s professorial board in 1938–40 and strongly backed the losing candidate, Douglas Copland, in hard fighting over the choice of a new vice-chancellor in 1938. He established a good working relationship with the eventual winner, John Medley, but the demands on his time were so

---

70 Bailey to Chancellor, 6 June 1930, RC, 1930/329; Chancellor to Bailey, 26 June 1930, RC, 1931/248.

71 Chair of Jurisprudence Committee Report, 18 December 1930, RC, 1931/248.
heavy that he wanted to give up the deanship at the end of 1939. The fight with the Law Institute was at a critical phase, and the faculty would not let him go; instead Paton promised to take over the burdensome task of interviewing and advising students about their course plans. But when the attorney-general, H. V. ‘Doc’ Evatt, asked him to go to Canberra as a consultant, Bailey took leave from the university. He left Melbourne at the start of 1943 and remained in Canberra until the end of the war. Although he initially retained his chair and the faculty hoped that he would return (so strongly that, for decades afterwards, it recorded that he had been dean until 1946), it was Paton who, as the only remaining professor, was elected dean from 1943.

**Geoffrey Sawer**

Bailey turned the long contest with the Law Institute to advantage wherever he could. As well as using it to try to provide more tutorials and extend the length of the law course, he relied on the looming introduction of new subjects to propose the appointment of a third member of the full-time teaching staff, the first below the level of professor. Vice-chancellor John Medley acknowledged in 1939: ‘the University has long known that the Law School has been seriously undermanned’. With his backing, the university created a senior lectureship in law the following year, while the argument over course changes continued.

The new senior lecturer was Geoffrey Sawer, a popular, gregarious and left-wing graduate of the law school. Scholarships for war orphans funded his education at Scotch College and the university, after his father died of illness contracted while serving in World War I and his mother followed soon afterwards. He worked as a law clerk and then as a barrister, and taught as a private coach, a tutor at Ormond College and a casual lecturer in the law school.

---

72 Interview with Sir Kenneth Bailey, 1971–72, NLA, 1:1/22.
73 LFM, 22 December 1939, 401.
74 Memorandum by the Vice-Chancellor on University Needs, 5 July 1939, Finance Committee Minutes, 17 August 1939, in CM, vol. 26, 380.
He joined Moore and Bailey in the Round Table, the influential discussion group on British Commonwealth and international affairs, as a result of an effort to bring ‘young men of left-wing views’ into the generally conservative membership.75 Bailey regarded him as a ‘professed Marxist’ in his early days at the university, ‘but quite apart from what you might call the Socialist trend in his thinking, there was a freshness and an originality, a directness and an unconventionality about his assessments and his generalisations that were immensely stimulating to teachers and his fellow students’. He was ‘simply a born teacher’.76

During Bailey’s absence working for the federal government in World War II, Sawer took on much of the public law teaching and served briefly as acting dean when Paton, too, was called away. He applied unsuccessfully for the chair of public law when Bailey resigned in 1946. Bailey himself thought Sawer was the best of the applicants, but his lack of overseas experience and postgraduate qualifications must have been a disadvantage. The appointment went to Wolfgang Friedmann, a German émigré who had taken a second doctorate and a readership at the University of London in the 1930s. Sir Owen Dixon, alumnus and High Court judge, thought Friedmann a ‘bold’ choice (‘so German, so continental in his learning and so little real knowledge of English law’), but the selection was symptomatic of the law school’s broadening horizons after the war.77 There was no equivalent at Melbourne of the bitter controversy, partly political and involving an element of anti-Semitism, that surrounded the appointment of Julius Stone as professor of jurisprudence and international law at Sydney in 1942.78

75 Interview with Professor Geoffrey Sawer, 1971–72, NLA, 1:1/43.
76 Interview with Sir Kenneth Bailey, 1971–72, NLA, 1:1/37, 1:1/10.
77 Philip Ayres, Owen Dixon (Melbourne: Miegunyah Press, 2003), 182.
Other staff

Throughout the nineteenth century the law school’s teachers constituted the whole of its staff. The dean was not merely the executive head of the law school, but its sole administrative officer. It was the dean who responded to students’ enquiries and handled their enrolment, while clerical and maintenance work devolved on the central staff of the university.

Technological change and rising student numbers led to the appointment of additional staff in the 1920s. Typewriting changed the employment structure of the university as it did that of other workplaces, although the process was very slow. Minutes of the faculty’s meetings were hand-written until 1922, and even Harrison Moore’s final annual report as dean was written by hand, although by this stage presenting such a document in this form was beginning to look incongruously casual.

Once duplication of course outlines and other documents was added to the workload, the law school could no longer function with only casual help from the central staff. In 1924 the university advertised for a ‘Lady typist’ with knowledge of duplicating and legal terminology, to act as secretary to the law school. The job went to Esme May, who had learned shorthand at the Methodist Ladies’ College business school and picked up legal language while working for two years at a city law firm. By 1932 the law school had two typists working largely on the duplicated lecture outlines and reading lists that were now commonly issued to students.79

The career of one of the typists, Florence Scholes, showed how an administrative appointment could develop into an amorphous and highly responsible position as the law school grew. An arts graduate of the university, Scholes was appointed as a typist in 1932, and a year later the dean made the first of several requests for her salary (a ‘very low’ 30 shillings a week) to be increased to match the scale and quality of her work.80 She became nominally

---

79 Moore to Registrar, 23 May 1919, RC, 1919/196; Appointment of Miss E. May, RC, 1924/305; Bailey to Registrar, 7 February 1933, RC, 1933/244.
80 Bailey to Registrar, 7 February 1933, RC, 1933/244.
the dean’s secretary but in fact, as Louis Waller, a student and staff member in the 1950s, put it, ‘the administrative eyes, ears and hands of the law school’. Her ubiquitous work embraced everything from typing and filing to advice and counselling for students. She also held much of the law school’s institutional memory, for the first time gathering its records for preservation and compiling lists of staff and graduates on which this thesis draws. In their annual reports and correspondence, successive deans thanked her for her central role in keeping the law school running, but the job she did seemed to have no true correlate in the university’s staffing hierarchy, or at least not one it would appoint her to. In 1966 the dean, Zelman Cowen, was still trying (unsuccessfully) to have her appointed at a higher level, as an Administrative Officer. She retired in 1970 after thirty-eight years as a member of staff.

The dean’s work as course adviser and enrolment clerk became ever more onerous as student numbers rose. The looming influx of students at the end of World War II was the last straw, and the tasks were delegated to a sub-dean from the academic staff. The first was Zelman Cowen, who served temporarily in 1945 during his short tenure as a lecturer before taking up a Rhodes scholarship. Geoffrey Sawer replaced him the following year, receiving an additional £100 a year for the added responsibility.

**Funding**

The decisions that determined the number and nature of the law school’s staff were made, for the most part, by the central organs of the university, not by the dean or the faculty. Until the 1960s Law, like other faculties, had no separate budget and no direct control over most of its expenditure. George Paton noted in 1950: ‘as Dean I spend no money and merely make recommendations to the

---

81 Interview with Professor Louis Waller, 1995–97, NLA, 355.
83 Staff and Establishments Committee, 14 March 1946, CM, vol. 33, 556; LFM, 9 March 1945, 126.
The outcomes were shaped by the resources available to the university and by the law school’s standing and skill in campus politics.

Relative enrolments were one measure of that standing, but as teaching began in other disciplines, law’s domination ended. In 1860, when arts was the only other course offered, 75 per cent of the university’s students enrolled in law; the figure declined steadily to the end of the century and then plateaued until World War II. From 1897 to 1939, law enrolments averaged 9.5 per cent of the university total. In 1946 law was outstripped by engineering, music, science, medicine, commerce and the university’s most popular discipline, arts, where student numbers had ballooned to 1844.85

A faculty that ranked so low in the hierarchy of enrolments could claim only a minor share of the university’s resources. The law school’s material aspirations were modest, partly out of a sense that little was needed for its work, and partly because the chances of receiving more were slim. The number of lecturing staff, consisting of the dean and four independent lecturers, remained frozen from the establishment of the faculty in 1873 until Moore’s departure in 1927, despite the increase in enrolments from 45 to 308.

In 1878 the faculty responded to the council’s request for a statement of its needs by saying its only requirement was for more books (admittedly it asked for a substantial sum, £500, to pay for them).86 The new staff appointed when the faculty was created five years earlier probably met all of Hearn’s needs for the time being, but the culture of needing little and making do persisted into the 1920s. It may have been grim realism that limited the faculty’s requests for additional staff to part-time tutors; three were employed to help with the post-war influx in 1919, and two remained through the 1920s.

When the council summarised the university’s requirements in 1912, and again when it set out its needs as part of a campaign for additional support from

---

84 Paton to F. R. Gubbins, 18 October 1950, HCP, box 2, UM 420/19.
85 Enrolment figures, including both matriculated and non-matriculated students, derived from University of Melbourne annual reports, Statistical Register of Victoria, Selleck, The Shop, and deans’ reports in RC.
86 Hearn to Chancellor, 20 July 1878, RC, 1878/9.
the state government in 1919, Law was the only faculty for which no new resources of any kind were requested. Moore was equally cautious in 1927, when he answered another request from the council to state the law school’s needs with a brief handwritten note to the registrar. The report from the dean of Medicine, by contrast, was an elaborate typeset document filling six closely printed pages.87

Staffing was one measure of the law school’s resources; accommodation was another. Law teaching began in the university’s original, and at that time only, building. Known later as the quadrangle, even before it gained its fourth side, it consisted of three wings in Tudor gothic style around a courtyard and housed not only classrooms, offices and the embryonic library, but also the professors, who lived there with their families. Squeezed into the quadrangle along with the library, other departments and the university’s small central administration, law school staff shared problems of overcrowding and poor accommodation. When Jenks arrived in 1889, he had to ask twice before he was given any office space at all. He was allocated a small room shared with the lecturer in mining; ‘the room is also used,’ he protested, ‘for domestic purposes, by the recently appointed Lecturer in Classics and Philology’. Teaching space was equally hard to find. Jenks used Hearn’s lecture room (which he found too small) and held classes on the dais of Wilson Hall.88

Some of the lawyers came to see themselves as Cinderellas, a metaphor that came, apparently spontaneously, to writers about the law school decades apart. An anonymous graduate wrote in 1927:

there is just a possibility that for too long the Law School has been the Cinderella of the University. It has occupied that position, and been content to occupy it, because it has suffered from an inferiority complex.89

87 CM, 1 July 1912, and Summary of Request for Assistance, 1919, both in RC, 1919/369; Moore to Registrar, 14 April 1927, RC, 1927/194A.

88 Jenks to Registrar, 18 July 1889, RC, 1889/27, part 3; Jenks to Acting Registrar, 26 March 1890, RC, 1890/39, part 2.

Other faculties, the former student wrote, asked long and loudly for resources and usually got something. The same trope occurred to Zelman Cowen when he tried as dean to rouse support for the law school thirty years later.90

In the recurring financial hardships suffered in the depression of the 1890s, the Dickson frauds and the aftermath of World War I, the university consisted largely of Cinderellas, with few favoured sisters. As student numbers increased, the government grant to the university, which provided about a quarter of its income in 1922, failed to keep pace. The grant dropped from £26 per student in 1901 to £15 in 1921. At the University of Sydney in 1921 it was £21, and at Adelaide it was £35. The main source of income, students’ fees, was supplemented by donations and bequests, but they too were less generous than at Sydney or Adelaide. Melbourne’s total charitable endowment in 1922 was less than that of Adelaide (which supplied a remarkable 60 per cent of its income, thanks to gifts from Sir Thomas Elder and others) and only half that of Sydney.91

Accidents of personal choice by wealthy graduates, the depletion of private fortunes in the 1890s and perhaps the nature of the university’s relationship with its former students left Melbourne lagging uncomfortably behind these Australian counterparts. Wealthy American law schools were almost beyond comparison. William Wilson Cook, whose benefactions to the University of Michigan between 1914 and 1930 totalled nearly $16 million, left most of his estate to its law school, funding its building and its research.92 At Melbourne, Law found itself towards the bottom of an impoverished hierarchy, although increases in both fees and the government grant in 1923 improved the university’s financial situation.93

90 Cowen to John R. Bishop, 5 March 1957, FLC, box 1, file ‘Law School: Future Developments.’
91 University deputation to the Premier, 19 September 1922, PROV, VPRS 1163/P0/540, file 23/3224; Australian Bureau of Statistics, Year Book Australia, 1924, http://abs.gov.au, cat. no. 1301.0, ch. 9, 467.
92 Brown, Legal Education at Michigan, 757.
93 Selleck, The Shop, 599.
When a major new source of funding did emerge, it came from the Commonwealth government. Its repatriation assistance for students returning from the armed services paid the fees of some 17 per cent of the university’s enrolment in 1919, and it gradually developed a continuing commitment to higher education. Federal research support began in 1936, for the sciences, and at the end of World War II the Commonwealth Reconstruction Training Scheme paid the tuition fees of men and women who had been in the armed services and gave full-time students a generous living allowance. It also financed a second senior lectureship in law for five years, foreshadowing the permanent federal funding that bankrolled much of the expansion of higher education from the 1950s onwards.94

IN CLASS

The case method

Writing about the modes of common-law legal education in the late nineteenth and early twentieth centuries is dominated by the study of a particular method of teaching, its adherents, its critics, and the conditions of its genesis and diffusion. The case method remodelled classes as forums for students’ engagement with the raw material of appellate judgments. It overcame early hostility on its introduction at Harvard in the early 1870s, became entrenched there, and gradually spread through American law schools. The system of which it was a part became, in the words of a recent history, ‘the common denominator of modern legal education’.¹

Visitors to the United States, Australians among them, observed and commented on the case method’s strengths and weaknesses, the conceptions of law it served and its applicability in their own countries. Although the method was not adopted at Melbourne until the 1950s, both the technique itself and its implications for university legal education form a framework for the interpretation of legal pedagogy in Victoria in the period during which the new method remained a model for comparison rather than emulation.

Before the emergence of the case method, the expository lecture was the mainstay of university law teaching. In the broadest outline it differed little from teaching practice at Bologna in the thirteenth century: the teacher presented the fact situation behind a particular law, and moved on to the law

¹ Macgill and Newmyer, ‘Legal Education and Legal Thought,’ 36.
itself and its meaning, cases where it might or might not apply, questions it raised, the main themes of the text, and its practical application.² The lectures of Henry Chapman, whose notes from the early 1860s supply the earliest extended examples from Melbourne, synthesised the law on any given topic in a familiar format. Although Chapman had no university degree, his private legal study, his journalism and his work as barrister and judge evidently acculturated him to the style and expectations of the law lecture room. His classes (at least in the form in which they survive in his notes) display few departures from the predictable handing-down of doctrine, and those few have more to do with content than technique. I noted Chapman’s interest in the United States and in questions of colonial sovereignty in Chapter 3, but most of his lectures stay close to the letter of English and Victorian law.

In effect, Chapman’s lectures comprised a spoken textbook, and his students attended for its transmission to them in abbreviated form in their notes. Nineteenth-century Australian legal publishing, while extensive (Castles lists over 2500 items), was dominated by legislation and manuals of legal practice. Student texts did not appear until the end of the century. Edward Jenks’s Government of Victoria (1891), which I discuss in Chapter 7, appears to have been the first to focus on Australian law, although it was preceded by William Hearn’s texts on English law and history.³ Earlier book lists for Melbourne law students, published in the university’s Calendar, contained English texts supplemented by Victorian acts of parliament.

The case method did not introduce cases to the classroom for the first time. Leading cases appeared constantly in Chapman’s lectures, and his students had a casebook, of a kind, in which they could read some of them. He commended John William Smith’s famous Selection of Leading Cases: ‘the student can scarcely resort too soon to that profitable class of reading…cases are the fountains of the law from which, in a great measure, the courts construct their


judgments’.4 But Chapman took cases as authorities and as factual examples to be explained to his students, extracting principles and rarely quoting the judges’ words. When pressure of time reduced his notes to a skeleton of principles and authorities, they resembled a terse digest of precedents. Smith’s book was consistent with this approach. Part casebook, part legal encyclopaedia, it ran to 1500 pages in its most recent English edition but contained only 39 cases. The rest of the text consisted of copious notes in which Smith and his later editors distilled, analysed and updated the principles for which their chosen authorities stood.5

The change made by the case method to this common tradition of teaching was not so much to bring cases into the classroom as to remove much of the synthesis and exposition formerly provided by the lecturer or by a textbook, leaving the students to interpret the cases and extract principles for themselves. The work of the teacher changed from expounding current law on the given topic to selecting cases for study and guiding the students, through questioning, to their own understanding of the principles found there. Explanatory notes, so profuse in Smith’s Leading Cases, disappeared entirely from the first casebook used at Harvard, which presented the student with unelaborated text from the law reports (although its author relented in later editions).6

A counterpart of the method was dialogue between lecturer and students, although elements of this, too, were already familiar. Under the text-and-recitation method identified particularly with Yale, students read nominated passages of prescribed texts and then, in class, recited what they had learned and answered the lecturer’s questions.7 A quiz of this kind, however, was altogether different from the dialogue, part colloquy, part inquisition, that developed in case classes. Sometimes it took the form of Socratic interrogation

---

4 Chapman Lectures, Introductory Lecture to Part I, MLS, 21.
7 Langbein, ‘Blackstone, Litchfield, and Yale,’ 55.
with a degree of intensity that tested students’ composure and mastery of the material to the utmost. Melbourne dean Harrison Moore encountered this practice on a visit to Columbia and Harvard in 1911: ‘Sometimes the professor will heckle a single student for ten minutes or more’, he observed, ‘before he passes on to some one else’.8

The introduction of the case method is attributed to Christopher Langdell, dean of the Harvard Law School from 1870 to 1895, although the degree of innovation involved is sometimes questioned. Certainly the practice was novel enough to cause bafflement and hostility among the students who first encountered it. Instead of being told what the law was, they were asked to find it for themselves and inform the teacher, a reversal of roles that seemed nonsensical to some. At Harvard this change became part of a broader transition to a competitive and merit-based model of education, albeit one from which some (notably women, until 1949) were excluded regardless of aptitude. Compulsory examinations and a sequential curriculum replaced the earlier pattern under which students attended voluntarily for as long as they found their studies useful.9

For Langdell the case method was not merely pedagogical. It expressed the scientism I discussed in Chapter 4: the belief that law was an inductive science of principles derived from cases. In the classroom, teacher and students joined in a common enterprise of discovering and testing these principles, a process that included the criticism of inconsistent decisions and unsound reasoning. Bruce Kimball’s imaginative reconstructions of Langdell’s early classroom dialogues portray him as Socratic interrogator, questing sceptic and critical observer of the flaws and uncertainties of his chosen material.10

---

10 Bruce A. Kimball, “‘Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law’: The Inception of Case Method Teaching in the Classrooms of the Early C.C. Langdell, 1870–1883,” Law and History Review 17 (1999): 96–123. At the time of writing,
Despite early resistance at Harvard and more persistent doubts elsewhere, the case method spread widely through American law schools. On Kimball’s figures, nearly two-thirds had adopted it in whole or in part by 1915. Historians have proposed a range of explanations for its pervasiveness. It was backed by the growing reputation of the Harvard Law School, which worked actively through its alumni association (established in 1886) to extend its influence. It could be deployed in large classes with little expense, an advantage shared by lectures but not by the text-and-recitation method. It suited the emerging corps of professional law teachers, who were developing a career pattern of full-time teaching and writing separate from practice, and it had a symbiotic relationship with the casebooks they produced. At the same time, the growth of law reporting and the increasing citation of precedents in argument magnified the importance of cases and validated the idea that their analysis gave students a skill they would need in practice.

In a review of Alfred Reed’s 1921 report on American legal education, the Melbourne Law School’s former dean, Edward Jenks (then director of legal studies for the Law Society in London), noted other reasons for the case method’s success. His interest was not based on first-hand acquaintance with American conditions, he confessed, but lack of personal experience of American law schools did not prevent him from making some characteristically sharp observations. Reed and others had noted the problems that gave rise to the case method, but Jenks argued that one in particular was peculiarly American: the ‘enormous mass of unco-ordinated decisions of tribunals of nominally equal authority, each of which was binding (of course subject to appeal) in a limited area only of the Union’. In England, by contrast, the appellate hierarchy was able to establish ‘an essential unity of authority’.

Kimball’s biography of Langdell, The Inception of Modern Professional Education, is not yet available.


Jenks’s point was perceptive. The United States Supreme Court could resolve conflicting lower court decisions only within its limited jurisdiction, which excluded most questions arising under the laws of the states. In Australia, on the other hand, the Privy Council and (from 1903) the High Court had effectively unlimited jurisdiction to hear appeals from the Supreme Courts of the states and so impose a degree of consistency even where no federal matters were involved. The same could be said about Canada.

Langdell’s solution to this difficulty was neither to attempt the impossible by teaching the diverse laws of every state, nor to limit himself to the laws of Massachusetts and so risk losing students from elsewhere. He tried, as Jenks put it, to instil ‘the essence of the common law’, maintaining Harvard as a national school. That essence was supposedly universal, reaching across state borders. Its teaching came at the expense of statute law, which Jenks saw was almost ignored where the Harvard model was used. He also disliked the ordeal it imposed on struggling students: ‘The belief in the wholesome effect of a “sink or swim” treatment for the average student is really a survival of the Puritan creed that unnecessary suffering and difficulty are themselves stimulating and refining influences’.13

At Melbourne, students were not entirely mute in class. When the law course began in 1857, the council reported that it would combine lectures with ‘the Tutorial system of teaching’, and Sewell said in his inaugural lecture that he would prepare questions on each class, which students would answer in writing for themselves and orally to him.14 If anything came of these early plans it has left no trace, although a passing reference in Chapman’s notes indicates that his students at least asked questions from time to time.

It was in William Hearn’s classes that promises of an active role for the students were fulfilled, although he was guided more by an instinct for what would engage them than by an explicit pedagogical theory such as Langdell’s. In Jurisprudence, a compulsory arts subject incorporated in the LLB course,

13 ibid., 158, 160.
Hearn assigned parts in a running hypothetical problem. ‘He would, soon after lectures began for the year, sort out from his class a troupe who formed the \textit{dramatis personae} in his little drama of “Legal Duties and Rights”’, a student recalled. The cast included a ‘perpetual plaintiff’ who was the victim successively of a burglar with homicidal tendencies, a usurious moneylender and other predators.\footnote{Robertson, ‘The University of Melbourne,’ 144–5.}

Forty years after Hearn’s death, such participation was so rare that he was still remembered for putting problems to his students and asking for their opinions.\footnote{‘LLB,’ ‘The Inadequacy of the Law School,’ \textit{Law Institute Journal} 2, no. 2 (1928): 32.} His classes were ‘the green oases in the arid wilderness of law lectures’, another former student recorded; ‘the Doctor’s lectures were enjoyable, while most of other law lectures were regarded as so much necessary drudgery to be got through somehow and anyhow’.\footnote{‘Legal Echoes,’ \textit{Melbourne University Review} 4, no. 1 (1888): 30.} The standard lecturing style was little better than dictation and gave ‘no scope of any kind to inquire or to be taught’, one student told the university royal commission in 1902. ‘It is simply a statement of the law which he takes down, and then goes away to learn.’\footnote{Royal Commission on the University of Melbourne, \textit{Minutes of Evidence}, 321.}

Edward Jenks’s interest in American teaching methods followed long after his departure from Melbourne, and his purpose in writing about Reed’s report was not to promote the case method but to point out the differences in conditions that made it poorly suited to English law schools. It was Jenks’s successor as dean, Harrison Moore, who began the law school’s turn towards the United States for models of legal education.

Moore’s knowledge of American law schools was initially based on reading rather than personal experience. He subscribed to Harvard’s law review and corresponded with some of the staff there.\footnote{ibid., 10.} What first sparked his interest is unknown, but British praise of American legal education was not hard to find.
In Moore’s chosen field of constitutional law, James Bryce’s *American Commonwealth* (from which the framers of the Australian constitution drew much of their knowledge of the government of the United States) strongly favoured American over English legal education. Bryce had supported educational reform since the early years of his involvement in British radical politics, and he taught law at the Inns of Court, at Owens College, Manchester, and at Oxford. He remarked on the ‘extraordinary excellence’ of many American law schools. ‘I do not know’, he wrote, ‘if there is anything in which America has advanced more beyond the mother country than in the provision she makes for legal education’.\(^{20}\) Moore knew Bryce’s work and cited his opinion of American law schools to the university royal commission in 1902.\(^{21}\)

Laudatory descriptions of American law schools by English or Australian observers owed something to the grass being greener on the other side of the fence, and there were many (Jenks among them) who did not share such enthusiasm. Americans could be equally flattering when identifying features of foreign legal education whose adoption they advocated at home. When in 1891 the American Bar Association sought comparative data from other countries, including Australia (Jenks supplied information), uncomfortable comparisons served its purpose of arguing for stringent admission examinations. ‘No American can examine these without a feeling of mortification’, the association said of the reports it received.\(^{22}\)

By the early 1900s, Australian observers had established a pattern, long continued, of envying the wealth of the richest American law schools and taking serious but critical interest in American pedagogy. Jethro Brown, soon to return to South Australia as professor of law, described the American law schools he visited in 1904 as a wonderland: ‘their general excellence is almost calculated to arouse in one a feeling of despair’. He marvelled at the

---


\(^{21}\) Royal Commission on the University of Melbourne, *Minutes of Evidence*, 5.

‘extraordinary perfection’ of their buildings and the zeal of their teachers and students.\(^{23}\) The teaching he observed varied greatly, presenting no simple demarcation between the case method and expository lectures, despite the tendency of students and professors to speak as if the distinction was always obvious. The use of cases in class was spreading everywhere, but the trend was towards an eclectic combination of cases and exposition, casebooks and textbooks.

Moore was convinced of the superiority of American over British law schools even before he visited the United States. ‘What we have to learn we have to learn from America’, he declared to the royal commission in 1902; the systematic legal training provided by its university law schools had no parallels in Britain.\(^{24}\) In 1911 he became the first of Melbourne’s law professors to visit American law schools. Investigating the case method was the purpose of his trip. Unlike Brown, who included a night school in his tour, Moore saw only two elite schools, spending about four weeks at Columbia and Harvard.

His admiration for the framework of American legal education at its most sophisticated—its staffing, facilities, graduate students and law reviews—continued, but his responses to seeing the case method in action were mixed. Moore’s summary of its advantages echoed the case method’s American advocates.

The student studies his law from the outset as he will have to study it for purposes of argument in court. He acquires familiarity with legal method, and with the process of legal development; he gains great facility in the use of his materials; he gains confidence, a critical habit of mind, and independence of thought; and his studies are carried on in the stimulating way of contest with his fellows and his instructor.\(^{25}\) But the method had shortcomings. In large classes (Moore visited none that had fewer than a hundred members), only a few students could take part in the


\(^{24}\) Royal Commission on the University of Melbourne, Minutes of Evidence, 5.

\(^{25}\) Moore, ‘Legal Education in the United States,’ 208.
discussion, and the same few tended to dominate a number of subjects. The
course of the debate might be illuminating or might not. Moore himself
sometimes left the class unsure of the law on the topic. Some professors
combined the case method with brief expository lectures for this reason.26

The use of the case method at Columbia and Harvard depended on certain
preconditions, Moore found. It needed ‘a certain maturity on the part of
students’—provided by graduate entry at Harvard—and a large academic staff,
allowing branches of the law to be broken down into smaller subjects in order
to accommodate the slower progress that full use of the case method entailed.27
The law of contract and personal property was one subject at Melbourne; at
Harvard, its various subdivisions occupied eight. With a small staff,
undergraduate entry and no casebooks, Melbourne enjoyed none of these
advantages. Nor did Adelaide, where Brown’s use of class discussions and
alternatives to exams ended after his departure in 1916 to become president of
the state Industrial Court.28

Moore thought students could get the benefit of the case method if it was
used fully in just one or two subjects, while the rest of the course fell back on
textbooks and expository lectures. But he also had more searching, if
speculative, philosophical reservations about its use in America, hinting at some
of the criticisms later voiced by legal realists. Reliance on the critical study of
selected cases overemphasised the logic, form, consistency and harmony of the
law, perhaps with wider social effects:

the law may become less and less an instrument for accomplishing
present social ends, and more an institution to the needs of which social
ends themselves must be adapted. In other words, we get a point of view
which may be described, with not more than the usual amount of
polemical exaggeration, as one according to which law does not exist for
society, but society for law.

26 ibid., 208–9.
27 ibid., 209–10.
28 Castles and Harris, Lawmakers and Wayward Whigs, 339–40.
This state of things will speedily produce sterility in the natural development of law; it stifles the sense of public duty in the profession of the law, and excites jealousy and suspicion of law and lawyers on the part of the public.²⁹

Exclusive attention to reported cases at the expense of legislation and the wider social context was antithetical to Moore’s advocacy of political science. His criticism chimes with the ‘sterile formalism’ sometimes attributed to late nineteenth-century American legal thought, even if the case method’s conservatism, noted by later historians, was less likely to trouble him.³⁰

After his return to Australia, Moore made ‘tentative experiments’ with the case method. But conditions made its use almost impossible, he told the university council: ‘the absence of “case-books” & the consequent necessity for resort by a whole class to the one set of Law Reports in the Library, offer difficulties which prevent any considerable use of the system here, while the demands which it makes upon time present a further difficulty as the year passes’.³¹ Even without trying the full rigours of the case method, the shortage of books and space in the library undercut the lecturers’ exhortations to the students to read cases and statutes for themselves, rather than rely on notes and textbooks. In 1922 Moore told the council:

While we are insisting that students must carry on their reading in a Library and must learn there to use their materials, and while notes are compiled for the purpose of facilitating and compelling this mode of study, the actual conditions in the University itself make it impracticable for the students as a whole to carry out this advice. Men grow tired of going to the Library and finding themselves unable to get books or space for reading them. Some students go to the Public Library; but many others tend simply to fall back upon their notes of lectures, and seek with this material supplemented by a minimum of text book reading to

³¹ Dean’s Report, 1911–12, RC, 1912/27.
pass their examinations. This sorry state of things must last until it is realised that a school in which there are 155 Degree students cannot be efficient on the provision that would not be adequate for half their number.\(^\text{32}\)

Lack of money was also a reason for the law school’s exclusive reliance on written exams for assessment. In 1895, in the aftermath of the course changes brought about by the amalgamation of the two branches of the profession, Moore floated the idea of requiring students to write four essays over their last two years (they could substitute reports of cases they attended at the law courts for two essays, if they chose). The proposal came to nothing, lost in disagreements between faculty, council and senate over wider course changes.\(^\text{33}\)

Another scheme for student research was also short-lived. In 1920 Moore supervised the work of two groups of students who collaborated on research projects with publication as their aim. Their two articles (on the status of illegitimate children and the compulsory acquisition of land) appeared in the *Journal of Comparative Legislation and International Law*, but the initiative appears to have gone no further.\(^\text{34}\)

Moore’s successor as dean, Kenneth Bailey, travelled to the United States in his turn, to see its law schools as part of a study tour funded by the Carnegie Foundation. His longest stay, of three weeks, was at the University of Minnesota, and he spent a few days at Wisconsin, Chicago, North-Western, Michigan, Yale and Harvard. The case method, he found, was the orthodoxy in doctrinal subjects.

At its best, it can be a really exciting process. Even at its worst, it has the merit of throwing the student upon what he can get out of the cases for

\(^{32}\) Dean’s Report, 1921–22, RC, 1922/115.

\(^{33}\) LFM, 18 July 1895, 196, 199–200, 12 September 1895, 202–3, and 19 September 1895, 204–5; CM, 28 October 1895, 403–6.

himself…Perhaps the truth is that it is a better instrument for teaching the method than the substance of the law.35 Its exclusive use, he found, was becoming confined to first year, while later subjects employed more varied methods.

Like Harrison Moore, Bailey returned to Melbourne from the United States interested in trying some of these teaching methods for himself, but (again like his predecessor) he found himself constrained by local conditions and ambivalent about what he had seen in American classrooms. Harold Ford, later a professor at the law school, was a student in 1939 when, inspired by his study tour, Bailey tried a rare experiment in a lecture. ‘Lo and behold, one day he threw out some questions to get a discussion going. This was unheard of.’36 Only one student (Zelman Cowen, himself a future dean) responded.

The more usual styles of Bailey and his colleague George Paton were described in oral history interviews by their student (and later colleague) Geoffrey Sawer, best known as foundation professor of law in the Research School of Social Sciences at the Australian National University. His comments are the most detailed observations of law school teaching in this period.

Ken Bailey was not, I think, a very good lecturer to large, undergraduate, doughy students. He was too hesitant in his conclusions; he would say something and then qualify it and qualify the qualification, and the students were apt to look for something more definite that they could swot up and dish back to him in examinations. But as a teacher of honours students and as a tutor of small groups he was absolutely admirable, because he was so careful, not pedantic in the bad sense of the word at all, just careful about ideas and about statements and events and so forth, and I certainly owed a great deal to him in first of all, for the first time discovering the meaning of rigorous thought, of really pursuing a thing to its conclusion and seeing all the difficulties along the way. And finally perhaps deciding that if that is the conclusion to this

35 Bailey, ‘Legal Education in the United States,’ 300.
36 Harold Ford, personal communication, 7 November 2005.
line of thought, then we’ve got to chuck it away and start afresh. He was quite admirable in that respect.

...

Bailey had a somewhat English style of talking and a measured, careful style. Paton had a very Australian way of talking, vigorous and colloquial, and he had a sort of commonsensicalness, too, which Bailey didn’t have. Bailey was better at considering rules and structures and things like that; Paton was extremely good at telling you about an actual case, a specific set of events and seeing how a rule applied to it, how you worked into it. Together they formed an absolutely marvellous pair, I don’t think I’ve ever seen the likes of them as a pair in harness, teaching different kinds of students. Paton was very good with these doughy, large classes of undergraduates that I’ve mentioned, because he would discuss a thing in a pleasant, easygoing way, talking fairly rapidly at first, and if he saw somebody starting to scribble he’d say ‘No, don’t put anything down as yet’, and then after he’d finished this fairly rapid discussion he’d say ‘Well now, I think we can probably summarise this in this way’. Then he’d give the students what they wanted, he’d say ‘Well, now, we can sum it up thus, this is only approximate, mind you, but here’s how it goes, 1—2—3—’. This was excellent for these pass students, though mind you, I found him equally good as an inspirer of honours work, too.37

The description implied, if it did not analyse, the aims of the lecture method in the hands of professional teachers. The precision of the exposition and the sense of hearing an expert think aloud exposed the students to a model of legal reasoning, complete (in Bailey’s case) with occasional false turnings and dead ends, when the teacher gave up a hypothesis that turned out to be flawed. The ability to follow reasoning to its conclusion and confront difficulties or contrary arguments was one Sawer particularly valued. He thought it was a ‘capacity for

37 Interview with Professor Geoffrey Sawer, 1971–72, NLA, 1:1/22–3.
seeing around large numbers of corners ahead’ that made E. F. (Ted) Hill, later one of the leaders of the Australian Communist Party, one of his best students.38

Paton’s classes, on the other hand, were more typical of the set-piece lecture. His explanation showed students the problem under discussion, and the concluding summary made its resolution clear in a form they could use later. For Henry Chapman, this systematising of the diffuse and sometimes inaccessible sources of law made lectures peculiarly suitable for legal study: ‘there is scarcely any department of human knowledge,’ he told his students, ‘to which lectures or the mode of teaching by lectures only delivered, are so applicable as law.’39

Teachers maintained hopes that this silent note-taking would not be passive or inactive. From Chapman onwards, they occasionally exhorted their students to consider and summarise what they heard and not to transcribe mechanically. Jenks delivered and published an introductory lecture, setting out his ideas about legal study, giving advice and commenting on the exams he had marked. His task as a university teacher, he said, was to guide, advise, explain, plan and encourage. He had his own advice about note-taking:

Remember that you are not taking down a mass of evidence which will disappear if not committed to writing; but you are trying to catch ideas, to glean hints, and pick up information … the plan I invariably followed as a student was to devote my energy to taking in rather than to taking down.40

Some students desired little more than transcription. Ted Sykes, a student from 1934 to 1937 and later professor of public law at Melbourne, was one:

As regards our lectures, we went in for extensive note-taking and for the most part we wrote like hell. It is rather ironic in the light of my later attempts to try ‘case-book’ method or at least to put questions to students in class, to confess that when I was a student, this was the very

38 ibid., 1:1/31.
39 Chapman Lectures, Note-Taking, 9 and 11 March 1864, MLS.
40 Edward Jenks, Legal Fore-Words: A Lecture Introductory to the Session of 1890 Delivered Before the Law School of the University of Melbourne (Melbourne: Ford & Son, 1890), 4.
last thing I wanted. All I then wanted was to be left alone to write down as much as I could! 41

But opinions varied. In some subjects, the Law Students’ Society complained, lectures amounted to ‘no more than the mechanical process of dictation of notes … It is not too much to say that some students are, after such a lecture, quite unable to say what it was about.’42 In 1941, when the student newspaper *Farrago* asked its readers to write about their faculties, law students had harsh things to say. ‘Our law course is academic and dead’, one wrote, adding weight to the Law Institute’s complaints of poor preparation for legal practice. Other criticisms included scanty preparation by practitioner–lecturers and low attendance at lectures. Contracts lectures were ‘a wild scramble to get them down’. Students called for more tutorials and essays, more about the sociological background to law, compulsory moots, and lectures on law reform, all of which featured increasingly in the law course after World War II.43

Lectures inducted students not only into legal knowledge and technical skills, but also into a culture. Jenks told his students that the aim of a university course was the acquisition not only of ‘sound knowledge’ (the adjective itself implying that discrimination was transmitted along with doctrine) but also of ‘disciplined character, and noble friendships’.44 Teachers conveyed much between the lines of formal lectures or overtly in *ex cathedra* comment on ideas or personalities to be approved or disapproved. In the 1930s they extolled the vigorous strength of the English common law, compared with the codified systems of other European countries. ‘You really had that thrust down your throats’, Jack Richardson recalled. He also found that the part-time lecturers could penalise departures from orthodoxy: ‘If you were an adventurous spirit you had to watch very carefully what you wrote’.45 But some, at least, kept both

43 ‘Faculty for Trial. Law Course Indicted,’ *Farrago*, 8 July 1941, 1.
45 Interview with Professor Jack Richardson, 1995, NLA, TRC 3259.
academic records and left-wing convictions intact. Geoffrey Sawer (described by Bailey as a ‘professed Marxist’ when a student) and Ted Hill each finished first in the class, Sawer in the LLB course and Hill in the course for articled clerks.46

**Tutorials and correspondence**

The law school’s teachers, or at least those on the full-time staff, believed in teaching outside the lecture theatre, but opportunities were limited, and the prevailing deference to professors constrained their discussions. ‘It was a law school which was somewhat remote from its students,’ Jack Richardson found.47 James Lemaire, another law student of the late 1930s, had similar recollections: ‘In those days, professors were rather remote figures. We only saw them when they appeared on the lecture platform.’48 Jenks told his students (through the pages of the *Argus* newspaper, for some reason) that they could see him after the regular Saturday morning lectures, and he held a ‘conversation class’ once a fortnight at his home, at which students read papers, followed by informal discussion.49

Tutorials were an obvious possibility for interchange of this kind. The university’s residential colleges had long appointed tutors, taking an opportunity to bolster their sometimes vulnerable academic status by providing a form of teaching that the university neglected. From 1876 John Winthrop Hackett (the future newspaper proprietor, politician and founding chancellor of the University of Western Australia) tutored in law, logic and political economy as vice-principal of Trinity College. But Hackett and later tutors, like their counterparts at Ormond, combined law with several other disciplines and

46 Interview with Sir Kenneth Bailey, 1971–2, NLA, 1:1/37.
47 Interview with Professor Jack Richardson, 1995, NLA, TRC 3259.
provided little or no teaching in the doctrinal subjects of the course. Such instruction was offered by law tutors at Queen’s from the 1920s onwards, if not earlier, while Ormond created a more comprehensive law tutorial program in the 1930s, and Trinity followed after World War II.\(^{50}\)

The law school itself provided few tutorials until the 1940s. Lack of money was one reason. Even if funds had become available, Harrison Moore would have dedicated tutorials to reinforcement of technical skills rather than exploration of matter covered in lectures. When the university assessed its current and future needs in 1919, Moore recommended the appointment of two tutors,

> to follow the courses of lectures particularly in Property, Procedure, Equity and Contracts by classes for going through and explaining the principal forms of documents in common use in the various departments of legal business, both litigious, and other, e.g., Conveyances, settlements, mercantile instruments, pleadings and judgments. This is provided in the University of Sydney…\(^{51}\)

But the teaching staff, perhaps influenced by parsimony, perhaps by caution at such innovations, thought that an extra class each week in Property, combined with the issuing of printed notes for students, would be sufficient, and the faculty agreed. A request in 1925 from the Law Students’ Society for the creation of a tutorial program met the same fate. The faculty feared the expense involved would delay the appointment of a second professor, which ranked higher in its priorities.\(^{52}\)

Tutors were appointed to help returned servicemen at the end of World War I, but they finished their work in 1919. Once they had gone, replacements were


\(^{51}\) ‘Law School—Present Requirements,’ LFM, 15 May 1919, 430.

\(^{52}\) Moore to Registrar, 25 November 1919, RC, 1919/151; LFM, 24 November 1919, 441, and 1 September 1925, 55–8.
employed only for a different purpose, teaching by correspondence. Students who enrolled in the articled clerks’ course while working in solicitors’ offices outside Melbourne had long struggled to complete their subjects without being able to attend lectures. Most managed by buying or borrowing lecture notes, but from time to time they lobbied for better conditions. A group of Ballarat law students proposed to establish their own, self-funded branch law lectureship in 1861 but were put off by the chancellor, and the Geelong Law Students’ Society supported local students in the 1890s.53

The university, reluctant to take any steps towards introducing a correspondence course, offered few concessions, but in 1919, as part of a post-war funding increase for the university, the state premier offered more help for students outside Melbourne. Two tutors for country students were appointed in March 1920. They and their successors operated a tutorial system by correspondence for country students throughout the 1920s and 1930s, sending out exercises and receiving answers.54

The correspondence course was a rare gesture by the city-centred law school to a regional constituency it generally ignored, but it created as many pedagogical problems as it solved. Many students, unable to find time and to get access to books, failed or dropped out. In 1922 the professorial board, wary of correspondence courses and students who spent little time on the campus, urged Arts and Law to fall into line with other faculties and require ‘substantial attendance’ at the university for their courses. But the faculty thought compulsory attendance at lectures might drive students away from the degree course and into the articled clerks’ course, over which the university had less control. It recommended no change in the rules concerning attendance at lectures, but conceded that vigilance was needed in case absentee students became a problem in the future. The correspondence system continued, but its shortcomings and the heavy burden it placed on the staff became a

54 CM, 1 March 1920, 404; Dean’s Report 1928, RC, 1928/209, 4; LFM, 27 February 1920, 450–1.
preoccupation of the faculty in the 1950s. Enrolment was progressively restricted to smaller categories of students until correspondence teaching was abolished altogether in 1962.55

Lecture outlines supplied by the teachers could help country and city students alike. Jenks produced an outline of his constitutional law lectures in 1889, as a first step to make up for the lack of a textbook, but the process was cumbersome and expensive. Typewriters were only just becoming available, and the only practical way to make the outline available was to have it typeset and printed.56 Moore experimented with typed lecture notes for his students, and it became his usual practice to give students a ‘very full synopsis’; soon the university had machinery for ‘multiplying’ them, as Moore put it, or duplicating them without having to have them printed.57

Moore’s outlines were extensive (examples survive in his papers), but they did not provide the connected narrative offered by full lecture notes. Sets of lecture notes circulated among the students, handed on as favours or in return for cash. In 1923 a former student, now an articled clerk and hence barred from other employment, got permission to earn an income outside office hours by typing up and selling her own lecture notes, updated with help from current students.58 Duplicated outlines gradually became a standard study aid, for which the law school began to charge students in 1927.59

Bailey was unable to mount a full tutorial program, but he and Paton provided discussion classes for small groups of honours students. The students would be given a topic to prepare, and then, when they arrived for the class, they would be given a task:

56 Edward Jenks, Outline of a Suggested Course of Reading on the Public Law of Victoria (Melbourne: Edgerton and Moore, 1889).
57 Dean’s Report, 1907, RC, 1907/11; Moore to Registrar, 23 May 1919, RC, 1919/196; Moore to Registrar, 25 November 1919, RC, 1919/151; Appointment of Miss E. May, RC, 1924/305.
59 LFM, 27 October 1927, 109.
perhaps to be given ten minutes to write down five points on the subject we were discussing; perhaps to state in a single sentence what was decided in a great case they’d been set to prepare, and thereafter each would read what he’d got and no quarter was either given or taken, and I would submit myself to the same discipline as they had and read for them what I had put down, and they would then take me apart and assign me sometimes very low marks indeed for my performance.60

When the tutorial program expanded in the 1940s, most effort was directed towards the technical training in drafting and conveyancing promoted by the Law Institute. Small groups of students went to solicitors’ offices for weekly tutorials.61 The dean claimed the system as a significant innovation, and it continued after World War II, a handy defence against criticisms that the law school taught theory and no practice.

Town and gown: location

The law lectures were defined not only by content but by location and style. They maintained at least an element of formality. When students took off their coats in class on a hot day, Moore told them to put them back on: ‘Gentlemen, I must trouble you to resume your clothing!’62 The high tone must have been difficult to sustain when students in the larger classes tried to perch on the window-ledge and even the mantelpiece in the overcrowded room.63

The lectures were initially delivered on three days a week at 6 pm, and attendance was a prerequisite for sitting the exam. For those who worked in the city, the two-kilometre journey to the university could be a trial. Almost as soon as lectures began, students asked for them to be moved to ‘some more central

60 Interview with Sir Kenneth Bailey, 1971–72, NLA, 1:1/10–11.
61 Dean’s Report, 1941, RC, 1941/212, 15–16.
63 ‘Questions of the Hour,’ Alma Mater 1, no. 9 (1896): 10.
location’. The council refused, but it did suggest that the lectures be held at an earlier time in winter.64

Classes remained at the university, with the exception of some held in the chambers of one barrister–lecturer because of his bad health. But in 1880 the opening of a new court complex in the city provided another potential venue, and when twenty-four Property students petitioned the council in 1884 asking for all evening lectures to be delivered at the law courts, they found a more receptive audience. With Hearn’s backing, the council decided that most lectures would be delivered at the courts for the remainder of the term, that they would be held only between 4.15 and 6.15 pm, and that the rolls would be ‘regularly called and kept’. The results of the experiment were favourable enough for the faculty to recommend that lectures should continue in the city, and the council agreed.65

The move highlighted the divisions between part-time and full-time students, certificate and degree students, and would-be barristers and solicitors. For the minority who were full-time students, moving to the city weakened university spirit: five students sent a counter-petition, protesting against the move to the city and invoking ‘the unity of the University’. In the 1890s the student union echoed their complaint, lamenting the ‘disastrous effect on the social life of the students’ caused by holding lectures outside the university.66 On the other hand, the city venue suited the part-time lecturers, who consistently supported it in faculty meetings.

The council was caught in the middle of a battle of petitions for and against city lectures. When one group of students complained about the lack of space, chairs and air, the council’s response was predictable: ‘The Students to be informed that the lectures are held at the Law Courts for their convenience – if the accommodation provided there is inadequate it will be provided at the

64 CM, 12 March 1857; CM, 15 May 1857.
65 Dobson to Registrar, 6 October 1875, RC, 1875/21; Dobson to Registrar, 21 March 1876, 19 June 1876 and 26 August 1876, RC, 1876/26; CM, 5 May 1884, 48; Hearn to Council, 31 March 1885, RC, 1885/25.
66 CM, 9 April 1884, 35; Elkington and Hansford to Council, 5 March 1894, RC, 1894/21.
University’. Some classes moved first one way, then the other: International Law headed into the city in 1888, at the students’ request, but another petition asked for Jurisprudence to move in the opposite direction when Hearn’s successor was appointed, and the council agreed. Both subjects returned to the university under the new dean, Edward Jenks.67

The courts’ growing need for space squeezed the law classes into even less suitable accommodation. In 1898 the university lost the use of the room in the library building where lectures had been held, and had to move upstairs, to the ‘small and ill-ventilated’ rooms in the dome where juries slept during long trials.68 In 1913 the dean reported that the dome rooms were ‘filled to their utmost capacity & a good deal beyond the limits of comfort’, but the influx of students after World War I created even worse problems.69 ‘You are aware of the unsatisfactory character of the accommodation we have had at the Law Courts’, he wrote to the registrar, ‘but as we were there by courtesy we could not grumble’.70

The law school took other spaces in the court complex when it could, but the solutions were always temporary. In 1919 the university paid for the refurbishment of two rooms that had become available, but conditions there were little better. Students crowded into and around the new lecture theatre (which doubled as the Licensing Court during the day), some reduced to hearing what they could from the room next door. The dean did not find conditions quite so bad when he went to have a look for himself, but the building’s days were numbered.71 Federal government plans for a new building, to be used by the High Court, required the demolition of the rooms used for the law lectures, and the opening of the arts and education building (later Old Arts)

67 CM, 6 May 1889, 284; Davis and others to Registrar, April 1889, RC, 1889/26; CM, 14 May 1888, 80, and 16 July 1888, 143; Robertson and others to Council, 4 May 1888, RC, 1888/27.
68 Harrison Moore to Attorney-General, 7 November 1919, RC, 1924/304. See also ‘Clippings from the Courts,’ Alma Mater 3, no. 1 (1898): 24.
69 Dean’s Report, 1913, RC, 1913/72.
70 Estimates re Numbers of Students and Needs of Various Departments: Law, RC, 1919/369.
71 Harrison Moore to Attorney-General, 7 November 1919, RC, 1924/304; Foster to Registrar, 31 July 1924, RC, 1924/304; Registrar to Foster, 12 August 1924, RC, 1924/304.
provided more lecture space on the campus. Construction of the new courts began in 1926, and the law lectures returned to the university, where they settled permanently.

For the forty years during which they were held largely at the law courts, the location of the law lectures linked the course to the profession even more strongly than did the preponderance of barristers among the lecturers. Once they completed their arts subjects, the degree students spent most of their class time at the courts; articled clerks spent an even higher proportion of their time as students away from the university. It was the court building, not the campus, that formed the backdrop for one of the few surviving group photographs of the law students, in 1915. By coincidence, the move back to the university prefigured Bailey and Paton’s renewed emphasis on the academic, rather than the vocational, side of the law course.

**Conclusion**

The Melbourne Law School’s local monopoly in legal training relieved it of the competitive pressures that motivated much pedagogical innovation in the United States. From the early 1900s, when Harrison Moore took an active interest in American law schools, successive professors compared Melbourne teaching methods not only with individualised teaching at Oxford and Cambridge (known to Moore, Bailey and Paton from personal experience) but also with the case method and its American alternatives. But the local conditions of university education made this study merely theoretical, apart from isolated experiments. The university lacked the funding, the library resources and the published casebooks necessary for anything more than brief trials of classroom innovations, and the reservations of Moore and Bailey after their visits to the United States made them cautious observers rather than evangelists for the case method. At the same time, the profession’s interest in the law school’s work focused on its curriculum rather than its pedagogy, removing another potential impetus for change. The transmission of knowledge
through the expository lecture remained at the heart of the law school’s teaching until the growth of legal academia after World War II began a phase of more durable pedagogical experimentation.
SCHOLARS AND AUTHORS

Writing and research

Richard Sewell’s inaugural lecture of 1857 was a manifesto for a course of study, not for a scholarly institution whose staff would write as well as teach, but authorship and postgraduate study gradually emerged as key components of the law school’s work. Sewell’s scholarly authorship had ended by the time he came to Melbourne, and his immediate successors in the law school derived their authority from their professional status as barristers rather than their published works. The most prolific author among them was Henry Chapman, although his involvement in politics and then his reappointment as a judge stemmed the flow of journalism and pamphleteering that characterised his earlier career.

A number of the law school’s part-time lecturers nevertheless made names for themselves in the legal community with practitioners’ manuals, often in the form of annotated acts of parliament. These drew on their authors’ experience as barristers rather than academics, and they were addressed to a readership of practising lawyers (although some also became prescribed texts at the university). Their main purpose was as aids to legal practice, a strand of publishing by law school staff that remained significant through the twentieth century. Thomas à Beckett led the way in 1867 with notes on that distinctively Australian departure from English land law, the Torrens system of title by registration. The topic became a staple for annotated statutes and other texts by later lecturers. Other topics for such books included mining law, insolvency and
married women’s property, joined in the early decades of the twentieth century by texts on hire-purchase, estate agents, transport regulation, securities, company law and the sale of land.¹

The earliest of these titles appeared under the imprints of some of the many small printing and publishing firms that supplied the Melbourne book market in the nineteenth century; John Atkins’s annotated Mining Statute was printed at his own expense. Specialist law publishing developed largely through the work of Charles Maxwell, a member of the publishing family whose English business continues today as Sweet & Maxwell. Starting in 1868, his firm gradually took a dominant position in the market for local legal titles, producing the Australian Law Times, the New South Wales Law Reports, annotated statutes and other texts. After Maxwell’s death in 1889, his Melbourne and Sydney businesses continued under separate ownership until, in 1903, they merged under the name adopted by the Sydney branch two years earlier, the Law Book Company.² It was this firm that published all of the legal texts written by the law school’s authors from 1901 to 1940.

In 1939 Arthur Dean, barrister and independent lecturer, satirised the uncritical exposition of doctrine by his colleagues under the ‘sublime


² Castles, Annotated Bibliography, xxv–xxvi.
patronage’ of the law school. Most true of the independent lecturers, the
criticism indirectly highlighted the two tracks on which much publishing by
law-school staff ran. Part-time staff occasionally explored the margins and
context of law, but legal doctrine was their home territory, and explanation
rather than critique was their favoured mode. Only a few addressed different
readerships, with more diffuse purposes. A small but significant example was
John Gregory’s pamphlet on the Torrens system, written for the Brisbane
meeting of the Australasian Association for the Advancement of Science in
1895, where he addressed the Economic Science section alongside lawyers
Robert Garran, Jethro Brown, John Quick and Henry Higgins. In speaking of
law to non-lawyers, Gregory’s paper served civic purposes of the law school
beyond professional training, and its tiny niche in the advancement of science
offered legal study a bridgehead to ways of knowing that the university valued
more highly than mere professional skill. It is also one of the few surviving
traces of travel to other parts of Australia by the nineteenth-century staff as part
of their work.

The deans and professors based their reputations not on expertise in legal
practice but on their standing as scholars, and they addressed their publications
to an audience extending beyond lawyers and judges to students, teachers and
the reading public. They came gradually to claim that what they were doing
constituted research, and that the domain of that research was the social
sciences. Although legal authors did not engage in the kind of discovery that
became the hallmark of research in the physical sciences, they ranged beyond
the analytic science of principles propounded by Langdell, and their work could
rank in the academy as both a contribution to the understanding of society and a
key to the techniques employed in the legal system. These wider purposes and
audiences protected the law school, within the university, against the

4 Australasian Association for the Advancement of Science, *Report of the Sixth Meeting of the
Australasian Association for the Advancement of Science* (Sydney: The Association, 1896), 674–83.
characterisation as a mere trade school that Bailey and Paton resisted so strongly in their dispute with the Law Institute.

**Hearn**

The teacher who first claimed attention to his work at the university outside the field of legal practice was one for whom legal doctrine was only a small part of wider and more captivating vistas: William Hearn. Hearn produced four major books, all of which attracted attention in Britain and America. The quality of his text on political economy, *Plutology*, was praised by the English economists William Jevons, Alfred Marshall and Francis Edgeworth.⁵ *The Government of England*, Hearn’s book of constitutional law and history, was acknowledged as an influence in Albert Venn Dicey’s classic *Introduction to the Study of the Law of the Constitution*.⁶ *The Aryan Household*, perhaps best described as a work of historical sociology, was reviewed ‘with considerable respect’ in England and America, in the words of Australian historian John La Nauze.⁷ Random testimony to Hearn’s reach beyond the academy is found in an English book of Christian temperance advice to young women, *Workers at Home*, which opened with some history drawn from *The Aryan Household*:

> A certain Dr. Hearn, Dean of the Faculty of Law in the University of Melbourne (whatever that may be), has written and published a book containing much interesting information respecting our very earliest forefathers.⁸

---


Although historians have debated Hearn’s originality as an economist, the profile of his books among readers far from his new home was remarkable and a source of pride for the university.⁹

The flowing, lucid style of *The Government of England* showed the gift for exposition that Hearn displayed in his lectures, but without the characteristic asides and diversions that took up much of his time in class. It was a book of synthesis rather than original research, and its typical sources were standard authorities on English constitutional history, Edward Coke, Edmund Burke, Thomas Macaulay, Henry Hallam and Thomas Erskine May. For Hearn, an Irishman who migrated from part of the empire to another, English history and tradition were the foundations of the state. He declared his ‘unbounded belief in English institutions and in English men’ and articulated a conceptual framework for *laissez-faire* policies, competition, free trade and small government.¹⁰ ‘Our mission’, he said in a public lecture, ‘is to spread the British language, the British religion, the British laws, the British institutions, over this remote portion of the globe’.¹¹

Hearn aimed to vindicate the freedom guaranteed by ‘the unwritten traditions of our political systems’ against ‘the ingenious inventors of paper constitutions’, the rationalist constitution-writers of the past century.¹² Their artificial devices were no rival for the organic strength of the common law: ‘while the mechanical contrivances of political inventors have crumbled away in the hands of the projectors, the goodly tree of British freedom, selecting from the kindly soil and assimilating its fit nutriment, still increases its stately bulk, and still extends its unequalled development.’¹³

---


¹¹ ibid., 609.

¹² ibid., 1.

¹³ ibid., 2.
The Government of England was first published in 1867, at a time of intense debate about democracy in Victoria (where protracted deadlocks between the two houses of parliament tested the limits of legality under the colony’s constitution) and in Britain (where the parliamentary franchise was being extended for the first time in thirty-five years). Hearn disclaimed any intention of discussing potential alterations of the constitution, but the vibrancy with which he delineated its historical origins and current virtues was itself an implied argument against change. ‘Whatever may be its merits’, he wrote, ‘democracy has no place in English law’.14

This was not merely a comment on the English reliance on convention rather than law to limit the powers of the monarch. Like Hearn’s discussion of the House of Commons, it pointed his readers towards an unexpressed conclusion that democracy founded on a mass electorate was incompatible with the foundations on which the English constitution rested. The system of government he described was representative but not democratic, answerable to parliament and giving each rank and locality its place but rejecting mere weight of numbers. Its adaptive equilibrium of common law, parliament and convention secured the advances of freedom in English constitutional history that Hearn revered.

Harrison Moore’s early lectures on constitutional and legal history used Hearn’s book as a text, providing a rare example of critical comment by one Melbourne dean on the work of another. Hearn’s reverence for what he saw as the unchanging English constitution—still the very constitution, he said, under which Edward the Confessor ruled—prompted a cautionary note of dissent from Moore in his lectures. It was ‘impossible to draw such conclusions as the language of Hearn infers’, he warned his students.15 Fresh from London, Moore also detected a colonial point of view in the prominence Hearn gave to the

14 ibid., 17.
crown, a point of view influenced, Moore thought, by the great importance of governors in the colonies when compared with the crown in Britain.\textsuperscript{16}

Hearn’s largest project united his scholarly work with his membership of parliament. In it he displayed a reforming zeal whose coexistence with constitutional conservatism was a characteristic he shared with his countryman Edmund Burke. Slow growth was all very well for the institutions of government, but for the law Hearn proposed a sweeping revision, one that would recast its sources in codified form and leave its substance supposedly unaltered. His preparation for the task was gradual. He helped attorney-general George Higinbotham with the first consolidation of Victoria’s legislation in 1864–65, drawing together scattered enactments and amendments into accessible, re-enacted statutes, and he produced a consolidated local government bill in 1879. From that year he conceived and led a mammoth project for the codification of Victorian law. Working on a daunting scale, he planned to reduce not only the colony’s statute-law, but English and local case-law as well, to a clarified and restated form, in a General Code enacted by parliament and embodying ‘the whole General Substantive Law of Victoria’.\textsuperscript{17}

In his book \textit{The Theory of Legal Duties and Rights}, published by the government printer as an adjunct to the codification project, Hearn laid down the duty-based jurisprudence on which the idiosyncratic classification scheme of the great code was based. The code left intact any aspects of the common law that it inadvertently omitted, but Hearn envisaged that successive revisions would gradually absorb unenacted law in its entirety. The ultimate objective was breathtaking, especially when it came from an author who venerated the history of English law: ‘Thus the old Common Law will meet its natural and its honourable end’.\textsuperscript{18}

\textsuperscript{16} W. H. Moore, Notes on Constitutional and Legal History, 1895, Library, Supreme Court of Victoria, vol. 1, 19.

\textsuperscript{17} William Hearn, \textit{The Theory of Legal Duties and Rights: An Introduction to Analytical Jurisprudence} (Melbourne: John Ferres, 1883), 379.

\textsuperscript{18} ibid., 382.
Visionary in the Australian context, Hearn’s idea had precedents not only in French and German codes, but in codification movements in India, Britain and the United States.\(^{19}\) Although he mustered a team of eminent lawyers, and with them produced draft codes that were considered by the Victorian parliament, the degree of comprehensiveness and accuracy needed to restate the law was almost impossible to achieve, and it was doubly difficult to reassure uncertain politicians that the code was sufficiently reliable. Legal opinion was also divided. An anonymous reviewer (probably the editor, Frederick Pollock) commented on the code in the *Law Quarterly Review*:

> the heresy of mixing up Public with Private Law is adopted and worked out in the most systematic fashion. It is well meant, and there is much honest work in it; but we hope the legislature of Victoria will think more than once or twice before enacting this elaborately revolutionary substitute for the Common Law.\(^{20}\)

Despite declining health, Hearn pressed on with the work, but the code remained unenacted when he died, at the age of sixty-two, in 1888. Without his personal drive the project soon ended, replaced by a second consolidation of Victoria’s statutes.

**Jenks**

Hearn’s books, written for a wide readership using secondary sources, fell more naturally into mid-century conceptions of learned authorship than later notions of legal research. It was his successor as dean, Edward Jenks, who began (albeit after his brief stay in Melbourne) to use the now-familiar pairing of ‘teaching and research’ as a description of the work of academic lawyers.\(^{21}\) Perhaps his experience as a student in Germany and his background in the study of history

---

\(^{19}\) See generally Alan Clayton, ‘The Hearn Code: Its Place in the Nineteenth Century Codification Movement,’ LLB research project, University of Melbourne, 1987, on which my account draws.


(at Cambridge he studied under John Seeley and won the Thirlwall prize for original historical research) disposed him towards this quasi-scientific description of the process of legal writing.

Whatever words he used for it, Jenks had much personal work of discovery to do for his major publication while in Melbourne, *The Government of Victoria*, conceived as a student text on Victorian constitutional law and history. The experience of having to teach himself part of the subject in the course of preparing his lectures brought home the difficulties of his students. ‘I could find no text-book which would give me even an outline idea of the subject’, he wrote. ‘The only authorities prescribed by the Faculty were the Acts of Parliament for the time being in force in Victoria on various branches of it.’

His response was to write the book himself, gleaning his material from original sources in the Melbourne Public Library.

The work was notable not only as the first textbook of Australian constitutional law, but also for uniting law with history and politics. The history courses taught by Hearn and his successor John Elkington were dominated by England and Rome; in his constitutional history lectures, Jenks became the university’s first teacher of Australian history. He used this material in his book. Its first half was historical, covering both the changing form of government and some of the general history of Victoria. Unusually for the time, it focused not only on parliament, the governor and the few central organs established by Victoria’s skeletal Constitution Act, but on police, public officials, local government and the courts. Although some of what he wrote was inevitably compromised by lack of time and the difficulties of his sources, the book was a model of a broad conception of constitutional law.

Jenks maintained his interest in Australian history. His surprising offer to premier Henry Parkes to continue the official history of New South Wales begun by George Barton came to nothing, but Jenks later published a history of

---


23 Selleck, ‘Empires and Empiricism,’ 17.
Australia and New Zealand that went through three editions. Nor was Victoria’s constitution the only topic of his research: while in Melbourne he wrote a monograph on the history of the doctrine of consideration, which won Cambridge’s Yorke prize for an essay on a legal subject.24

The twentieth century

Jenks’s essay on consideration was the last monograph on a topic of private law published by a professor at the law school for more than fifty years. Journal articles (notably by George Paton) broke this drought, but for the most part jurisprudence and public law—particularly constitutional law and international law—preoccupied Jenks’s successors until after World War II. This pattern was partly due to accidents of personal interest, but there were also other influences at work. At the University of Sydney, too, jurisprudence and public law dominated the work of the five professors who held chairs of law down to the end of World War II; the only private-law specialist among them was James Williams, dean and professor from 1942 to 1946.

One factor in this turning away from private law was the division of labour in both law schools between professors and independent lecturers. The barristers who filled the part-time lectureships tended to teach the subjects they encountered most often in practice, where private law predominated. The professors taught the other, more theoretical subjects, notably constitutional law, jurisprudence and international law, which practitioners rarely encountered. For the same reasons, graduates who thought of making a career in these areas faced little chance of concentrating on such a specialty in private practice. Academic posts or legal appointments in government (both very small in number) offered some of the few opportunities.

Another possibility concerns the role of constitutional law in this period of Australian history. Moore and his successor Kenneth Bailey made their academic careers at a time when the working-out of the balance of power between the Commonwealth and the states, and the testing of central sections of the *Australian Constitution*, generated some of the most complex and consequential questions in Australian law. For much of this period, Australian federal constitutional law was novel, it was constantly in the news and in the higher courts, and its study led to influential connections with government (a source of significant outside work for both Moore and Bailey). It was an attractive area for academic lawyers looking for subjects to make their own.

When Moore arrived in Melbourne in 1893 at the age of twenty-five, still to find a field in which to specialise, Federation was the dominating issue of Australian politics and law. The study of its legal consequences became the focus of much of his work and the foundation of his reputation. A series of smaller publications on the topic led to Moore’s *Constitution of the Commonwealth of Australia* (1902). Self-described as a textbook, it became much more than a student text, particularly in its greatly expanded second edition (1910). Moore’s book, Quick and Garran’s *Annotated Constitution of the Australian Commonwealth* and Inglis Clark’s *Studies in Australian Constitutional Law* were, in George Winterton’s words, the ‘three celebrated works on the new Constitution’ that greeted the inauguration of the Commonwealth.  

Moore’s book was a probing study of the emerging body of legal doctrine that surrounded the new polity. It was more reserved and conventional in style than Jenks’s text, serving more to elucidate than to break new ground. To a later chief justice of the High Court, Sir Anthony Mason, *The Constitution of the Commonwealth* seemed to be ‘a work written under restraint. One sensed that the author had much more to say but decided to hold back.’ In this restrained

---

voice, Moore spoke authoritatively to his students and discussed the legal questions of the new nation in terms to which the judges, too, could relate. As they entered the profession, Melbourne graduates—chief justice Sir Owen Dixon prominent among them—kept Moore’s name alive, and still today the High Court occasionally cites his book and some of his other publications. They are used both as a record of Federation-era thinking and as a source of ideas and authority in current controversies, outliving even Hearn’s works as texts of more than merely historical interest.27

From the late 1920s onwards, the volume and diversity of publications by law school staff grew markedly. In 1908 the university began publishing a list of ‘Contributions to Literature and Science’ as an appendix to the annual report in its Calendar. Law featured there only occasionally in Moore’s time, although lax reporting evidently accounted for a few omissions. The creation of new outlets for scholarly articles produced two bursts of publication, one in 1927–28 (when the independent lecturers published six articles in the new Australian Law Journal) and another in 1935–36, when lecturers and professors loyally submitted articles to the law school’s new journal, Res Judicatae. True to form, the independent lecturers specialised in technical, doctrinal topics of private law (P. D. Phillips’ articles on international relations and public administration were an exception, reflecting his interests as the lecturer in Modern Political Institutions).

The law school’s authors made no innovations in methodology; there was nothing to compare to the boldness in legal theory of Julius Stone, professor of jurisprudence and international law at the University of Sydney from 1942. Nevertheless, Bailey and Paton brought their urbane empiricism to a remarkable range of topics. Bailey produced no major monograph but wrote a stream of articles and chapters on jurisprudence, constitutional law, international relations, Australian history and the British Commonwealth. Paton’s eclectic

publications ranged from his special subject, jurisprudence, across a wide area of legal theory and private law. The topics of his journal articles included property, defamation, privacy, forensic medicine, negligence and (apparently as an outgrowth of his work on property) the law of bees. Sawyer’s regular journal articles also addressed a grab-bag of private-law subjects, few hinting at the specialisation in constitutional law that he was to develop after World War II.


Even wartime conditions did not stop this work altogether. ‘Research is almost rendered impossible by present conditions in the Faculty’, Paton lamented in 1944, yet he managed to complete his landmark textbook on jurisprudence, which appeared two years later. Its second edition earned Paton the quinquennial Swiney prize for jurisprudence. If it has not proved to be ‘one of the outstanding legal works of the century’, in the words of Harold Hanbury’s early review, it undoubtedly fulfilled, through its four editions, another reviewer’s prediction of being ‘to many students the text-book of jurisprudence’.29

The value Bailey and Paton attached to research was reflected in a Law Students’ Society initiative, the creation of a new vehicle for the publication of staff and student writing. The first issue of *Res Judicatae*, as the new publication was entitled, appeared in September 1935. Its self-description as ‘the Magazine of the Law Students’ Society of Victoria’ disguised its true character as a scholarly journal. ‘The initiative came from the Society itself’, Bailey reported to the council, but *Res Judicatae* also embraced the law school’s goals.30 Its first issue declared:

28 Dean’s Report, 1944, RC, 1944/181, 17.
It is the proud aim of the Law Faculty at Melbourne to foster the idea of law not merely as an examination study or as the equipment for eking out a doubtful living, but as a social science to be continually moulded and re-made as the needs of Society changed.31

The editors were elected by the Law Students’ Society, but the academic staff also participated, through an editorial advisory board of which both Bailey and Paton were members.

There were no other Australian university law journals at the time, and few Australian law journals of any description. The nineteenth-century magazines of the Sydney and Melbourne law students and articled clerks had not survived, and the short life of the Commonwealth Law Review ended in 1909. Articles and comments accompanied law-reporting periodicals published in New South Wales and Queensland from 1884.32 In a similar style, the Australian Jurist (1870–75) and the Australian Law Times (1879–1927) accompanied Victorian law reports with short articles; the latter was supplanted in 1927 by the Australian Law Journal, and the journal of the Law Institute of Victoria appeared in the same year. In this small field, Res Judicatae rapidly distinguished itself as a forum for serious research, drawing, as its founders intended, on the law school’s staff, graduates and students. Bailey highlighted the project in his annual report to the council for 1939:

The journal is entirely scientific in character and has won for itself an honourable place in the periodical literature of the law in Australia. Recent articles have been cited lately in the Commonwealth Law Reports and in the Parliament of Victoria. The journal has this year been linked to the teaching work of the School by the inclusion of notes on recent leading cases, written by students after discussion in the honours tutorial groups.33

---

32 Castles, Annotated Bibliography, xxii.
33 Dean’s Report, 1939, RC, 1939/188, 2.
The immediate post-war years brought signs of law’s acceptance as a research discipline. In 1949 the new Australian National University created a research professorship of law, in its Research School of Social Sciences. Research-only positions remained rare and usually temporary exceptions to the usual combination with teaching, but the appointment was a confirmation of the status of law as a field of academic research and not just professional expertise. The post went to Geoffrey Sawer, who left Melbourne for the new university in the national capital.34

The library

One boundary of the work of the law school’s authors—less obvious now than their fields of interest or conceptual approaches—was the scope of printed sources available to them in Melbourne. Those supplied by the university library were rudimentary, and its recurring funding difficulties handicapped its efforts to provide adequately for students and staff alike. Until 1951 the university had no separate law library, and law books were housed with the rest of its collection. Classics, mathematics, history, political economy, science and works of general reference predominated in the 1856 catalogue of books shipped to the university library by its London bookseller.35 It listed just five legal texts. Three were commentaries on constitutional, civil and comparative public law by George Bowyer, one of the readers appointed by the Inns of Court in their mid-century attempt to revive law teaching. The others were treatises on evidence by William Best and John Phillimore.

Jenks found on his arrival in 1889 that the library still had no complete set of English statutes, although this was soon remedied at his suggestion. By 1914 the librarian rated the university’s holdings of English law reports as ‘fairly complete’, but (showing their lesser importance as sources of authority in the

34 Foster and Varghese, The Making of the Australian National University, 100.
law school’s teaching) acknowledged that this could not be said of Australian reports. As late as 1947, the only Australian state reports in the library came from Victoria and New South Wales. As for monographs, in 1914 the librarian could only say, with tactful understatement, that ‘the Theory of Law is not fully represented’.36

The money provided for law books was meagre. In 1919 the law collection received an annual allotment of £15 to £20 from the library vote, ‘plus about £22 for subscriptions to Law Reports and Periodicals’.37 Funding for other disciplines was equally bad or even worse; the library spent an average of £20 a year on history books and periodicals in 1911–13. This sum would pay for only the most basic acquisitions. It was considerably less than the fee that each student paid the university to do the four-year law course, which was over £77 in 1919. Special grants helped from time to time (they paid for a set of Halsbury’s Laws of England in 1913 and two French legal journals in 1919), but Moore was reduced to buying books on his own account and lending them to his students.38

Donations and exchanges supplemented the law collection. Moore gave over a hundred volumes to the library around the time of his retirement, presumably including those he had bought to fill gaps in its stocks. In 1929 the Law Institute of Victoria decided to give the library the journals it received in exchange for the Law Institute Journal, and from 1935 Res Judicatae brought in copies of other periodicals: ‘the magazine as a medium of exchange, secures for the library a harvest of periodicals from overseas’, Paton recorded.39 The library also received £350 raised by the legal profession to honour Moore on his

36 Jenks to Acting Registrar, 26 March 1890, RC, 1890/39, part 2; University Library Committee Minutes, UMA, 4 October 1892, 26A; Dean’s Report, 1947, RC, 1947/264, 19; E. H. Bromby, ‘The University Library,’ University Review 1, no. 3 (1915): 65.
38 University Library Committee Minutes, UMA, 7 May 1914, 156C; University of Melbourne, Calendar, 1919, 95, 98; Dean’s Report, 1913, RC, 1913/72; Ulrich to Registrar, 10 September 1919, RC, 1919/152; ‘University’s Fight against Money Shortage’, Herald, 28 October 1926, 6.
39 Dr Caitlin Stone, personal communication; Dean’s Report, 1946, RC, 1946/288, 18.
retirement, the income from which was to be used to buy new editions of textbooks.40

The library’s one complete set of law reports and statutes made work increasingly difficult for the growing number of students. The faculty asked the council for a grant for the purchase of additional law reports in 1918, but the request went unfulfilled. The council authorised the purchase of a second set of English law reports in 1923, and duplicate sets of the Victorian Law Reports and the Commonwealth Law Reports finally arrived in 1930, along with extra copies of other law reports.41

Not only were essential references in short supply. The library was open for only a few hours each day—from 10 am to 1 pm and from 2 pm to 5 pm during the week in 1898, with another two hours on Saturday morning—and students were not allowed to use ink or to borrow books without their lecturers’ permission. Opening hours were extended slightly the following year, and the installation of gas lighting allowed the library to open in the evenings in 1905, but Moore’s mild observation in 1913 must have understated many irritations and frustrations: ‘much inconvenience arises from the number of people desiring to consult the same works about the same time’.42

As the library’s accommodation in an extension to the university quadrangle became more and more crowded, finding space for new books was almost as difficult as finding money to buy them. In 1920 the faculty repeated its request for an essential duplicate set of law reports but noted that there was nowhere to put them: ‘it is impossible’, it said, ‘to provide accommodation for such additional Reports and Statutes and facilities for their use in the present Library’.43 Moore told the council in 1919:

41 LFM, 6 December 1918, 421; Dean’s Report, 1930, RC, 1930/179, 2.
42 University of Melbourne Library Committee Minutes, UMA, 25 November 1898, 45, and 26 September 1905, 82; Dean’s Report, 1913, RC, 1913/72.
43 LFM, 8 April 1920, 455.
The matter of Library accommodation is of peculiar concern to this School, seeing that a Library to the Law students should be something like the Laboratory to the Science students. At present the conditions discourage this most important part of the work. It is useless to provide books unless they can be placed where they are immediately accessible.44

‘The admission of new books has become an almost insuperable difficulty’, the university librarian said in the same year.45

When the council at last authorised the purchase of the duplicate set of English law reports, there was no room for them on the shelves, as John Behan, the acting dean, pointed out. He added his voice to a long lament, echoed in other faculties:

the Library is sadly lacking in multitidinous standard authorities which it would be quite impossible for a student to procure for himself. These facts seem to point to the conclusion that it will be impracticable to carry on the work of the Law School in the manner in which one would, for the credit of the University, hope to see it carried on, unless accommodation for a separate Law Library can be provided at the University, and a considerable sum of money allocated to the purchase of books.46

Lecturers were painfully aware that the situation made nonsense of their exhortations to students to read cases and statutes for themselves and not to rely on notes and textbooks alone. Moore told the council:

While we are insisting that students must carry on their reading in a Library and must learn there to use their materials, and while notes are compiled for the purpose of facilitating and compelling this mode of study, the actual conditions in the University itself make it impracticable for the students as a whole to carry out this advice. Men grow tired of

45 Ulrich to Barrett, 26 April 1919, RC, 1919/369.
going to the Library and finding themselves unable to get books or space for reading them.47

The only immediate prospect of improvement came from the chance to expand the university library, after the opening of the new arts and education building (later Old Arts) in 1924 freed up space in the quadrangle. When the north side of the quadrangle was gutted to make the new general library, Moore hoped to turn its old home, upstairs in the northern extension, into a separate law library, but the council allocated the space to the new Faculty of Commerce, saying it was unable to meet the increased cost of supervision that a separate law library would entail. Moore himself had urged the creation of the new faculty, but now it blocked his hopes for better accommodation for the law collection.48 For his successors, advocacy for a better law library was subsumed by other campaigns: for a new building for the whole law school, and for a new university library.

Often frustrated by conditions in the university library, students turned elsewhere. Melbourne’s Public Library developed a large collection of legal materials, and some students took their work there in search of more space and to find texts that were difficult or impossible to obtain on the campus. The Public Library’s 1880 catalogue listed more than 2000 books under the general heading of law; its total holdings already exceeded 100 000 volumes, a figure the university library did not reach until 1937. Like Jenks when he was working on The Government of Victoria, Moore too could be spotted there.49

Despite its strength in nineteenth-century materials, until 1924 even the Public Library lacked the law reports of the other states of Australia.50

Difficulty of communication was not the only reason for Victorian lawyers to

47 Dean’s Report, 1921–22, RC, 1922/115.
48 LFM, 24 June 1927, 104; CM, 25 July 1927, 262; University of Melbourne, Calendar, 1927, 949; Summary of the Reasons urged by Professor Moore, RC, 1919/369.
work in frequent ignorance of the laws of the other states of their own country. Until the Public Library acquired its sets, the only state law reports to which students had ready access were those of Victoria and New South Wales, held at the university. The courts of other states were a legal blank.

Other collections filled some of these gaps. Students working as articled clerks could use the libraries of their employers and the Law Institute. Hearn had his own library of two or three thousand volumes (containing much of the source material for his books). It was dispersed after his death, and only scattered titles made their way into the university library. The Victorian parliamentary library had a valuable collection of law books, but it was off-limits to the public in all but exceptional cases. Its generous funding, compared with the starvation diets on which public libraries often subsisted, was an anomaly that only MPs (Hearn among them) could benefit from, until even the parliamentary library slid into decline in the 1930s.

Melbourne’s best law library was that of the Supreme Court, which held over 10,000 volumes by 1875 and continued to expand. It far outstripped the university library’s law collection, which still numbered only about 8000 volumes in 1947. It was at the Supreme Court that Jenks found the sources for his prize-winning monograph on the history of the doctrine of consideration. But the court’s collection was for the use of the judges and the profession, not the public. Even Jenks, who was never admitted to practise as a lawyer in Victoria, needed the permission of chief justice George Higinbotham in order to use the library, repaying the debt with a generous tribute in the dedication of his book. Despite the students’ proximity, attending lectures in segregated parts of the library building from 1884 to 1919, they had no right even to apply for access until after World War II (although articled clerks may earlier have been

---

able to use the library on behalf of their employers). The comparative richness of its collection and the space and quiet of its domed reading room made it a sanctuary the older judges had no intention of opening to potentially troublesome undergraduates. Many must have glimpsed it only from outside, until they too entered the profession, paying the admission fees that sustained the library’s growth.

**Postgraduate study**

The law school offered higher degrees from its early years, but these were initially not based on postgraduate research. The degree of Master of Laws was awarded from 1881. Imitating the automatic conferral of masters’ degrees at Oxford, it was at first given to any LLB graduate who applied for it, five years after their admission to practise. But this privilege was limited to graduates who received their bachelors’ degrees before the LLM first became available, and from 1881 onwards entitlement to the master’s degree was confined to LLB honours graduates, to whom it was given after a shorter delay, without further examination. It effectively remained an undergraduate honours degree until the separate LLB (Hons) was created in 1950.

Postgraduate study in law, and particularly postgraduate research, were of very slow growth. Until the creation of the PhD in 1946, the law school’s sole research degree was the doctorate of laws, the LLD, but it performed several functions. The university’s earliest doctors of laws received their degrees under a statute that entitled the graduates of recognised universities to proceed *ad eundem gradum* in the University of Melbourne—that is, to receive the same degree in Melbourne without examination. In this way Richard Sewell received the university’s first LLD on the strength of his Oxford doctorate. Some, like Sewell, applied for *ad eundem* degrees as a further honour, or in order to

---

56 *Collins v Supreme Court Library Committee* [1953] VLR 161, 164–6; Students’ Register, Supreme Court Library.

57 *University Act 1881* (Vic.), s. 14; University of Melbourne, *Calendar*, 1882–83, 142.
become Melbourne graduates and so (for holders of masters’ degrees and
doctorates) members of the university senate. Sometimes an ad eundem
doctorate served the purpose of an honorary degree, as in the case of Prince
Alfred, second son of Queen Victoria, who qualified for an LLD on his visit to
Melbourne in 1868 thanks to his honorary Edinburgh doctorate. Other ad
eundem LLDs went to William Hearn and Redmond Barry, both of whom
graduated on the strength of their Trinity College, Dublin, LLDs (an honorary
one, in Barry’s case).  

Giving doctorates to Melbourne’s few royal visitors was easy, since their
honorary British degrees always paved the way for ad eundem graduations.
Honouring other guests could be more difficult. They might be entitled only to
bachelors’ degrees, which would be faint praise for the famous people the
university hoped to ally itself to as graduates. When in 1913 the university
abolished ad eundem awards, it formalised and extended the practice of
ceremonial graduations for eminent visitors by allowing the council to award
any Melbourne degree by special grace. Now any graduate of another university
could receive a Melbourne doctorate, in effect (although not yet in name) an
honorary degree. Down to 1946, recipients of honorary LLDs included five
royal visitors, the war heroes Sir William Birdwood and Sir John Monash,
prime ministers Stanley Bruce and Robert Menzies, wartime ally Hsu Mo (the
Republic of China’s minister to Australia), and one of the law school’s own
luminaries, Harrison Moore.  

The award of a degree by special grace required recommendations by
absolute majorities of both the professorial board and the relevant faculty
(Moore punctiliously absented himself when the faculty endorsed his own
LLD). When the university awarded six LLDs to eminent visitors in the course
of 1937, the law faculty gave its expected approval, but some of its members
evidently began to resent being taken for granted. The following year, a
proposal to award an honorary doctorate of laws to prime minister Joseph

---

58 LLD Graduates, HCP, box 1, UM 420/9; University of Melbourne, Calendar, 1939, 74.
59 University of Melbourne, Calendar, 1913, 47, and 1948, lxvi–lxvii.
Lyons prompted not the usual immediate endorsement but a statement of principle from the faculty, regretting that past recipients had been offered degrees without its prior approval. Bailey, presiding over the meeting, seems to have feared outright rejection: once the scale of the opposition became clear, he deferred further debate until the arrival of Sir John Latham, chief justice of the High Court, deputy chancellor, member of faculty and once Lyons’ close colleague as deputy prime minister. With his weight behind it, the proposal went through with one anonymous abstention.60

In displaying one of the big guns at the faculty’s disposal, the incident indirectly demonstrated the strength of the law school’s ties to the highest echelon of the profession, but the university would not let such a threat to its rituals pass unanswered. A new statute promptly removed the need for the faculty’s approval when honorary LLDs were conferred on people ‘distinguished by eminent public service’.61 Other faculties retained their vetos over honorary doctorates, which were now to be awarded only to people of distinguished eminence in the relevant discipline. The Cambridge terminology of ‘special grace’ disappeared, replaced by degrees awarded *honoris causa*.

The wider eligibility for the LLD (helped perhaps by the lack of a requirement for faculty approval) made it the council’s honorary degree of choice, awarded in ever greater numbers in the 1940s and 1950s. Of the 50 degrees awarded by special grace from 1914 to 1938, only 16 were LLDs. But from 1939 until 1960, under the new statute, 60 of the university’s 86 honorary graduates received LLDs. No one was now sent away with a mere honorary MA, as eminent lawyers Robert Garran and Albert Piddington were in 1915 (Garran was promoted to LLD on a later visit).62

Conferred in such numbers, the honorary LLD had become more important to the university than the doctorate earned by examination. It had a troubled

---

60 LFM, 24 March 1938, 324.
62 ibid., 74–5; Honoris Causa Degrees, University of Melbourne, http://www.unimelb.edu.au/unisec/calendar/honcausa/hon.html (this list includes both honorary and *ad eundem* awards from 1914 to 1937).
history. When the LLD first became available in 1865, it did not require specialised study on a narrow topic, as later research doctorates did. Instead the university attempted to assess knowledge of law in general, much as the Supreme Court did in the sweeping subjects of its admission exams. Doctoral candidates had to pass written exams on six prescribed topics: the law of England; the statute law of Victoria; the practice of Victorian courts; Roman law; international law; and jurisprudence. In Jenks’s time, and perhaps before, the faculty supplied details of subjects and books, but, beyond this, candidates were on their own.

The first to qualify for the degree by examination was John Madden, the future Victorian chief justice and university chancellor, in 1869, but he succeeded only on his second attempt. None of the nineteenth-century graduates went on to university careers, and several worked in fields other than law. Early graduates included Richard Hodgson, who had won the prize for the top student as an undergraduate and later became a leading psychical researcher in England and the United States, Thomas Bride, the future librarian of Melbourne’s Public Library, and two secondary-school principals, John Wilson (Presbyterian Ladies’ College) and George Crowther (Brighton Grammar). For all, and particularly the schoolmasters, the title would have been valuable, even if they made little use of their legal knowledge.

The university reduced the list of prescribed subjects to three (Roman law, jurisprudence, and the principles of legislation) in 1873, but the exam was still a daunting one sixteen years later, when one of the candidates (Harry Wollaston, who was emerging as a leading public servant in the Victorian government and later served as one of the first Commonwealth departmental heads) asked the council to make the assessment less stringent. Jenks, newly arrived as dean, was receptive to the idea of restructuring the degree, although not to the call for easier assessment. On his initiative, the faculty proposed to establish the degree as a recognition of advanced legal ‘research and ability’, in line with its status in England and, particularly, in Europe. New regulations abolished the written

---

63 University of Melbourne, Calendar, 1865–66, 48.
exams in 1889, replacing them with submission of a thesis followed by an oral exam.\[64\]

Wollaston went on to earn his doctorate under the old regulations, but the first candidate to apply under the new rules, barrister Wolfe Fink, failed badly. When he submitted his thesis on the topic of ‘reform in the law of evidence and procedure as regards criminal trials’ (after less than eight months’ work), the examiners thought it so weak that they cancelled his oral exam.\[65\] Some succeeded in spite of all difficulty: E. Mayhew Brissenden, another barrister, became the first graduate under the new regulations after submitting ‘a comparative study of the laws of the Teutonic races in Western Europe as those laws existed between the 5th and the 10th centuries, and of their relation to the Roman law’.\[66\]

Henry Higgins, High Court judge and president of the Commonwealth Court of Conciliation and Arbitration, earned a doctorate for his published work on the operation of the court, but it was an arts degree, a doctorate of letters, not an LLD. The arts faculty, evidently thinking that Higgins’s application to them might belong elsewhere, asked the law faculty whether the topic would be suitable for an LLD thesis, but the answer was that his articles would not count as a contribution to legal knowledge, as the regulations now required. Higgins’s description of the court’s work probably relied too much on his own experience to rate as research in the minds of the faculty members, despite the fact that it had appeared in the Harvard Law Review. Conciliation and arbitration, too, was a novel topic, ‘a new province for law and order’, as Higgins called it.\[67\] Until after World War II, industrial law was taught only in the commerce faculty, not

---

\[64\] LFM, 18 July 1889, 97, and 5 September 1889, 102; CM, 8 July 1889, 345–6.

\[65\] LFM, 31 July 1890, 113, 17 March 1891, 123, and 5 May 1891, 125.

\[66\] LFM, 16 July 1891, 131, and 5 February 1892, 136.

in the law school. Higgins’s success was unique: his was the only LittD awarded for a thesis on a legal topic down to 1946.

Success in the LLD depended entirely on the students’ own resources. They had no supervision and no official guidance apart from the faculty’s approval of their proposed topics. The examiners had a standard in mind, but it was not always articulated to candidates. The faculty resolved in Moore’s time:

it is not desirable that the LL.D. degree should be regarded as the completion of ordinary academic studies or that it should be associated with attainments of a distinctly professional kind … it should be conferred only in respect of work marked by conspicuous ability as well as by care and research, and containing contributions of value to the study of Law.  

Only some were able to translate these generalities into an acceptable thesis. One took twenty-nine years to submit; another failed three times. Even some of the most gifted got no further than proposing a topic. Geoffrey Sawer (who probed deeply into the law of property before finding his metier in constitutional law) planned an LLD thesis on the Roman-derived concepts of *occupatio, accessio, commixtio, confusio* and *specificatio*. He assured Bailey that these topics were ‘of daily occurrence in legal practice’; Bailey kept his doubts to himself, on paper at least, but commended ‘the courage with which you are facing a problem of this very obscure kind’. The thesis never appeared, probably overwhelmed by Sawer’s punishing workload in the late 1930s.

The problems of the LLD reached a peak between 1939 and 1952, when wartime conditions and the difficulties of students labouring in the dark produced a damning series of failures and delays. Of the eight theses submitted, only two passed, but even this failure rate was only part of the degree’s shortcomings. The examiners took four years to report on one thesis, only to

---

68 LFM, 16 July 1915, 393.
69 Sawer to Bailey, 24 October 1936, and Bailey to Sawer, 7 November 1936, FLC, box 1, file ‘Doctoral Theses.’
request revisions; after the candidate spent another eight years rewriting, he failed. Percy Joske and Louis Voumard, both independent lecturers in the faculty and authors of the standard texts on their subjects (the law of marriage and divorce for Joske, and the sale of land for Voumard), both failed, Voumard after waiting six years during the war for a result. Striking a familiar note in LLD reports, the examiners criticised their theses for deficiencies in original discussion or criticism, while recognising their value as textbooks.70

In these conditions, it was unsurprising that few candidates undertook the daunting task: ‘it is almost unheard of for post-graduate work to be done at the University in ordinary circumstances’, Paton wrote in 1937, and scholarships for overseas study were rare.71 The eventual solution for the dysfunctional LLD came from a university-wide initiative, the creation of the PhD program in 1946, although doctoral candidates in law remained few in number through the 1950s and 1960s. Melbourne’s first PhD in law was not awarded until 1956 (to Kenneth Sutton, later dean of law at both the University of Queensland and James Cook University). A small number of experts seeking a special mark of distinction continued to apply for the unsupervised LLD, but both the number of candidates and the proportion who failed declined, until only rare scholars, with a strong assurance of success, sought the degree.

---

70 FLC, box 1, file ‘Doctoral Theses.’
71 University Survey: Faculty of Law, 1937, RC, 1938/748, 27.
CONCLUSION

The end of World War II brought changes to the law school quite unlike the settled continuity that marked Harrison Moore’s long incumbency through World War I and into the 1920s. The influx of students whose studies had been delayed by war greatly increased the university’s enrolments, as it had in 1919, but this was only the beginning of wider transformations. At Melbourne as in other Australian law schools, the ideas now implemented had long been discussed: more full-time teaching staff, more active participation by students inside and outside class, and a growing emphasis on research and international links. The key to their realisation (and to their earlier frustration) was financial.

In the 1940s and 1950s the increasing involvement of the federal government in higher education facilitated many of these innovations. The framers of the Commonwealth Reconstruction Training Scheme, which paid the fees of students returning from the armed forces and provided many with a living allowance, had more in mind than merely adjustment to peace-time conditions: they intended the scheme to become permanent, as it did (on a less generous scale) with the introduction of Commonwealth scholarships in 1951.\(^1\) The temporary senior lectureship created in the law school by the training scheme in 1945 also became permanent, when the university took over its funding. Another senior lecturer was appointed in 1949, and still more in the 1950s.

The small but growing group of full-time teachers of law, affiliated to their universities ahead of the legal profession, had common aims and interests

beyond those of their part-time predecessors. Paton took the initiative in the formation of the Australian Universities Law Schools Association, whose thirteen founding members, from six universities, convened in 1946. Membership grew as the post-war transformation of law teaching into a full-time occupation took hold. At the University of Sydney law school, the two professors who constituted the whole of the full-time teaching staff in 1940 were joined by four sub-professorial staff by 1950; ten years later, there were sixteen full-time academics (four professors and twelve others). By 1975 the combined Australasian membership of the association had swelled to 278.²

AULSA conferences gathered the scattered inhabitants of Australian (and later New Zealand) legal academia, sharing ideas and occasionally trying, with mixed success, to take a position on issues of common interest. Agreement from the members to set it as a prescribed text assured the publication of Australia’s first case book, Geoffrey Sawer’s collection of cases on the constitution. When it appeared in 1948, its title-page recorded that it was published at the association’s request.³

For these legal academics, research was an endeavour they shared with their colleagues in other disciplines. The university’s first research report, published in its calendar in 1949, included brief notes of ongoing work by law school staff. Tiny by comparison with the voluminous descriptions of research in the sciences, the entry was nevertheless a claim to participation in a task of growing significance both in the university’s idea of itself and in its appraisal by those who provided its funding. The law school appointed its first research assistant in 1948, to help Paton and others with the Australian volume of a survey of British Commonwealth laws and constitutions.⁴

⁴ University of Melbourne, Calendar, 1949, 543; Dean’s Report, 1948, RC, 1948/262, 17; G. W. Paton, ed., The Commonwealth of Australia: The Development of its Laws and Constitution,
The law school entered this new formative period with most of its determining features intact. Of these, the most influential remained the one that had protected its inauguration and ensured its survival: its privileged status under the rules for entry to the profession. Its students’ initial exemption from the Supreme Court’s law exams, and the later compelling of all local entrants to the profession to enrol in its courses, entrenched the university’s role in the training of Victorian lawyers. In its broadest outline, Victorian legal education had a faint and (for a common-law jurisdiction) incongruous Germanic flavour: intending lawyers faced compulsory training in a state university under a government-accredited curriculum before being admitted by the Supreme Court rather than professional organisations.

But this distinctive framework resulted from colonial experimentation rather than a grand design for the relationship of law and state, and its operation was very different from the training of the government-dominated German legal profession. It grew from personal influence, the nature of the University of Melbourne, and the structure of the Victorian legal profession. William Stawell and, most of all, Redmond Barry supplied the personal influence. Their presence on both the university council and the Supreme Court bench allowed the university to benefit from an instant adjustment of the admission rules to promote its new law course. This cross-membership was itself a function of the nature of the university as a state institution whose governing council comprised local worthies and, in its early decades, none of its staff. Its composition infuriated Edward Jenks, who, as professor and dean, looked to English models of academic self-government, but it could sometimes supply the university with friends who were well-placed to aid its efforts.

The framework of the Victorian legal profession favoured the university in ways not seen in the United States or Britain. The establishment of the law course predated the formation of the first association of Victorian lawyers, the

---


Law Institute of Victoria, in 1859. The profession had no corporate body to regulate the admission of new practitioners (although informal meetings and individual lobbying exerted influence from time to time), and the judges retained the control over entry that they had exercised ever since the admission of former convicts had brought about a crisis of legal policy during the era of transportation to New South Wales.

The judges exercised this control by prescribing substantive tests of legal and general knowledge for locally trained students. These tests harmonised with British advocacy of higher educational standards for lawyers, but this was far from their only purpose. The judges first laid them down during the gold rush, when public criticism of poor professional standards seemed to confirm the fears of the chief justice that the fabric of society was under threat. Victoria had no period of lowered formal requirements for entry to the profession, as in the United States, and no period of practitioner control of admission, as in Ontario or England. The judges maintained a commitment to educational tests for new practitioners, and if teaching was to be provided to help them gain the required knowledge, the university was the obvious, indeed only, candidate to provide it.

The delegation of all examining powers to the university in 1905 was a critical step. In the previous decade, new entrants had had to pass the exams of both the university and the court. It would have been possible, as in the United States, for separate admission exams to become an entrenched feature of legal training. Instead the judges handed what was left of their examining function to the university. Its ability to both teach and examine had outstripped that of the court’s trouble-prone board of examiners. Because of the university’s monopoly position in law teaching, the state lacked the diverse range of law schools found in many jurisdictions of the United States, where a single bar exam could impose a unified standard and operate as a more effective restriction on new entrants. Lower mobility of students between Australian states had a similar effect. The law school was never a national one, and diploma privilege bound each Australian law school to the entrance requirements of its own state,
reinforcing in law the general preference of undergraduates to study close to home.

The abolition of the court’s admission exams left the Melbourne course with the certification role that was performed in the United States by bar exams and in England by the exams of professional organisations. The university always aimed to retain this status. It had no local competitors whose equal access to diploma privilege might drain it of students, as in Michigan. It was willing to submit its curriculum to the scrutiny of the Council of Legal Education, whose prescriptions (most detailed in the case of the articled clerks’ course) did no violence to the professors’ conceptions of legal education. Providing the state’s only law course brought the university welcome students who could be taught relatively cheaply—so cheaply that Paton (like later law deans) complained at what he saw as the profit the university made from the law students’ fees, a profit that was redirected to other faculties.6

When an attack on the university’s role came, it originated in the profession. In Victoria as in Ontario, the growing influence of full-time teachers over the content of law courses provoked criticism of their preference for theoretical over practical training. But in neither case did the protests halt growing domination by academics whose profession was the study and teaching of law, not its practice. At Melbourne, the university maintained its monopoly over examination for entry to the profession by compromise, neutralising emergent challenges to its curriculum in the 1930s and 1940s.

These challenges, and the need to maintain the law school’s recognition under the admission rules, had a far greater influence over its curriculum than did the need to attract students. For its first ninety years and beyond, the law school was never short of enrolments and never had to seek students or promote itself to recruit them. The short-lived flight from the LLB course to the articled clerks’ course in the 1890s affected only the division between the two courses, not overall enrolments. In the twentieth century, deans struggled with the problem of too many students, not too few.

6 Dean’s Report, 1944, RC, 1944/181, 16.
A state university with a relatively small private endowment and a grant revenue captive to fickle government support could provide only basic funding. The stasis in the law school’s staffing from 1874 to 1930 was a sign of this frugality. Other departments, and other law schools, were in a similar situation—the pattern recurred often in Australian higher education—but Melbourne trailed even the University of Sydney’s law school. There the step-up given by the university’s Challis bequest and other endowments opened the way to slow increases in full-time staffing that outpaced Melbourne through the middle decades of the twentieth century. The Sydney law school also gained new buildings in 1938 and 1969, while similar hopes at Melbourne led to nothing except a larger share of the space in the university quadrangle.

The division of teaching labour between full-time academics and practising lawyers was a hallmark of the period, at Melbourne as at other Australian law schools. The practitioners, a disproportionate number of future judges among them, linked the law school and its course to the profession but qualified its claims to full academic status within the university. The practitioner–teachers’ publications, while claimed for the law school in its reports to the university, were often part of a professional discourse different from the scholarship that the full-time teachers intended to foster, as the practitioners’ embarrassing failures in the LLD attest.

Their typical subject-matter, too, was different. The practitioners usually wrote about private-law doctrine, the core of their work in the courts. But most of Australia’s early law deans and their few professorial colleagues claimed distinctive expertise not in private law but in the exposition of public law, history and legal theory. The scholarship of Australia’s small group of academic lawyers had a distinct flavour of public law and jurisprudence, just as their curricula incorporated contextual and non-legal subjects alongside legal doctrine. Their focus contrasts with the Harvard model, which above all offered students mastery of the sprawling world of American private law.

Some significant questions remain for future researchers. The influence of the law school, its staff and its teaching on the profession is one of the most
obvious. How, for example, did Victorian lawyers compare with those in New South Wales, where university qualifications remained optional for new lawyers throughout this period? Anecdotal accounts have contrasted the two legal cultures, suggesting that Sydney lawyers were more litigious and inclined to literalism than their Melbourne counterparts, but these are no more than fragments on which future studies of the character and social role of the professions might build.\footnote{Michael Sexton, ‘Same Priests, Different Cult: The Lawyers,’ in The Sydney–Melbourne Book, ed. Jim Davidson (Sydney: Allen & Unwin, 1986), 91; Alex C. Castles, ‘Law Schools Old and New and their Impact on Australian Law,’ Australian Law Journal 64 (1990): 148.}

The classing of lawyers as a profession, and the values endorsed by their teachers and collective organisations, have sociological and cultural meanings that I have not explored. Legal training is an induction into occult language and ritual, one that suppresses reactions to the strangeness of law. Wesley Pue has traced connections between legal culture and Canadian colonialism, identifying a theme with obvious significance for Australia’s nineteenth-century history, particularly when compared with the United States.\footnote{W. Wesley Pue, ‘British Masculinities, Canadian Lawyers: Canadian Legal Education, 1900–1930,’ Law in Context 16, no. 1 (1999): 80.} Michael Burrage’s comparisons of broad structural patterns in the training of lawyers, doctors and engineers in England, France and the United States, and Bruce Kimball’s architectonic analysis of American professions, suggest lines of inquiry for Australia.\footnote{Michael Burrage, ‘From Practice to School-Based Professional Education: Patterns of Conflict and Accommodation in England, France and the United States,’ in The European and American University since 1800: Historical and Sociological Essays, ed. Sheldon Rothblatt and Björn Wittrock (Cambridge: Cambridge University Press, 1993), 142; Bruce A. Kimball, The ‘True Professional Ideal’ in America: A History (Cambridge, Mass.: Blackwell, 1992).}

The law school’s status as the educator of all locally trained practitioners until the 1960s guaranteed its enrolments but not an emotional bond with its former students. Its graduates sang no sentimental songs, attended few reunions and more often forgot than remembered the university in their wills. Even in their memoirs it generally makes only a fleeting appearance. The mandated trainer of the profession, its students brought to it by choice of career rather than choice of institution, the law school shared the prosaic utility implied by the University of Melbourne’s nickname, ‘the Shop’: a workplace, perhaps even a seller of degrees, and only sometimes the bounteous alma mater of more romantic ideals.
BIBLIOGRAPHY

Journals and newspapers

Age                      Alma Mater
Australian Jurist         Australian Law Times
Argus                     Farrago
Herald                    Law Institute Journal
Melbourne University Magazine Melbourne University Review
Quadrangle                Res Judicatae
Summons                   Undergrad
University Review         Victorian Law Times

The Calendar of the University of Melbourne is available in the university’s Digital Repository, at http://dtl.unimelb.edu.au.

Manuscripts

University of Melbourne Archives: Faculty of Law Correspondence 1932–77; Historical and Centenary Papers (UM 420); Faculty of Law Minutes 1873–1981 (UM 76); Registrar’s Correspondence (UM 312); Registrar’s Miscellaneous Correspondence (UM 447); Council Minutes (UM 174); Professorial Board Minutes (UM 410).

Law Students’ Society minute-books: Supreme Court Library (1893–1902); University of Melbourne Law Library (1939–78).


Law Institute of Victoria records (UMA).

Supreme Court professional admission files and Attorney-General’s Department correspondence (PROV).

Papers of Sir Kenneth Bailey (NLA), Sir David Derham (UMA), Sir John Latham (NLA), Law Institute of Victoria (UMA), William Hearn (UMA), Sir William Harrison Moore (UMA) and Harold Ford (MLS).

Oral history interviews
National Library of Australia: Sir Kenneth Bailey, Lady Yseult Bailey, Professor Geoffrey Sawer, Professor Jack Richardson, Professor Louis Waller.

Parliamentary papers


Books and articles


——. *Legal Fore-Words: A Lecture Introductory to the Session of 1890 Delivered Before the Law School of the University of Melbourne*. Melbourne: Ford & Son, 1890.


——. *Outline of a Suggested Course of Reading on the Public Law of Victoria*. Melbourne: Edgerton and Moore, 1889.


University of Cambridge, Faculty of Law. *750 Years of Law at Cambridge: A Brief History of the Faculty of Law, to Commemorate the Opening of the New Building*. Cambridge: Faculty of Law, University of Cambridge, 1996.


Author/s: WAUGH, JOHN

Title: Diploma privilege: legal education at the University of Melbourne 1857-1946

Date: 2009


Persistent Link: http://hdl.handle.net/11343/35199

File Description: Diploma privilege: legal education at the University of Melbourne 1857-1946

Terms and Conditions: Copyright in works deposited in Minerva Access is retained by the copyright owner. The work may not be altered without permission from the copyright owner. Readers may only download, print and save electronic copies of whole works for their own personal non-commercial use. Any use that exceeds these limits requires permission from the copyright owner. Attribution is essential when quoting or paraphrasing from these works.