

Teaching legal research subversively

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Abstract

This article presents a novel approach to teaching the compulsory law degree subject Legal Research. It considers that while legal research is traditionally a non-substantive subject that does not explain — let alone question or critique — the law, it can be taught in a way that encourages law students to think critically about legal institutions and the broader social context that gives rise to them. The article explores ways to pursue such legal instruction, with reference to methods used in a legal research subject taught in the Law and Justice Faculty of the University of New South Wales, Australia. It concludes that the discipline of legal research presents valuable opportunities for providing law students with a deeper social education in the law.

Keywords: teaching, legal research, critique, legal institutions

Introduction

Of all the law subjects capable of subverting the minds of unsuspecting law students, or at least opening these minds a little wider, who would ever think of legal research? Surely, few law academics would imagine that a legal research subject, with its lack of substantive legal content and its limited class time to invite critical thinking, could lead students to question their faith in mainstream legal institutions, doctrines, and traditions.

Indeed, legal research is commonly perceived simply as a subject that instructs students on where to find the law, as opposed to how to think about the law, and as a subject that is not generally informed by higher-level theory or

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politics.¹ Purportedly, in being short on interdisciplinary perspectives,² legal research is only as engaging as the teaching methods used to convey it, which, we are told, should be creative in order to hold students' attention.³ The subject is often regarded as bland even for teaching staff, who have been said to try their best to avoid it.⁴ Some commentators even recommend outsourcing the tuition of legal research to law librarians, whose knowledge is technical rather than oriented to methods of analysis and critique,⁵ and consider the use of permanent staff to teach the cognate Legal Writing as 'a great waste of their time and talent'.⁶

Those who do teach legal research sometimes feel they must 'make the most of a dry subject' by offering 'chocolate incentives' and advising students that taking the subject is like taking medicine that may not be as palatable as international law but has practical benefit.⁷ Some teachers design class exercises in the form of games such as *Who Wants to Be a Millionaire* and *Mission Made Possible*,⁸ and create animated library tours with acting and sound effects in the style of tours of Alcatraz.⁹ They reimagine the form of the subject to make it more stimulating but do not consider how they could alter the content to achieve the same end. This is because they see their role as providing a solid grounding, rather than delicately destabilising that which is

¹ Robert C Berring and Kathleen Vanden Heuvel, 'Teaching Advanced Legal Research: Philosophy and Context' (2009) 28(1–2) *Legal Reference Services Quarterly* 53, 54.

² See, e.g., Vincent Kazmierski, 'How Much "Law" in Legal Studies? Approaches to Teaching Legal Research and Doctrinal Analysis in a Legal Studies Program' (2014) 29(3) *Canadian Journal of Law and Society* 297, 299.

³ See, eg, Kelly Browne, 'Teaching Legal Research Can Be Fun!' (2003) 8(2) *AALL Spectrum Magazine* 28; Perry M Goldberg and Marci Rothman Goldberg, 'Putting Legal Research into Context: A Nontraditional Approach to Teaching Legal Research' (1994) 86(4) *Law Library Journal* 823; James B Levy, 'Escape to Alcatraz: What Self-Guided Museum Tours Can Show Us about Teaching Legal Research' (2001) 44(2) *New York Law School Law Review* 387; Jean Davis, Victoria Szymczak, Katherine Topulos and Stefanie Weigmann, 'Perspectives on Teaching Foreign and International Legal Research' (2001) 19(3–4) *Legal Reference Services Quarterly* 55, 66–67.

⁴ Herbert E Cihak, 'Teaching Legal Research: A Proactive Approach' (2001) 19(3–4) *Legal Reference Services Quarterly* 27, 28.

⁵ Joyce Manna Janto and Lucinda D Harrison-Cox, 'Teaching Legal Research: Past and Present' (1992) 84(2) *Law Library Journal* 281, 281.

⁶ Willard H Pedrick, 'Should Permanent Faculty Teach First-Year Legal Writing? A Debate' (1982) 32(3) *Journal of Legal Education* 413, 415. Cf Jan M Levine, 'Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching?' (1998–2000) 7 *Scribes Journal of Legal Writing* 51, 51, 59.

⁷ Thu Nguyen, 'Legal Research is Not So Dry' (2000) 1 *Uniken* 14, 14.

⁸ Davis et al (n 3) 66–67.

⁹ Levy (n 3) 403–405.

solid and thereby enhancing students' ability to identify flaws in socio-legal institutions.

Accordingly, legal research is not known for being on the same subversive plane as, say, the brand of human rights law interrogating Western concepts of freedom or the brand of international law confronting feeble policies of the United Nations. It is not regarded as raising issues as compelling as societal responsibility in criminal law, Indigenous dispossession in real property law, industrial disharmony in labour and corporate law, and unequal relations in contract law and equity. Supposedly, legal research is, at most, useful to the subversive cause in a passive rather than active way, by assisting scholars and practitioners from areas of law such as these to search for supporting sources.

This paper challenges the foregoing assumptions by showing a different side of legal research education that is being practised in the Law and Justice Faculty of the University of New South Wales (UNSW), Australia, in the undergraduate subject *Introducing Law and Justice (Research)*, referred to herein as *Legal Research*. Offered at the beginning of the law degree in the form of one-hour weekly tutorials, the subject teaches a standard legal research syllabus on locating, understanding, and documenting sources of law. But, through a critical frame, it also poses questions at various intervals in class and in the subject workbook that do not always have straightforward answers. This paper demonstrates how, when revealed, these answers, together with the ensuing discussion, give students a new perspective on the legal institutions that give the law its character; they pull the rug out from under legal certainty, setting a tone of critique for students' entire law degree.

The purpose of the subject, it should be noted, is not simply to encourage critique for critique's sake. On the contrary, it is to help students direct their inquisitive minds towards problematising legal institutions that do not deliver justice for people in a consistent or complete manner, and the elements of society on which such institutions are founded. These elements include distinctions in social class that continue to create differences in people's enjoyment of legal rights. They also include liberal paradigms which, for all their benefits, possess a formalistic nature that can serve to conceal and perpetuate such distinctions. In this way, the subject helps develop in students an instinct to recognise and inquire into some of the basic barriers of our legal system.

Subverting the Institution of Law School

A common entry point for discussion in legal research subjects is the idea that, as in many professions, research is integral to the legal profession, as it is, to some degree, a contingent fact of everyday life. In Legal Research at UNSW, this observation is used as a springboard to suggest to students that they would probably have already begun their legal research journey by researching the path to attending university and becoming a lawyer. Hence, some of the opening questions posed are: ‘What requirements are there to practise law in Australia?’ and ‘How does one become a solicitor or barrister?’

Students often answer that one first needs a qualification from a law school. We then challenge them by noting that neither Susan Kiefel, the current Chief Justice of the High Court of Australia and thus Australia’s most preeminent judge, nor Michael McHugh, a former Justice of this apex court, obtained a Bachelor of Laws or Juris Doctor from a law school. We inform students that still today the *Legal Profession Uniform Admission Rules 2015* of New South Wales (NSW) state that successful completion of an accredited tertiary education course is a prerequisite to practise law, ‘whether or not leading to a degree in law’.¹⁰ This exception is a hangover from when one’s main education in the law in Britain was not at an academic institution, but rather in the workplace of the practising legal profession, which contrasts with continental Europe’s longstanding location of legal education in universities.¹¹

Upon learning these facts, some students look bewildered as they wonder why they studied so diligently to obtain a high Australian Tertiary Admission Rank score to qualify for law school. When informed that the substitute for a law degree — the Diploma in Law, awarded by the NSW Legal Profession Admission Board — is significantly cheaper and requires less time to complete, they further ponder the point of the pricey piece of paper they will gain at the end of their university studies.

We refer them to US celebrity Kim Kardashian. The tabloid press states that she has ‘dropped a surprise bombshell in her interview: She’s studying to

¹⁰ *Legal Profession Uniform Admission Rules 2015* (NSW) s 5(1).

¹¹ Joseph Dainow, ‘The Civil Law and the Common Law: Some Points of Comparison’ (1967) 15(3) *American Journal of Comparative Law* 419, 429.

become a lawyer, and she has been doing so in secret for the last year.’¹² It continues, ‘No, Kim is not in law school. But she is doing a four-year apprenticeship at a law firm in San Francisco, which in California, is a legal way for someone to become a lawyer and take the bar without attending law school.’¹³

Intrigued by the alternative pathways that also exist in the United States of America and the irony of a privileged person traversing one such route, the students are now at a peak point of puzzlement over the institution of law school and university in general. They query whether they are at university to get a well-rounded legal education with critical perspectives, academic rigour, and access to bountiful scholarly resources — supplemented by other degrees, extra-curricular activities, a stint of student activism, and a vibrant campus culture, which provide an edifying experience — or whether they are there merely to become a lawyer on good pay. In weighing the value of education against that of material gain, they question their morality and class perspective. They experience their intrinsic motivation to learn for the sake of learning, and extrinsic motivation to gain a prestigious degree that their family and friends will admire, compete with the weight of financial pressures in their lives. Ideally, they also reassure themselves that they are, at the end of the day, in the right place, if not the wrong point in history where the cost of a comprehensive education can create indebtedness and render it exclusive.

Subverting the Institution of Legal Terminology

Another institution the Legal Research subject seeks to subvert is that of legal terminology. We inform students that the law library they will be expected to frequent, like most Australian university libraries and the National Library of Australia, uses Library of Congress subject headings in its catalogue. This means that the subject headings are American, which can be counter-intuitive to people researching Australian law.

We point out that competition law, for example, is listed in the library catalogue as ‘antitrust law’, which is a throwback to an age when monopolies commonly took the business form of a trust in the United States. The goods and services

¹² Alyssa Bailey, ‘Kim Kardashian is Studying to Become a Lawyer and Plans to Take the Bar in 2022’, *Elle* (10 April 2019) <<https://www.elle.com/culture/celebrities/a27101447/kim-kardashian-studying-to-become-lawyer/>>.

¹³ *Ibid.*

tax appears as ‘value-added tax’, which is the term adopted in US debates on whether to introduce such a levy at the federal level. Individually owned flats or units and strata title come up as ‘condominiums’, which Americans often abbreviate to ‘condos’. And compulsory acquisition or resumption of land is shown as ‘eminent domain’.

When mentioning eminent domain, it is apt, we figure, to ask students whether they have seen the iconic Australian film *The Castle*, made in 1997 before many of them were born. Usually a few hands are raised, and the more cultivated students proceed to tell us that it is a comedy about a family’s legal struggle against a government acquisition of its modest home located in the path of a proposed airport expansion. We then explain to students that the authority under which this acquisition is performed is what Americans call eminent domain and show them that the Australian titles on land resumption in the library catalogue contain the American expression as the subject heading.

Thus, students learn that the legal terminology they were expecting to master must be studied alongside that of a different English dialect used in another legal system. Not only should students memorise a raft of British cases inherited from our colonial past, but they must also learn to recognise the law in American terms, if they have not already done so from the US legal programs that pervade their television sets and devices. In this way, students are gaining a sense of the humble place of Australian law in the wider global context. They are seeing through their legal research that with the spread of influence of great powers across the world comes not only imperialist interventions and fast-food chains, under the banner of liberal democracy, but also the most basic legal ramifications — the Americanisation of our legal language — with evidence reposed in a simple library catalogue.

Subverting the System of Government

In addition to subverting the institutions of law school and legal terminology, the Legal Research subject attempts to dismantle assumptions about the institution of government. Students often begin their law degree with a particularly optimistic view of the form of governance and level of democracy in Australia and other Western nations. They see a pluralistic governing structure that entertains diverse perspectives, and a separation of powers that ensures restraints on the power of lawmakers. Sometimes this vision reflects an uncritical acceptance of the messages of liberal democracy found in the

media, popular culture, and certainly their law textbooks. While not wishing to dampen students' spirit of justice, the teachers in the subject make a point of finding opportunities to balance evidence of the representativeness of government and the independence of its component parts with a dose of realism.

One means of approaching this discussion is through the topic of sources of law. Students are provided with a list of legal sources they are asked to categorise in terms of primary, secondary, and hybrid sources. One source that students tend to be uncertain about classifying is a Bill of Parliament, with some claiming that it is a primary source of law because it comes from lawmakers themselves, and others suggesting that it lacks the authoritativeness of such a source, in not yet having officially become law and perhaps never becoming law. So, we delve into the topic of Bills and encourage students to start thinking about why some Bills are so short-lived and what this might say about the operation of government.

We show students various Bills currently before federal and state Parliaments and ask which ones will be passed. For instance, will the Ending Native Forest Logging Bill 2023 (Cth) or the Liability for Climate Change Damage (Make the Polluters Pay) Bill 2020 (Cth), sponsored by Australian Greens members, be made into an Act of Parliament? Will the Abortion Law Reform (Sex Selection Prohibition) Amendment Bill 2021 (NSW) or the Anti-Discrimination Amendment (Sex Workers) Bill 2020 (NSW) succeed? What about the COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022 (Cth) or the Australian Education Legislation Amendment (Prohibiting the Indoctrination of Children) Bill 2020 (Cth), proposed by the populist One Nation party?

We explain that although many Bills are introduced into Parliament, only rarely do those not sponsored by the executive government get passed. Between 1901 and 2017 in Australia, a mere 30 private members' Bills were voted in, including Bills put forward by backbenchers of the incumbent political parties.¹⁴ While Parliament regularly considers Bills that come from various positions on the political spectrum, this consideration does not tend to lead to change that would represent a material expression of pluralism and the separation of the executive and legislature. It consequently has the appearance

¹⁴ DR Elder and PE Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 584.

of a well-oiled operation that Parliaments invest in largely to communicate the importance of open debate in the political sphere.

Granted, the experience in Australia with private members' Bills is not necessarily replicated across Western countries. Yet, if not at the point of Bills, celebrated liberal principles can come undone at other junctures. There are limits to the representativeness of government, despite democratic processes in place. For example, it may be said that representativeness is undermined where the same interests of the major corporations — such as the banks and mining companies that underpin the economy — are represented regardless of which political party in the two-party system is in power. Representativeness is also obscured to the extent that the class composition of Parliament does not tend to reflect that of society, with ordinary workers under-represented.

One may be ready in class to draw on examples in which the ostensible openness of the branches of government to the will of the people may lead to, in quoting Gerald Rosenberg, a 'hollow hope'.¹⁵ It is tempting to point out the peculiar logic in which democratic mechanisms can consolidate people's faith in the system even while that system fails them. For instance, when former US President George Bush encountered backlash in addressing the Australian Parliament shortly after sanctioning the invasion of Iraq, he tendentiously responded, 'I love free speech'.¹⁶ In this way, he leveraged the dissent to bolster support for a system that extols the virtues of free speech, while deflecting attention from his ideological position that led him to declare war, which might otherwise have called that system into question. Although one may endorse the enlightened role that democratic doctrines have played since ancient times, the practice of emphasising formal arrangements of power over substantive policies can serve to reinforce unsavoury policies by default.

While a legal research subject is not the place to expose all the traps of liberalism, it can be a useful venue to sow seeds of critique that prompt further explication by students in their study of government in constitutional and

¹⁵ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 2008).

¹⁶ Margo Kingston, 'Parliament Greets Bush: A Day in the Life of Our Faltering Democracy', *The Sydney Morning Herald* (online at 24 October 2003) <<https://www.smh.com.au/opinion/parliament-greets-bush-a-day-in-the-life-of-our-faltering-democracy-20031024-gdhnd2.html>>.

administrative law subjects, even if it was not originally intended to be a stepping-stone to these subjects in this way.

Subverting the Rule of Law and Human Rights

Other liberal doctrines raised in the Legal Research subject are the rule of law and human rights. The rule of law includes the notion that people are entitled to know what the law is at the time that the law applies.¹⁷ This entitlement is also a human right in relation to penal offences, having been enshrined in the *Universal Declaration of Human Rights* as well as in the *International Covenant on Civil and Political Rights* to which Australia is a party.¹⁸ It is compromised when governments enact laws retrospectively, which has been done in Australia for some time, principally in the areas of criminal law, taxation law, migration law, social security law, and Native Title law,¹⁹ with laws in some cases predated by numerous years.²⁰

The subject introduces the concept of retroactivity to unwary law students in their education on locating statutes and determining from the notes field when the legislation came into force. We direct students to the *Civil Liability Act 2002* (NSW) — which they will need to have an intimate knowledge of when they study the law of torts — and ask, first, when the Act was assented to and, second, when it became operational. Students tell us that the answer to the first question is 18 June 2002, but that the answer to the second question is in fact 20 March 2002. That is, they discover that the Act became effective before approval of the instrument's entry into law. Similarly, students find that while former Prime Minister Paul Keating (as Treasurer) announced on 19 September 1985 a capital gains tax on profit from the sale of assets, effective immediately, the implementing legislation, the *Income Tax Assessment Amendment (Capital Gains) Act 1986* (Cth), was not passed and assented to until 24 June 1986.

We explain to perplexed students that such *ex post facto* legislative practice has become relatively accepted in our legal system over the decades, just as

¹⁷ See, eg, Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 235, 237.

¹⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 11(2); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 15(1).

¹⁹ See Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (ALRC Report 129, 2015) ch 13.

²⁰ Denise Mulder, 'Legislation by Leaflet' (2001) 72(3) *Charter* 30, 30.

retrospectivity is a cornerstone of the common law that has existed for centuries. Indeed, the principle of the non-retroactivity of the law is undermined each time a judge makes rather than interprets the law, which inevitably involves subjecting the defendant to a law enunciated following the commission of the act in question.²¹ Nor are civil law systems immune where judges are authorised to fill occasional gaps in the law and where the government answers to the European Union, whose laws sometimes have retrospective effect in member States.²² Thus, notwithstanding that apologists for non-retrospectivity may argue, for instance, that the application of retroactivity at the post-World War II Nuremberg trials was a rare deviation from a relatively stable norm of liberal democracy, legal researchers can unearth many exceptions to this norm.

We suggest to students that although the rule of law and human rights have profoundly influenced the socio-legal landscape, in facilitating the development of a liberalised society, they remain to some extent at the level of ideals and aspirational targets. In a high-stakes market economy there are significant economic incentives for the legal certainty and predictability that liberal doctrines impart, such as attracting and retaining investors who favour regulatory stability. Yet every now and then, economic factors trigger a departure from the doctrines.

Systemic problems around people and entities not paying taxes, for instance, have led to the retrospective commencement of tax avoidance and tax evasion legislation in Australia,²³ and even the passage of amending legislation before the legislation being amended has been passed,²⁴ as well as administrative action in anticipation of the statute.²⁵ This is not to say that retrospective legislation has escaped objection from certain parliamentarians who, while supportive of wealthy people contributing their fair share of tax, see that any instance of legislative retrospectivity ‘leads one down a track which is fraught

²¹ James Popple, ‘The Right to Protection from Retroactive Criminal Law’ (1989) 13(4) *Criminal Law Journal* 251, 252, 260–261; G Nash, ‘Legislation by Ministerial Fiat and the Dangers of Retrospectivity’ (1978) 6 *Australian Business Law Review* 226, 229.

²² Dainow (n 11) 433; Leigh Hancher, Kim Talus and Moritz Wüstenberg, ‘Retrospective Application of Legal Rules in the European Union: Recent Practice in the Energy Sector’ (2021) 39(1) *Journal of Energy and Natural Resources Law* 65.

²³ Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013 (Cth); Taxation (Unpaid Company Tax) Assessment Act 1982 (Cth).

²⁴ Mulder (n 20) 30.

²⁵ Nash (n 21) 236.

with disaster ... the track that Adolf Hitler went down' and who implore, therefore, that the end should not justify the means.²⁶

Students are asked for their opinion on whether legal retroactivity is in the interests not only of human rights, but the rights of everyday people. These rights can diverge where there is competition between individual rights (such as the right of propertied persons to enjoy their property without the intervention of retrospective tax laws) and collective rights (such as the right of the greater population to public services and welfare and infrastructure financed by tax laws which, even if retrospective, can help property owners fulfil their civic responsibilities). Woozley argues that 'back-dating tax relief' is 'wholly to the advantage of those affected by it' and therefore an acceptable form of retrospectivity.²⁷ But this observation pertains only to how individuals are directly affected, rather than how society is indirectly affected, and only to how individuals benefit materially through accumulating wealth rather than spiritually through sharing it. One should also bear in mind that not all tax is progressive and that government spending from tax revenue is not always benevolent.

As a prelude to their studies in legal ethics and professional responsibility, students might be asked to consider whether lawyers ought to have a duty to detect changes to the law in advance. That is, should lawyers assiduously follow pronouncements by ministers (and even by government agencies such as the Australian Taxation Office)²⁸ on the impending introduction of retrospective legislation, and monitor cases that are before the courts in the event that these cases set precedent, which can affect their clients' legal position if and when the potential law crystallises into actual law?

Conceivably, if lawyers neither conduct legal research in this way nor act upon it, they could be subjected to legal action in negligence. Alternatively, practitioners could be sued for acting in accordance with the announcement or the imminent judicial decision. The latter scenario may arise where the announced legislation is not passed or where a Bill on the matter was never

²⁶ Senator Don Chipp (inaugural leader of the Australian Democrats party), cited in Pople (n 21) 260.

²⁷ AD Woozley, 'What is Wrong with Retrospective Law?' (1968) 18(70) *The Philosophical Quarterly* 40, 53. See also Andrew Palmer and Charles Sampford, 'Retrospective Legislation in Australia: Looking Back at the 1980s' (1994) 22(2) *Federal Law Review* 217, 275–276.

²⁸ See Mulder (n 20) 30.

even put before Parliament, as in circumstances where the announcement was intended by the executive only as an ‘amorphous’ or ‘inchoate threat’,²⁹ or where the contemporaneous case was not decided as expected.

Hence, in another subversive twist, the subject exposes an inherent vulnerability of the legal profession around expectations of what one might call ‘crystal ball legal research’. We mention the case of *NRMA Ltd v Morgan*, in which it was held at first instance that the legal advice of, *inter alios*, Mr Dyson Heydon QC, who would go on to become a Judge of the High Court of Australia, should have taken into account the landmark High Court case of *Gambotto v WCP Limited* that had not yet been concluded.³⁰ The point, which led to an award of over \$32 million to the plaintiff, was overruled by the NSW Court of Appeal in *Heydon v NRMA Ltd*, which effectively rescued lawyers from a situation outside their control. The appellate court did not expect lawyers to be aware of present appeals concerning legal principles that relate to their active cases, or obtain court transcripts and foresee how such appeals might be decided (particularly where the decision was not reasonably foreseeable), or delay the provision of advice until the conclusion of the appeals.³¹ The High Court subsequently declined to entertain a final appeal on the matter,³² contrary to the prediction of one commentator who flippantly expressed fear of being found negligent if proven incorrect.³³

Therefore, at least for the time being, students can be assured that lawyers do not necessarily need to follow the multitude of developments around the formation of the law or have an awareness of the law before it is binding. Nonetheless, we advise students that a commitment not only to research that looks back on what has been decided but also looks forward by anticipating future and retrospective legal events — in noting prospects of relevant cases and heeding ‘government by press release’³⁴ on the prospective implementation of retrospective legislation — is judicious in a legal system

²⁹ See, eg, H Reicher, ‘Legislation by Press Release’ (1978) 7 *Australian Tax Review* 31, 32–34, 38; Nash (n 21) 237.

³⁰ *NRMA Ltd v Morgan* (1999) 17 ACLC 1029; *NRMA Ltd v Morgan* (No 3) [1999] NSWSC 768; *Gambotto v WCP Ltd* (1995) 182 CLR 432.

³¹ *Heydon v NRMA Ltd* (2000) 51 NSWLR 1.

³² *NRMA Ltd v Heydon* S 26/2001 [2001] HCATrans 439.

³³ Bob Baxt, ‘The Foresight Saga’ (2001) 72(4) *Charter* 54, 57.

³⁴ This is also referred to as ‘legislation by press release’, ‘legislation by leaflet’, ‘legislation by ministerial fiat’, and ‘law by force of proclamation’. See Popple (n 21) 262; Reicher (n 29) title; Mulder (n 20) 30; Nash (n 21) title; Dicey, cited in Nash (n 21) 236.

where retrospectivity appears to be more common than our founding legal principles may suggest.

Subverting the Authority of Legislators and Courts

As well as showing students the notes field of legislation, we look at the legislative provisions and, specifically, the topic of statutory interpretation. In dovetailing with our teaching on this topic, we suggest to students that while learning to interpret legislation is an important initial step, they will be expected during their degree to develop a distinct position on the law in question, including a position on whether it serves a socially constructive purpose. The Legal Research subject encourages them to use legal sources effectively towards this end so that they adopt an informed view and build a solid case for either the maintenance or reform of the law.

There are many roles that lawyers play in helping to improve the law, not least of which is working for a law reform commission. Even those who choose to enter the practising legal profession may find themselves in a situation in which they must negotiate a balance between, on the one hand, respecting the law and, on the other hand, calling it into question, whether they are presenting a legal interpretation in court or advancing a reform agenda of a professional law association. Students' interest in law reform will help define where they fit institutionally, and whether indeed they are able to find a comfortable fit that complements their 'sense of general morality'.³⁵

In this connection, one may recall the fictional barrister Horace Rumpole, who, with his sharp sense of justice and aversion to the pomposity of the English legal profession, famously said, in the words of his creator John Mortimer, 'If I don't like the way the times are moving I shall refuse to accompany them',³⁶ or the main character in Andrea Camilleri's *Inspector Montalbano*, who flouted as many rules of a Mafia-corrupted system as he followed in order to solve murder mysteries in southern Italy. These dramas aim to paint a realistic picture of the state of the law and, in doing so, ignite an interest in legal resistance that might otherwise be delayed by classics such as *Twelve Angry Men* and *To Kill a Mockingbird*. While inspiring generations of law students, the latter stories lead us towards the other end of the spectrum in fostering confidence that our laws and legal institutions can successfully guard against miscarriages of

³⁵ Adrian Evans, *The Good Lawyer* (Cambridge University Press, 2014) 86–87.

³⁶ John Mortimer, *The Anti-Social Behaviour of Horace Rumpole* (Penguin, 2007) 85.

justice if only there is a will to overcome parochialism and prejudice among the laity, including those who populate juries.

By this stage, students should realise that legislators and courts are not infallible; that there is a distinction between law and justice; and that although mechanisms are in place to minimise injustice, not everyone who engages with the legal system will have a satisfying experience. Some fascinating examples that may be relayed in class come from defamation law, which is sometimes presented with a measure of scepticism as an area of law that ‘protect[s] powerful people from scrutiny’.³⁷

A defamation matter widely publicised in Australia concerned former Deputy Prime Minister of Australia Jim Cairns and his private secretary Junie Morosi, who, in the 1970s, sued numerous media outlets that portrayed the pair in an extramarital relationship. Cairns denied under oath that he had committed adultery, and former Prime Minister Gough Whitlam provided corroborating evidence, which led to wins against newspapers and radio stations and the awarding of a great deal of money in damages. However, in 2002, a year before Cairns’ death, it transpired through his own admission that he had in fact been in a sexual relationship with Morosi at the time of the alleged defamation.³⁸

This case study reveals to students that people of high standing in our society can engage in contempt of court and squander its precious resources simply because they have the means to do so. In addition, the legislature can choose to have little say on the matter and the judicial system can follow suit. The judiciary may even preference defamation cases of the rich and famous amid the congestion of the courts, as with the lengthy libel trial involving actors Johnny Depp and Amber Heard held in person in London at the height of a government-imposed lockdown during the COVID-19 pandemic. The Criminal Bar Association of England and Wales and family and children’s law barristers complained that this case contributed to the delay and consignment to video-link of numerous more pressing matters involving vulnerable

³⁷ Brian Martin, *Information Liberation* (Freedom Press, 1998) 107.

³⁸ Richard Ackland, ‘Cairns Admits Sex, and Breathtaking Hypocrisy’, *The Sydney Morning Herald* (online at 20 September 2002) <<https://www.smh.com.au/opinion/cairns-admits-sex-and-breathtaking-hypocrisy-20020920-gdfndq.html>>; Annabel Crabb, ‘Cairns Admits Morosi Affair’, *The Age* (online at 16 September 2002) <<https://www.theage.com.au/national/cairns-admits-morosi-affair-20020916-gdulfu.html>>.

people.³⁹ They implied that a legal system that bows to privilege fails to serve properly those most in need of its expertise. A knowledge of colourful areas of legal history can be used to convey this message, in encouraging students to evaluate their identity as advocates or reformers of the law.

Subverting the Authority of Legal Publishers

Students should also appreciate that legal research is not a pure method of gathering evidence for understanding and scrutinising the law. As with the law itself, it can reflect obstacles created by the political and economic conditions of the society in which it is conducted, as well as the state of technology and means of access to this technology.

We barely need tell students that the internet has significantly improved access to legal information. Yet the internet cannot be credited alone. In Australia, legislation and cases can be readily sourced because the government and the Australasian Legal Information Institute, commonly known as AustLII, have provided universal free access to them on their websites, without the encumbrance of subscriptions or advertising. While older cases, statutes, and parliamentary debates have not all been uploaded, and decisions of lower courts and court transcripts are often not made public, students can expect a relatively short time frame between the creation of the major laws of Australia and their appearance on public internet sites.

Nevertheless, as we explain to students, the courts and the academy still prefer the citation of authorised versions of cases found in privately published law reports over so-called medium neutral citations. The *Australian Guide to Legal Citation* states: 'The authorised version of the report should always be used where available.'⁴⁰ Similarly, while legal commentaries are highly regarded in civil law systems as a method of legal interpretation,⁴¹ they are often held by commercial publishers. Even where the library possesses a subscription, accessing privately published cases and commentaries from private databases such as Lexis Advance and FirstPoint can be a time-consuming and involved

³⁹ Mark Townsend, 'Star Treatment for Depp Trial Branded "Galling" by Lawyers amid Huge Backlog', *The Guardian* (online at 25 July 2020) <<https://www.theguardian.com/film/2020/jul/25/johnny-depp-libel-trial-branded-galling-by-lawyers-amid-covid-backlog-of-half-a-million-cases>>.

⁴⁰ *Australian Guide to Legal Citation* (Melbourne University Law Review Association Inc and Melbourne Journal of International Law Inc, 4th ed, 2018) 50.

⁴¹ Dainow (n 11) 428.

process. It is necessary to enter one's login credentials at various points of the library and database sites, calling to mind the series of security barriers in the opening sequence of *Get Smart*.⁴² Sometimes one must go on to navigate a range of databases before succeeding at finding the relevant information. Although private investment in legal research has contributed to innovations of many kinds, the private entities that drive progress, in being competitors, naturally lack coordination with one another, complicating the process of legal research for end users.

In addition, private databases exclude people who do not have a subscription or who do not belong to an institution with one, which can include students and academics at universities with limited funds for library resources, lawyers employed by non-profit organisations such as trade unions, and, notably, self-represented litigants and the general public who are seeking to know their legal rights. For example, the cost of subscribing to Halsbury's Laws of Australia, published by LexisNexis, or the Max Planck Encyclopedias of International Law, published by Oxford University Press, is prohibitive for a number of small and regional universities in Australia, which widens the divide between those who study and work at top-tier tertiary institutions and those who do not. Private publishers are simply not inclined to allow people to share equitably in the fruits of legal information lest this be detrimental to their bottom line.

Another complication is that private publishers make organisational and editorial decisions that are consistent with their interests, which sometimes differ from the interests of the legal community. They commonly choose the path of efficiency, which may mean cutting corners and making mistakes. One exercise we would give students was to look up the entry for Susan Kiefel in the Encyclopaedic Australian Legal Dictionary on Lexis Advance and tell us her current occupation. For several years following her appointment to the position of Chief Justice of Australia's highest court, students would say that she is a mere Justice, precisely because the computerised resource, which should have been able to respond quickly to her promotion on the bench, erroneously listed her as such.

Teachers can ask students whether they agree that, just as new technologies have shaped methods of legal research and the types of information that we are able to find, the private sector and its publishers who are profit-driven have

⁴² *Get Smart*, television series created by Mel Brooks and Buck Henry and broadcast on NBC and CBS, United States of America (1965–1970).

influenced the art of legal research. Comment may thus be solicited on the following statement by Robert Berring and Kathleen Vanden Heuvel: 'Contrary to what most law students thought (that is if they thought about it at all), the forms in which legal information appeared were not divinely ordained or historical inevitabilities. They resulted from editorial choices, market forces, and social pressures, translated through the life cycle of profit-making enterprises.'⁴³ A legal research subject can thereby extend beyond instructing students on how to find sources; it may promote, as Christopher Knott states, 'a deeper understanding of how legal information is produced, arranged, and consumed'.⁴⁴

There are, of course, limits to how subversive legal research teachers can be. When students ask about overcoming paywalls or saving time in the research process by using unauthorised sources, we cannot provide advice that would be in breach of intellectual property laws. We can, however, encourage them to avoid personally paying for sources by optimising their use of the library and turning to law librarians who are skilled at producing sources through various channels. In some instances, librarians will put a case to their university for purchasing a particular resource, subscription, or licence, although the addition of one resource may mean the subtraction of another. In this way, students can see librarians (at universities, but also court houses, parliaments, and libraries of international organisations) as their advocates in a largely user-pays system of legal information, a drop of salve for their efforts in accessing the law.

Students may be assured that they can take advantage of public resources on the world wide web. But it is prudent to set standards around internet usage, given that this dynamic platform is not primarily an academic tool and is cluttered with a morass of advertisements, including those for law firms, that can distract students on their research expedition. Hence, students may be warned against what Kurt Meyer refers to as 'directionless Google searches

⁴³ Berring and Heuvel (n 1) 55.

⁴⁴ Christopher A Knott, 'On Teaching Advanced Legal Research' (2009) 28(1–2) *Legal Reference Services Quarterly* 101, 117.

and overuse of less-sophisticated “free” resources⁴⁵ or what Tony Thew describes as an excessive ‘reliance on serendipity’.⁴⁶

Many privately published journal articles and books are now available via open access, often because a fee has been paid to the publisher to release the publication to the public, or because the publisher has permitted a repository to reproduce it, usually following an embargo period. Journals that have bypassed private publishing houses — through support from tertiary institutions or law associations and foundations — can likewise be universally accessible online, bringing scholarship a step closer to the scholars of the world. Similarly, the literary content of classic legal works that are no longer subject to copyright is free to read on the internet, provided it has been digitally transcribed and uploaded (often a labour of love by volunteers).

However, a discernible bias remains in academia towards conventional, privately published versions. Many citation styles require pinpoint references and a standard publisher name,⁴⁷ which can discount unofficial sources. While countless books scanned in their originally published forms are available on Google Books, many on this site have limited or no text for public view, or else can be missing page numbers, which is intended to compel scholars to purchase the book for reference purposes.⁴⁸

In any case, there are increasingly legitimate ‘grey literature’ alternatives to traditional sources of legal information. Some examples are working papers, reports, and concise papers on current legal developments published in informal journals such as ANZSIL *Perspective* and ESIL *Reflections* of the Australian–New Zealand and European international law societies, respectively. While not as authoritative as materials that undergo blind peer review, these types of sources can assist students along the research trail, particularly in meeting an interim need for academic analysis where formal expositions on a topic have not yet been published.

⁴⁵ Kurt Meyer, ‘Teaching Legal Research to Today’s Digital Natives’ (2017) 21(4) *AALL Spectrum* 12, 14.

⁴⁶ Tony Thew, ‘Working on Serendipity: An Approach to Teaching Legal Research for Practice’ (1994) 2(3) *Australian Law Librarian* 127, 129.

⁴⁷ See, eg, Australian Guide to Legal Citation (n 40) 4, 102.

⁴⁸ Tim Parks, ‘References, Please’, *The New York Review of Books* (online at 13 September 2014) <<https://www.nybooks.com/daily/2014/09/13/references-please/>>.

Moreover, it is conceivable that a new world of sources and ideas awaits students beyond Google, given the availability of other search engines with different algorithms, and of artificial intelligence assistants. Yet the myriad possibilities conspire to make the research enterprise highly complex. While pre-internet legal research was once considered a ‘monster’,⁴⁹ internet legal research might now be regarded as one with many heads, like the Hydra of Ancient Greek legend standing in the way of the golden fleece.

It is helpful for students to appreciate that the struggle of legal research is amplified by broad social circumstances. These circumstances include the chaos of the market economy and its sheer number of rivals competing for legal research business in the publishing industry and online, including predators. There is also the array of charitable alternatives responding to gaps that the business model of service provision inevitably leaves, while they themselves compete for survival. Moreover, the pervasiveness of private property in this market economy naturally encourages legal disputes, which generate an immense volume of law through which legal researchers must wade. On this point, an Australian lawyer who visited a differently constructed society in Europe some decades ago wrote of his experience:

I began to consider the remarkable fact that there is no private property in the USSR. The citizen has his or her personal property but the large private ownership which dominates ownership of land and the means of production in capitalist countries is non-existent. As a result, all that litigation which comes before our courts arising from disputes over private property [...] — the list is endless — do not exist in the USSR. There are no insurance cases, no banking cases, no company cases. In addition there is no dispute over workers’ compensation. ... This absence of disputes arising from the ownership of private property and of disputes arising from personal injuries means that if a similar system applied in Australia at least 80% of all time now spent in court disputes would be eliminated.⁵⁰

Added to the convolutions of contemporary legal research is the prevalence of developing economies that are under-resourced and developed ones that have

⁴⁹ Wesley Jr Gilmer, ‘Teaching Legal Research and Legal Writing in American Law Schools’ (1972) 25(5) *Journal of Legal Education* 571, 571.

⁵⁰ Roy Turner, *An Australian Lawyer Examines — Law in the USSR* (Alternative Publishing Co-Operative, 1979) 37–38.

digitalised legal resources but require people to pay for them — both of which, students soon realise in their attempt to engage in foreign and comparative law studies, present enormous challenges.

The imagination of students may consequently transport them to a society with a more palpable emphasis on education, where knowledge is not owned by the privileged few, all legal sources are free and accessible in the public domain, and legal research is a considerably more centralised, straight-forward, and rewarding activity. Indeed, it follows from a subject that seeks to teach legal research in context that some forward-looking students will emerge.

Conclusion

In response to the question of what teachers of a legal research subject teach, Michael Lynch has suggested that '[t]he subject matter is not a coherent body of thought; it is a mass of details', with the 'end result' being the development of merely a technical 'skill, or a knack'.⁵¹ His is a standard representation of the subject. It conjures the idea of law schools as 'trade schools' or 'lawyer factories', as opposed to institutions in which critical thought is nurtured.⁵² It is redolent of the classical common law method of research starting at the level of the particular (that is, individual cases that interstitially form a common law), rather than the level of general precepts.⁵³ It is also reflective of the broad emphasis in law schools on black-letter law.

The present article has reconceptualised the technique of teaching legal research. It suggests that there is no compelling reason why a legal research subject should not find ways, as other law subjects have, of tying technical aspects of the law to social issues, especially from a perspective that questions institutions that are designed to enhance our lives but can instead perpetuate division and disadvantage. The discipline of legal research covers a wide array of legal sources and concepts that lend themselves to social reflection. In the

⁵¹ Michael J Lynch, 'An Impossible Task but Everybody Has to Do It — Teaching Legal Research in Law Schools' (1997) 89(3) *Law Library Journal* 415, 429.

⁵² See John Littrich and Karina Murray, *Lawyers in Australia* (Federation Press, 4th ed, 2019) 28; Nickolas J James, 'More than "Lawyer Factories": The Social Obligation of Law Schools' (Conference Paper, Professional Legal Education Conference, 2 October 2020).

⁵³ Dainow (n 11) 422, 426, 430–431.

process of teaching research skills, its educators are in a good position to teach thinking skills.

This article has accordingly shown how the subject of legal research can be a vehicle for exploring the relationship between law and the prevailing socio-legal structures and for contemplating problems pertaining to its access and outcomes. The examples in the article constitute a mere sample that is illustrative of the potential of this unique pedagogy. Thought-provoking questions and ideas that seek to provide a social education in the law can be tailored to the specific legal sources and materials of each legal research subject and jurisdiction — whether common law or civil law — and the knowledge base of each teaching team.

In a similar vein, Charles Brink has sought to inject his Advanced Legal Research subject with legal theory in an effort to make students ‘critical judges’ of the legal sources they are learning to research.⁵⁴ Brink structures his legal research classes around themes from the discipline of jurisprudence, with a particular emphasis on the formalist and legal realist schools of thought of the late nineteenth and early twentieth centuries, respectively.⁵⁵ He also introduces theories of Wittgenstein and Critical Legal Studies (CLS) that question the very basis of legal rules, albeit ‘[j]ust for fun’ and with an allusion to Humpty Dumpty.⁵⁶

While Brink takes the important step of integrating analysis into legal research, the subversion he sets up, in furnishing radical ideas of CLS and so forth, is undermined by his offering of HLA Hart as a ‘tonic’.⁵⁷ He suggests that to question mainstream legal theories is to be ‘angry’ at the system.⁵⁸ But in reducing critical theories to negative emotions and children’s tales — even though jurists and academics have commonly drawn on Lewis Carroll’s

⁵⁴ Charles J Ten Brink, ‘A Jurisprudential Approach to Teaching Legal Research’ (2004) 39(2) *New England Law Review* 307, 307–308.

⁵⁵ *Ibid* 309.

⁵⁶ *Ibid* 313.

⁵⁷ *Ibid* 315.

⁵⁸ *Ibid*.

anthropomorphic egg⁵⁹—Brink adopts an air of subjectivity. He liberates legal research from its legal practice orientation, only to replace it with a circumscribed theoretical perspective with a (reportedly) more palatable tone and with which he acknowledges students are already familiar.⁶⁰

Our Legal Research subject instead aims to present students with a new world of ideas. We do not try to convince or persuade, in straddling the different sides of the issues; the focus is simply on exposing students to less orthodox ways of looking at the law that they may wish to keep in mind as they progress through their law degree — perspectives that are generally not directly assessed but rather form the context of our teaching on legal research techniques. Typically, students lack the experience and confidence to mount an argument that fundamentally questions prevailing legal institutions. We therefore believe that a formative first-year legal research subject is an apposite point at which to encourage students in their journey of critical analysis and intellectual inquiry at the tertiary education level.

Certainly, most people would not expect classes in legal research to involve dynamic discussions, let alone be subversive. The subject tends to be viewed as a compartment of the ‘unstoppable train of vocationalism’ passing through law schools.⁶¹ However, if the academic profession is committed to diverting this train, it ought to consider how subjects as seemingly pedestrian as this one, which does not *prima facie* have a social justice character, may be reformed.

Indeed, if Legal Research can be shown to be subversive, or at least to entertain social critique, then any subject can, including the core law subjects that have built a reputation for disproportionately emphasising legal doctrine. It does not take a great deal of imagination to formulate basic social questions around the process of legal research and the legal institutions on which it is constructed.

⁵⁹ See, eg, Ken Barlow, ‘Alice, Humpty Dumpty and the Law’ (2011) 85 *Australian Law Journal* 365; Martin H Redish and Matthew B Arnould, ‘Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative’ (2012) 64(6) *Florida Law Review* 1485, 1513 fn 116; Alok Prasanna Kumar, ‘Humpty Dumpty Jurisprudence’ (21 March 2020) 55(12) *Economic and Political Weekly* 10.

⁶⁰ Brink (n 54) 311.

⁶¹ Nickolas J James, ‘More than Merely Work-Ready: Vocationalism versus Professionalism in Legal Education’ (2017) 40(1) *University of New South Wales Law Journal* 186, 209.

No new technology or ‘app’ need be introduced. It is simply a matter of thinking more deeply about the origins and ideological role of the law.