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Editorial: Law in Context for the Digital Age

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ABSTRACT

We introduce both the new inception of *Law in Context - A Socio-legal* Journal and the continuing issue of LiC 36 (1). The editorial provides a brief historical account of the Journal since its inception in the early 1980s, in the context of the evolution of the Law & Society movement. It also describes the changes produced in the digital age by the emergence of the Web of Data, Big Data, and the Internet of Things. The convergence between Law & Society and Artificial Intelligence & Law is also discussed. Finally, we introduce briefly the articles included in this issue.

Keywords – Law in Context, Law and Society, Socio-legal research, Artificial Intelligence, Digital Society

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Summary

LAW IN CONTEXT (LIC) IN CONTEXT

Volume 36 (1) of *Law in Context* constitutes a renewed *Law in Context - A Socio-legal Journal.* From 2019 onwards it will be published in Open Access at no cost to either the authors or the readers. It thus represents a new stage in the Journal's long and fruitful history.

The Journal was launched in 1983 at the then Department of Legal Studies of La Trobe University by Oliver Mendelsohn (as General Editor), Martin Chanock (as Book Editor) and Ian Patterson (as Business Manager). Although *Law in Context* (LiC) was launched after the retirement in 1982 of E.K. Braybrooke, the charismatic founder of the Department, it retained his realistic stamp. It is worth noting that many members of the so-called "First Legal Scholarly Community" in Australia, after World War II,

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were closer to American legal realists than to English jurisprudence (Bartie 2010).[1]

Since then, LiC has been continuously published due to the efforts and work of many people—Christopher Arup, Paula Baron, Roger Douglas, Pat O´Malley, Margaret Thornton, to mention just a few. Law & Society world leading scholars from USA, Europe and Asia (India)—such as Richard L. Abel, Upendra Baxi, Stanley Cohen (†), Marc Galanter, Doreen McBarnet, Simon Roberts (†), and Harry N. Scheiber—served on the Editorial Board and have supported the journal since its inception.

Looking at it from a distance, the coherence of LiC's trajectory is clear. Its first editorial, written by Oliver Mendelsohn, reads:

> *Law in Context is published as a forum for the inter-disciplinary study of law. For much of the nineteenth and twentieth centuries there was a tendency to reduce the study of law to a narrow technical and doctrinal focus. This coincided with a period when it was only lawyers who were interested in studying law. Now, there is a widespread realisation that law is too important to be left to the lawyers. And the companion view is that legal matters can be more richly understood by placing them in their social context and subjecting them to study from a range of academic disciplines. This first issue of Law in Context exemplifies the inter-disciplinary approach to law. (LiC, Editorial 1983)*

Thirty-six year later, all issues of LiC so far continue to show this inter-disciplinary, pluralistic, and especially *contextual* approach along a variety of disciplines, methodologies and trends. These are in the main Social Sciences, Humanities and Law. Yet it shows something else, more intangible and definitively essential: *the will to transcend academic boundaries*, i.e. a continuing and firm commitment to not only understand and explain but also participate and eventually remould the deep changes that were occurring after the Cold War and were affecting dramatically the whole society and lives of people in Australia and beyond.

We can track this approach in practically all contributions and, especially, in the collective actions that were generated around the Journal and contributed to shape its differential style and added values—e.g. the creation of legal clinics; the building of feminist discourses; the critical approach to the rule of law; the effort to (re)write legal and institutional history; the defence of democracy and citizenship; the description and criticism of corporate practices and economic organisations; the emergence of Alternative Dispute Resolution (ADR); the close attention to increasing numbers of immigration flows; the study of Asia and individual countries therein; and the support for the cultural, political and judicial fights seeking for the recognition of Aboriginal rights, against the race-based policies that sustained segregation in the immediate colonial past.

In 1988, the Australian Publisher Federation Press commenced publishing *Law in Context*. Then, in 1995, the former Legal Studies Department at La Trobe University became La Trobe School of Law and Legal Studies (and still later, School of Law). Nevertheless, LiC maintained its original character and orientation. In 2013, the Journal celebrated its thirtieth anniversary—twenty-five years at Federation Press—with a Special Issue on socio-legality, its history, and achievements as an academic discipline (Petersen 2013).[2]

LiC fostered both innovation and experimentation at a theoretical level. This specific commitment was not exempt from internal dissents. Embracing an open perspective of the law and regulations as socio-political patterns is more challenging than the more classical, textual, normative approach. Thus, LiC's context of discovery reflects the same tensions between the formal (technical) and the substantive (social) approach to law that had characterised legal scholarship in the nineteenth and twentieth centuries —either in the Civil or the Common Law tradition. Perhaps more importantly, it also mirrored the inner disparities and confrontations of invention and

[1] This was the case of E. Kingston Braybrooke (1915-1989), who had studied at Columbia Law School in 1949. Columbia was one of the main centres of legal realism, under Karl Llewellyn's leadership. Braybrooke, like Julius Stone (1907-1985) at Harvard, was also influenced by Roscoe Pound's sociological jurisprudence. See Kerruish (1989), Douglas (1989), Kirby (2012), Neil (2013).

[2] This LiC Special Issue, entitled *Socio-legality: An Odyssey of Ideas and Context*, was edited by Kerry Petersen and introduced by Roger Douglas. It contains essays by some of the leading scholars of the Journal: Christopher Arup, Paula Baron, Susanne Davies, Ian Duncanson, Ian Freckleton, David Neal, and Christopher Tomlins. As acknowledged by Douglas (2013, p. x), "heterogeneity (and, possibly, achievements) came at the cost of conflict."

discovery that occur when epistemic, moral and political assumptions are at stake.

This is not a singular feature. Thinking about government, law and the state in the second half of the 20th century led to discussions and eventually differences among scholars in all Law & Society disciplines. For instance, after the emergence of legal pluralism in the 1970s and 1980s, and the hatching of globalisation in the 1990s, at the dawn of the new Millennium, Sally Falk Moore summarised the changes in legal anthropology as follows:

> *What legal domains have anthropologists examined in the fifty years we are considering [1949-1999]? How much have their topics changed? How much do the changes in topic reflect the shifting political background of the period? The big picture is simple enough. What was once a sub-field of anthropology largely concerned with law in non-Western society has evolved to encompass a much larger legal geography. Not only does legal anthropology now study industrial countries, but it has expanded from the local to national and transnational legal matters. Its scope includes international treaties, the legal underpinnings of transnational commerce, the field of human rights, diasporas and migrants, refugees and prisoners, and other situations not easily captured in the earlier community-grounded conception of anthropology, though the rich tradition of local studies continues along a separate and parallel track. (Falk Moore 2001, p. 95)*

Thus, anthropologists "are not just talking about what is going on. They also are talking *about what could go on [...] They are treating their own critical commentary as a form of social action* [emphasis added]" (Falk Moore 2001, p. 111).

This "form of social action" entails a moral and eventually a political judgement, and it conforms a methodology and a notion of law encompassing what Nonet and Selznick (1978) had termed, in accordance with human rights and social challenges, *responsive* law. Responsive law contrasts with two other notions—*repressive* and *autonomous* law—which do not require a similar amount of *competence*, i.e. knowledge of the social context, the design of better institutions, and the involvement of citizens in power.[3]

The second wave of legal realism—the "new legal realism"— that has blossomed in the first decade of the present century has also embraced this organisational and institutional turn. It can be primarily defined as "an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets" (Miles and Sunstein 2008, p. 831). But, in fact, it goes beyond the judiciary and advanced statistical analysis. It entails an extended notion of context, in which principles, ethics and universal values acquire a new place in the dynamics of evolving institutions.[4] "We do want to *judge* contexts, which we do by appealing to transcendent values" (Selznick 2003, p. 186).[5] And, as stated by the scholars who started the discussion, it entails the need to face new comprehensive relationships among the stakeholders themselves:

> *Our goal is to create translations of social science that will be useful even to legal academics and lawyers who do not wish to perform empirical research themselves, while also encouraging translations of legal issues that will help social scientists gain a more sophisticated understanding of how law is understood "from the inside" by those with legal training. (Erlanger et al. 2005, p. 336)*

The pages of *Law in Context* also reflect this recent *regulatory* turn, related to new forms of corporate governance, public Health, the relations between law and science, and the relations between quantitative and qualitative methods.[6]

[3] According to Nonet and Selznick (1978, p. 78), competence is "the most difficult problem of responsive law: In an environment of pressure the continuing authority of legal purpose and the integrity of the legal order depend on the design of more competent legal institutions."

[4] As put by Nourse and Schaffer (2009, p. 134) "New legal realists refuse to believe that all law and politics should be determined by a single, consequentialist goal, but they also refuse to indulge the fantasy of ethical relativity."

[5] See on the Deweyan Selznick´s naturalism, Lieberman (2012).

[6] Hence, to give only one example, Christopher Arup's works elaborated on the multiple possible approaches to better understand innovation, intellectual property, labour, financial and industrial policy, and the implementation and defence of consumer rights in the blurring of private/public global space (Arup 2000). Arup correctly observed that to understand the role of lawyers, law firms and corporations in the process of globalisation, Law and Society scholars had to collect data by means of ethnographic and qualitative methods (e.g. interviews), addressing and sorting out the problem of access to the information. See, for example, Garth and Dézalay (1996, 2002).

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CONTEXT AND LAW IN THE DIGITAL AGE

A new path beckons. It adds a complexity to what LiC already does yet also provides the opportunity of new fields and discourses. This path is one that the renewed LiC will also now illuminate.

To tread the path for a little distance, we are in a new stage of the same evolution that has led capitalism to its next phase: the digital age. Perhaps we are not able at this time to entirely cope with it, as we cannot anticipate all the consequences that will follow from a technological revolution based on information-processing knowledge, big data analytics, artificial intelligence, and the so-called Internet of Things. These changes are deep, and they have come to stay. Even the scientific method is subject to its impact, due to "the presence of nonlinearity, non-locality and hyper-dimensions which one encounters frequently in multi-scale modelling of complex systems" (Succi and Coveney 2019).

From a foundational point of view, the representation of knowledge is at the heart of the social shape of a digital society that we do not yet know.[7] Our theoretical assumptions should acknowledge the fact that we behave necessarily not only with limited information but with limited knowledge and tools to handle this information. In an increasingly complex society, law consists of a set of regulatory components that do not constitute separate silos, and there is a plurality of ways to conceive their interrelationship.[8]

From a practical point of view, everything remains open to the building of institutions that could be able to link machine and human interfaces. In a hybrid, semi-automated world, the classical societal micro-macro link goes through the *meso-level*, in which platforms, apps, blockchains, and digital data are technological components of emergent participatory, civic, democratic, ecosystems (Poblet, Casanovas and Rodríguez-Doncel 2019). However, this intermediate inter-communication level between machines and humans is also the yet-to-be-fully-regulated domain in which data collection, storage, aggregation, and eventually analysis occur. The problem is who carries out the analyses, how and for what purposes are they performed, and what impacts they may have on individuals and society.

The role of Cambridge Analytica in the British referendum to leave the European Union and in the last presidential elections in the US has opened a Pandora's box. Democracy is certainly at stake (Cadwallader 2018, 2019). But this is just one example among many others in which mass surveillance programs, financial excesses, uncontrolled data exchange between state agencies, manipulation of feelings, prosecution of whistle-blowers, and the convergence between bio-tech and info-tech may led to "digital dictatorships", even under democratic political forms (O´Neil 2016, Harari 2018, Eveleth 2019).

These issues have only been partially addressed so far. In Europe, for example, the promulgation and entry into force (25/05/2019) of the General Data Protection Regulation (DGPR, 2016) enhances a broad range of privacy rights to protect citizens' identities, personal lives and individual autonomy. Likewise, several Reports of the UN Special Rapporteur for Privacy urge the Member States to implement similar safeguards to avoid more data breaches and the evasion and denial of responsibilities by corporations and governments.[9]

However, is this enough? Do we have the right instruments in place to pursue such a noble dream? We are afraid that in a hyperreal world in which reality can be inflated artificially with fake news but true feelings, law and legal measures can be inflated as well. This would entail a loss of meaning. It may well be that the law in

[7] "One normally thinks that everything that is true is true for a reason. I've found mathematical truths that are true for no reason at all. These mathematical truths are beyond the power of mathematical reasoning because they are accidental and random." (Chaitin 1994) As Chaitin's theorems have shown, information-theoretic computational theory deals (again) with *incompleteness*. Hence, it is at the limits of mathematics and reason. If some things are true for no reason at all, accidentally, at random, we may expect new black swans in all dimensions of societal levels (Taleb 2007).

[8] Since 2010, the LNAI Workshop Series *AI Approaches to the Complexity of Legal Systems* shows this plurality of languages and methods for legal and social design. See Pagallo et al. (2018).

[9] See, Reports A/73/45712 and A/HRC/40/6, UN Special Rapporteur on Privacy (2018, 2019). There is a direct warning in the second Report: "6. [...] while most Member States unequivocally commit themselves to protecting the right to privacy, many are acting in ways that increasingly put it at risk, by employing new technologies that are incompatible with the right to privacy, such as, in certain modalities, Big Data and health data, infringing upon the dignity of its citizens based on gender or gender identity and expression, as well as by arbitrarily surveying their own citizens."

hyperreal regimes no longer requires legitimacy—the acquiescence of citizens—but obeying in advance.[10]

Shadbolt and Hampson (2018) have pointed out that the regulation of digital societies is an urgent need and, yet, a formidable task.[11] It cannot be limited just to privacy and security issues —these could be deemed starting points. As underlined by Mathews (2017) what is required now to match civilization requirements is a holistic view bridging systemic and semantic interoperability. All dimensions covered by statutes, regulations, policies, best practices and protocols should be faced through this lens. It is an ethical stance.

Law & Society has produced cutting-edge research so far in a variety of significant subjects —gender, access to justice, crimes, colonialism, litigation, legal cultures, human rights, the rule of law, dispute resolution, among many others. It might be time to incorporate Computer Science and Artificial Intelligence languages to an epistemic approach for fleshing out such a rich legacy. Thus, the bulk of socio-legal knowledge could be taken further, beyond the conditions in which it was produced, and information technologies could also be incorporated as well into its array of methodologies to shed light on this matter. It would represent a third wave of legal realism.

It is certainly not the only way of handling global-scale changes. Environmentalists may refer and lean on top of the "deep ecology" movement launched by Norwegian philosopher Arne Naess—back in the 1970's. Global climate change has led earth scientists to propose a new division of the geological time as a paradigm to understand the impact of human behaviour on nature—the *Anthropocene*, which holds also as a political paradigm to ground policies and regulations (Lewis and Maslin 2015). The human body can be approached as well as a new analytical space dealing with bio-ethics, self-reflection and health care—e.g. the "quantified self" of individuals tracking information about their own bodies (Swan 2013, Mittelstadt and Floridi 2016). But, still, all these topics—including those related to Physics and Mathematics—are unthinkable without referring to computer science, robotics and AI running within this interplay between humans and machines that we have termed above the *meso-level*.

We believe that this mutual approach is felt as a necessity by both Law & Society and AI & Law communities. Artificial Intelligence and Law has been working for thirty years now in the modelling of legal norms and legal systems. As L. Thorne McCarty, one of the founding members, recalls in a recent account, it is a common mistake to believe that they were reducing law to rules to be modelled. On the contrary, the flexibility and many ways of creating law—including judicial tests and the "open texture" of its language—were considered as true challenges since the beginning. First wave AI systems were "very good at complex reasoning, but not very good at perception and learning" (McCarty 2019, p. 57). The second and third waves are. Focusing on machine learning, Natural Language Processing (NLP) and Knowledge Representation Technology (semantics) systems are able to better define the problems, to figure out different scenarios in non-identical environments, and to anticipate solutions. We can find many parallels with the evolution of Law and Society and its increasing attention to the transformation of contexts. We recommend interested scholars to read this account in conjunction with Kevin Ashley's contribution about machine learning (in this issue).

ABOUT THIS EDITION: LAW IN CONTEXT FOR THE DIGITAL AGE

There are many examples of the common ground of Law & Society and AI & Law. Knowledge acquisition techniques, the construction of socio-technological systems and socio-cognitive systems, the building of cognitive

[10] This is the first lesson from the 20th century drawn by Timothy Snyder to preserve democracy. "Do not obey in advance. Most of the power of the authoritarianism is freely given." (Snyder 2017, p. 16)

[11] "Broadly though, a vast range of applications have been engineered on smart devices that seem capable of unlimited marvellous things: translate from one language to another, place a gamer in a virtually real landscape, find the best route through this afternoon's traffic, chat about the weather with granny. There is little or no social policy framework yet around how these applications may be affecting our lives or our brains. There is not enough general understanding of the issues to begin to construct such a framework. Like Prospero's sorcery in The Tempest, these magical transformations have just crept us on the waters, and we have accepted them, without as yet sufficient policy response. We urgently need such a framework." (Shadbolt and Hampson 2018, p. 51) Moreover, coming to the point: "To put it ever more bluntly, the problem is not that machines might wrest control of our lives from the elites. The problem is that *most of us might never be able to wrest control of the machines from the people who occupy the command posts* [Emphasis added]." (Shadbolt and Hampson 2018, p. 63)

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and computational ontologies, the setting of legal and regulatory systems and eco-systems, the structuring and managing of legal data and metadata, all these processes require a closer attention to the work that Law and Society scholars have been carrying out so far.[12]

Related to the LiC relaunch, we thought that pointing at the concept of legal knowledge as a research object would be a good point of departure to start thinking alike.

We asked several scholars from both fields to freely summarise their own work, their motivations, and personal journeys. We suggested some questions to be answered—How did you approach law and legal knowledge? Why? What did you learn? What do you think was left in the end?

Some wrote about their research journey; some responded with a thorough description of their recent works; others wrote specific essays of related topics according to their expertise. The result is for the reader to evaluate. We found it interesting, informative, and insightful. We organised it in such a way that some articles are placed in a strategic pivotal position, in the middle of the volume, linking both sides of the equation —socio-legal studies and computer science—through empirical and cultural social sciences and the law. We will describe the contents of the volume from the inside out, and from the centre to the two ends of the rope.

Susanne Davies reflects on the symbolic figure of Atticus Finch, the main character of Harper Lee's 1960 novel *To Kill a Mockingbird*. This was one of the legal icons of the 20th century for legal and political education, against intolerance, racism and injustice. What happened next so that this figure and its meaning darkened in the 21st century? What about his message now? These questions are properly sociological and do not have a simple answer.

Leaning on their recent books, *Capital Failure and Australian Superannuation*, Sue Jaffer and Nicholas Morris address the issue of the underlying causes of the Global Financial Crisis (GFC) and the various related scandals that have emerged in UK and Australia. Why did UK financial regulation fail so blatantly to prevent the crisis and its devastating effects? And why is bad behaviour so endemic in the sector? The article also examines how the Australian banking environment has evolved and the inception and development of Fintech and Regtech. The need for new regulatory models from an ethical stance, able to be both more effective and trustworthy, lies at the core of this approach.

Both articles point at the deep social and economic changes that have been occurring in the early 21st century.

The three contributions that open the volume shed light to the legacy, methods and trends of Law and Society studies, and how scholars were (and are) able to raise critical questions with a political and moral value, and with a global scope. Hence, they are also personal, disclosing some of the motivations that trigger research projects, and beyond that, research lives.

On legacy. Lawrence Friedman reflects about two important topics in the present Law and Society movement: the sources of law, on the one hand, and the impact of law, on the other. He suggests the use of legal historical studies as a kind of control group, as studies of modern legal systems show a high degree of convergence. He delves into his own experience to describe the growth and extension of socio-legal studies across different legal cultures in the world, and the benefits that follow from this interconnection.

On conscience. Martin Chanock draws a political and intellectual cartography of his journey through South African history and the construction of a democratic state. He recalls his education and political struggles in South Africa, and how he started asking the right questions and getting the right answers about the functions of law, the implementation of the rule of law, and the institutional creation of customary law in colonial and neo-colonial regimes. This paper contains a sound reflection about truth, politics and the development of legal instruments—a critical view on "the innocence of legalism" and the incapacity of the state.

On resilience. Richard Abel's work exemplifies citizens' response to the US turn towards democratic authoritarianism. He explores which strategies had been most effective to protect the rule of law against the "war on terror" that followed September 11, threatening American liberties

[12] There are many computer scientists working in this interesection—Pablo Noriega, Tom van Engers, Jeremy Pitt, Frank and Virginia Dignum, among many others. For a general overview on normative-multiagent systems, see Andriguetto et al. (2013); for the state of the art in law and the semantic web, Casanovas et al. (2016).

under Bush and Obama administrations. He summarises the findings of his two recent books—*Law's Wars* and *Law's Trials*—concluding that the rule of law "whose raison d'être is to immunize law from political distortion, itself depends on politics."

Finally, this volume collects several papers that refer to the uses, developments and methods of technology in the legal domain. These papers bring us back to reality that impacts on our personal and professional lives.

Zhiqiong June Wang's contribution focuses on legal education and technology. She brings into consideration three main issues: the adoption and adaptation of technologies to teaching and learning, the study and research of their impacts on society to formulate legal responses, and the preparation of future lawyers. She concludes by stressing the human side and its critical role in the evolution of legal education: law demands a "human touch", and that calls for human values and empathy.

From a computer science perspective, John Zeleznikow offers an accurate and deep insight of what such a "human touch" means. His work has been centred on empowering citizens through the development of Online Dispute Resolution (ODR) systems providing tools for self-represented litigants. His contribution to the present volume recalls how he became increasingly aware of the importance of modelling legal realism. From the early use of machine learning to more complex solutions, he realised that law was more than a mere application of rules: "Law is used as a social device to reflect society's changing attitudes."

We situated Kevin Ashley´s article at the end of this volume, last but not least. It consists of an illuminating account of the evolution of Machine Learning (ML) techniques across the AI and Law field. Understanding the rationale of judicial sentencing and being able to predict the outcomes have always been one of the aims of legal realism. So has it been for computer scientists as well. Focusing on recent developments in legal text analytics and the techniques to extract meanings from legal decisions, contracts and statutes, this article explains in detail how bottom-up approaches enrich and complement top-down ones. What is actually possible, why, and what is next.

LAW IN CONTEXT IN OPEN ACCESS

From Issue 36 (1) onwards *Law in Context* (LiC) will be published in an Open Access format. It complies with the sixteen *Principles of Transparency and Best Practice in Scholarly Publishing* published by the *Committee on Publication Ethics*, the *Directory of Open Access Journals, the Open Access Scholarly Publishers Association,* and the *World Association of Medical Editors*.[13] It also follows the ten *core practices* of the Committee on Publication Ethics, and the policies of the *Australasian Open Access Strategy Group* chart.[14]

According to its tradition, *Law in Context* is keen to publish original and pathbreaking contributions in the fields of legal studies, legal scholarship and jurisprudence. We will of course be happy to host Technology/AI & Law approaches to these fields, so that we can see where this new path may lead us.

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Context and Convergence: Some Remarks on the Law and Society Movement

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ABSTRACT

The law and society movement has grown greatly in recent years. It explores two macro-questions: the sources of law, on the one hand, and the impact of law, on the other. It rejects the orthodox view of "legal science", but embraces the methods of the social sciences. My own work has, recently, dealt with the issue of legal impact; and has also delved into socio-legal history. Historical study can act as a kind of control group for law and society studies; comparative and cross—cultural studies can perform the same function. Studies of modern legal system demonstrate a high degree of convergence—in an interconnected world, societies share both problems and solutions. Socio-legal studies themselves have converged; and share a common intellectual language.

Keywords – Human rights, Impact, Socio-legal history, Comparative legal culture, Law and Society movement, Convergence

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I

It was a pleasure, and an honor, to be asked to contribute to the first issue of the renewed *Law in Context*. I want to begin by congratulating the scholars who made the rebirth of this journal possible; and extend a hearty welcome to this new member of the family of outlets for studies of law and society. The name of the journal is especially apt. Context is at the heart of law and society studies. Context—that is, the real world. The world where legal systems actually behave; and where people in society experience legal systems, and legal institutions, as part of their lives. Context means to explore what these systems and institutions mean in society; and how societies respond to the work output of legal systems.

The world of law and society scholarship is a big tent—sprawling, vivid, colorful, exciting. I think of it as a kind of great academic circus, with thousands of performers, working in every corner of the world; men and women using many different techniques, approaches, strategies; scholars attacking many distinct questions, to which they give distinct answers. The law and society movement is growing, expanding, flexing its muscles; it is already a vital and salient movement; and its future, I think, is extremely bright.

The movement does not have a long history. It has its founding figures: Eugen Ehrlich, for example, and (very

notably) Max Weber, whose insights are still a valuable part of the canon. As a separate field, an organized field, it is only a few generations old. In the United States, a handful of researchers, mostly sociologists, founded the Law and Society Association (LSA) in the 1950's. Today, a much larger group of scholars identifies with the movement. They are law professors, sociologists, political scientists, anthropologists, historians, economists, and others. The movement has a significant presence in many countries--from Japan to Brazil to Australia to South Africa. LSA itself has grown steadily; and its annual meetings attract thousands of participants. At first, it was strictly an American organization. But it has become distinctly international. Hundreds of its members hail from other countries. LSA has also held annual meetings outside the United States, scheduling these international conferences at roughly four year intervals. LSA has met in Berlin, Budapest, Glasgow, and, most recently, in Mexico City. There are now law and society organizations in Japan, in Australia, in England, in Israel, and elsewhere. The International Sociological Association sponsors a Research Committee on the Sociology of Law, which also holds yearly meetings. All this is encouraging. Of course, if we had our wish, there would be even more of everything: more scholars, more organizations, more studies. But those of us with long memories, who remember the earlier years of law and society scholarship, are grateful for what we have now.

II

The law and society movement, in essence, looks at legal phenomena with the sharp and objective eyes of the social sciences. It explores, as we said, the way the legal system actually works. This is what binds the membership together; it is what the movement is all about. The movement is also, in a way, *against* something as well. The enemy—if one may call it that—is conventional legal education and conventional legal scholarship. These embody an old, orthodox approach to law: formalistic, doctrinal, ingrown, conceptual, and strongly normative. This is an approach which dominated, and still dominates, the way law is taught in law faculties, and the way the legal academy writes and thinks about legal issues. The law and society movement has hardly conquered this ancient enemy; but it has seen to it that the old orthodoxy is no longer so absolute and so dominant as it was in the past.

It is, of course, impossible to sum up the work of the law and society movement—what it has accomplished, what insights have come out of the work. Much of the scholarship, however, can be organized around two macro-questions. Conventional legal scholarship mostly ignores these questions; or treats them in the most superficial way. The first question is about the *sources* of law. What social forces produce specific laws, doctrines, ordinances, regulations; what forces produce patterns of laws, doctrines, ordinances, regulations? What role does public opinion play; or elite opinion; or religion, or science, or recessions and depressions? How does social change alter the mind-set of legal actors, and lead them to change their behavior? The basic assumption underlying this work is that law is not autonomous—that is, independent of society. There is disagreement about whether or not legal institutions can be or are at least slightly autonomous, and to what degree; but total autonomy, no—that is simply impossible. Conventional legal scholarship looks *inside* the legal system to answer questions of source; it treats law, in short as autonomous. The law and society movement looks outside, and treats the degree of autonomy, if any, as an empirical question.

The second question is about *impact*. Once a law, doctrine, regulation, institution is in place, what effect does it have? Does it work? Does it induce changes in behavior, and if so, why, and of what sort? Here too the basic assumption is that impact is *always* an empirical question. There can be no a priori answer to any question of impact. Some laws or doctrines are dead letters; some are effective; most are only partially effective; some are downright counterproductive. There are short term effects, and long-term effects; there are direct effects, and indirect effects. There are positive and negative effects. Some potential burglars give up burglary, because they want to stay out of prison. Other potential burglars react to the law by changing tactics. Skillful burglars drive clumsy ones out of business. Home-owners react to the situation by buying burglar alarms. Other home-owners move to a different city, because they are afraid of burglars in the city they came from. Impact, in short, is complex. And there is no way to know in advance what changes a

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law or decision might bring; what ripples in the stream it might cause. Clearly, though, the study of impact is of the essence. Here too conventional legal scholarship either ignores impact completely; or assumes, without real evidence, that a new rule or decision will accomplish its goal, almost magically.

Law and society scholars also tend to sneer at the very concept of "legal science," the idea that conventional, doctrinal legal studies can be described in any way as "scientific." Law and society scholars do claim for themselves the mantle of science, and they have a right to make this claim—precisely because they reject the idea of "legal science," and instead, turn to established social sciences, and make full use of the tools of sociology, psychology, political science, anthropology, and (yes) economics. The methods are quantitative when that works, qualitative when that works; both, when that seem appropriate. Just as there is a sociology of religion—the external study of religious phenomena—there is also the external study of law and legal systems. Sociology of religion does not ask, which is the true religion. It does not try to solve puzzles of dogma or doctrine within any particular religion. It does not give "right" answers to theological questions. In short, it studies theology as a social phenomenon, but is not in itself theology. Similarly, the social study of law asks questions about the legal system, but does not give answers to legal questions. It is not, in short, a legal theology. Conventional legal scholarship very often is exactly that. To some legal philosophers and jurists there are "correct" answers to legal questions; and lawyers, arguing before a court, will try to persuade the judges that their client's point of view is (legally) "correct." Law and society scholars want to know why a certain answer is considered "correct" in this or that society, at this or that period of time; why an argument today is persuasive, which past generations rejected as total nonsense (a right to gay marriage, for example). But otherwise, they find the question of right answers meaningless.

Of course, we have to be realistic: law and society scholars do have opinions, ideologies, ethical points of view, yes, and even prejudices. These surely make a difference. A scholar is attracted to a certain question because the scholar thinks it is socially important; or simply because the question intrigues and fascinates the scholar; or because the question has a deep personal meaning to the scholar or the scholar's family. Nonetheless, the work is supposed to be rigorous and objective; in theory, opinions and ideologies should have no effect at all on the studies and the finding. But we know that this is, alas, somewhat naïve. The personality and prejudices of the scholar almost inevitably make a difference. In the United States, hundreds of studies have tried to measure whether the death penalty actually has a deterrent effect on crime. If the author is an economist, the answer tends to be yes. If the author is a sociologist, the answer tends to be no. This difference hardly seems accidental.

Still, a good scholar at least tries to follow the rules; tries to stay objective. A good scholar has an open mind—or at least tries to have an open mind. A good scholar is willing to be surprised, disappointed, and even upset at what she finds; and to accept these disappointing results. This means that there is a certain tension between scholarship and advocacy. Advocates—for human rights, say—devote their money, muscles, time, effort, and sometimes their very lives, to causes they believe in. Advocates battle for the environment, gender equality, health and safety, the rights of the underprivileged, the struggle against poverty and oppression. We owe a lot to these advocates; the world would be a much worse place without them. But their zeal makes them, at times, intolerant of scholarship that comes out the wrong way (in their view). In one of my books, *The Human Rights Culture*,[1] I tried to discuss the human rights movement in socio-legal terms. Once, giving a talk on this subject, I mentioned, casually, that ideas about human rights were socially and historically contingent. This seems perfectly obvious to me; and would be, I assumed, obvious to everybody else. A few centuries ago, almost nobody—even advanced and elite scholars—would have had the foggiest concept of gender equality, or, for that matter, of gay rights, or the rights of "primitive" and "pagan" people. Yet my audience found what I said to be deeply offensive—they rejected the very idea that there was anything contingent about basic human rights; they reacted with something close to fury. To them,

[1] Lawrence M. Friedman, 2011. *The Human Rights Culture: A Study in History and Context.* New Orleans: Quid Pro Books.

human rights were universal and inherent; and anyone who denied this was (they felt) condoning or indifferent to human suffering.

In a sense, I agree with these critics. I think human rights, in our day, *ought* to be universal; and I have nothing but admiration for those who work tirelessly to help women, minorities, indigenous people, prisoners, dissenters, refugees, the poor; or who are trying to save our planet from the miseries climate change can bring on. Nonetheless, it is a plain fact that concepts of human rights (and environmental rights) change over time; and from society to society. You are not an enemy of human rights and other good causes, simply because you recognize social and historical facts. And indeed, real scholarship on the politics, economics, history, and sociology of human rights migh turn out in the end to be of real value to the human rights movement. At least I hope so.

III

The editors of *Law in Context* invited me to speak about my own work in its pages; and I am happy to add some brief comments about what I have done. Some of my work has been synthetic: attempts to sum up, and make sense of, at least some of the vast body of law and society work. This was so in my recent book, *Impact: How Law Affects Behavior*.[2] I had dealt with this issue earlier in my career, in *The Legal System: A Social Science Perspective*, published in the 1970's.[3] *Impact* expanded on the subject, which is one of the two macro-questions in the law and society arsenal, as I mentioned earlier; in this book, I also tried to bring the subject up to date.

I also tried to bring some order into a rather chaotic field. I set out a framework, defined some terms, advanced some basic concepts, and pointed out connections between different types of impact studies. Whether I succeeded, I leave to the reader to judge. In fact, there is a vast literature on impact, effectiveness, obedience and disobedience to law, and a whole cluster of related questions. But scholars in different subareas mostly stayed in their own little province; they talked to other people in their circle, they read each other's works, but ignored what was happening outside of that circle. A great deal has been written, for example, about *deterrence*, by criminologists, economists, and sociologists. Most American states still have the death penalty (at least formally), and there have been, as I mentioned, countless studies about whether the death penalty has any impact on crime rates, and if so, what the impact might be. There is also an interesting literature on drunk driving: whether campaigns against it, and various punishment regimes, make a difference, and if so when and why and how.

Also: many scholars, particularly political scientists, have been studying business regulation: regulation on air and water pollution, or employment discrimination, or safety and health controls, or stock markets and corporate finance. The question is, when does this regulation work, and when does it fail to work? When is it productive, and when is it counterproductive? What difference do various styles of regulation make? Does harsh enforcement pay off, or do more cooperative and conciliatory methods get better results? This too is impact literature—just as much as studies of the death penalty. Yet, little has been done to work out terms, definitions, theories, and concepts, to tie together the various subareas of impact. I thought it was useful to let the deterrence literature speak to the regulation literature, and vice versa. These are only two examples of research areas that are, in truth, impact research. There are others as well. Does tort litigation in the United States or elsewhere have any effect on the number of auto accidents? What is the best way to make people put on seat belts? Do patent and copyright laws encourage or stifle innovation and creativity? Of course, I have no definitive answers to these hard questions. But I tried, at least in a modest way, to say: here are some ways to analyze and explore impact, here are some terms and concepts that might be useful; here is (maybe) a way to straddle fields which (whether consciously or not) are asking questions about the impact of law.

So much for synthesis. I've also done a good deal of research, both quantitative and qualitative into legal phenomena. Most of it has been historical research. I have spent years digging around in dusty court records, looking

[2] Lawrence M. Friedman, 2016. *Impact. How Law Affects Behavior.* Cambridge, Mass.: Harvard University Press.

[3] Lawrence M. Friedman, 1975. *The Legal System: A Social Science Perspective*. New York: Russell Sage Foundation.

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at old newspapers, and reading statements, books, and papers of dead people, people who lived in the 19th and early 20th centuries. Why was I so focused on history? The most honest answer is because I like it. I do not like interviewing people and doing survey research; or designing experiments, or analyzing big piles of data. These are wonderful things to do, and I admire the people who do them; but they're not for me. I find records of dead people much more congenial.

When I use a term like "historical research", I am referring to socio-legal history. Most of what passes for legal history, in many law faculties, particularly those in Europe, is not "socio-legal" at all. It reflects the same dreary, arid attitude toward law that obsesses law faculties; all it does is add a meaningless time dimension to the conventional approach. "Legal history" then becomes a kind of daisy chain of cases, statutes, doctrines, and treatises, traveling through space and time, almost totally divorced from what was going on in the outside world. There is, of course, a distinction between doctrinal history (useless), and the intellectual history of law and legal ideas, which many of my colleagues, including some I really admire, pay a great deal of attention to. Personally, I am quite skeptical about whether the intellectual history of law and legal systems is valuable, that is, the history of legal ideas and legal philosophy, the work of such jurists as Hans Kelsen or Ronald Dworkin, or H. L. A. Hart. Some of my colleagues consider my attitude misguided. I am not so sure. To me, legal theory, legal ideas, legal philosophies are on the whole effects, not causes; they reflect the age the jurists live in, and are the product of the norms and ideas of their societies. Medieval jurists, however brilliant, reflected medieval society. Modern jurists are no different. And, frankly, in the big world, where real people live and do real things for real reasons, I doubt very much that what my colleague Robert W. Gordon calls "mandarin texts" make much of an impact. If you claim that (say) some branch of legal philosophy, or legal theory, or some book or some philosophical twist or turn, has been quite "influential" (a word whose meaning is extremely vague), I want to see the evidence. I want to see how theory made a difference. I want to see indications of a causal connection between the "mandarin text" and something happening in the real world that reflected the "influence" of the "mandarin text". Usually, there is no such evidence. But I have to admit mine is a minority view.

Social-legal history is something that appeals to me; something I find extremely exciting. Mucking about in old papers and records provides for me something like the thrill archaeologists must feel, when they dig up the ruins of a buried city, and find long-lost treasures deep below the surface of the earth. To me, there is a romance in old court records, in old newspapers, in the voices of dead people. It is, to use another analogy, like entering a foreign country, like exploring what is in some ways another world. Actually, this world is never *entirely* foreign, especially if your field (like mine) is not remote legal history, but the legal history of modern times—the legal history of the age that began with the Industrial Revolution. Indeed, one intriguing question, which we have to ask constantly, is this: exactly how foreign is this other world? When you look at an old photograph, the faces are human faces, the clothes are familiar, the landscape is familiar. The photographs tell a story; but there is mystery behind the story, there is something unknown (and possibly unknowable); socio-legal historians try, as best they can, to understand the story, and to solve the mystery.

For me, this is great fun. But I can also honestly defend it as a vital and even necessary branch of law and society research. The past, no matter how foreign, is never totally gone. It casts a shadow. How much of a shadow is the question. And socio-legal history can be immensely rewarding, even when the past *fails* to cast a shadow: when, instead, it throws into bold relief the fact that the world has changed, that things are very different now, that some feature of the past is in fact dead and buried. The past can act as a kind of control group; it tests the validity of guesses about why things are the way they are. To be sure, people may fall back on history too readily, to explain modern problems and situations. Sometimes this is plausible; often it is not. Violent crime rates are, unfortunately, higher in the United States compared to other developed, western countries. Why is this the case? Is history the key? Is it because of the wild west, the frontier, or the frontier mentality? Some people think so. But it is hard to see why gunfights in Dodge City or Tombstone, Arizona, help explain the murder rate in

modern Baltimore or Detroit. History is a strong medicine that has to be taken with caution.

Cross-cultural comparisons act as yet another kind of control group. Take the question I just asked: why is violent crime so common in the United States? If we think history is the clue, then consider the violent crime rate in Japan or the United Kingdom. These were both, at one time, violent societies—as violent as the United States, if not more so. But today violent crime rates are much lower than in the United States. Why has their experience been so different? Any explanation of American violence must reckon with the lack of violence in societies that are, in many respects, at a similar stage of social and cultural development.

Another example: in the United States, both law and society have always defined citizens as "black", even if their ancestors were mostly (though not entirely) white. The law has changed; but socially, people who are (say) one-eighth black still consider themselves part of the African-American community; and both whites and non-whites will classify them this way. During the period of slavery, children of slave mothers were legally slaves. This was true, even if the father was white, which was often the case; white owners and overseers took sexual advantage of slave women, who of course had no say in the matter. As generations passed, many slaves were mostly (genetically) white, and perhaps even looked white. But they were nonetheless still slaves. This attitude, I assumed, persisted even after slavery was abolished.

But is this really what explains racial classification today? I am no longer quite so sure, because the experience in other slave societies—Brazil is the best example—has been strikingly different. In Brazil, many American "blacks" would be simply considered white. Yet slavery itself lasted even longer in Brazil than in the United States. Here is an instance in which cross-cultural research on law complicates in an interesting way an important social and legal phenomenon. There are countless examples where cross-cultural studies act, as in this case, as an important control group.

Cross-cultural studies are also important in and of themselves. We live, after all, in a global village. More and more, socio-legal scholarship pays attention, and *must* pay attention, to situations, events, problems, and movements that are global or at least trans-national. A glance at law and society journals gives striking proof of this fact: they devote more and more of their pages to studies that are cross-cultural or which reflect, in any event, studies of socio-legal phenomena in Africa, Asia, Europe, Latin America. Take, for example, the second issue of volume 53 of the *Law and Society Review*.[4] This journal was once almost exclusively devoted to the United States. But in this issue, which appeared in June 2018, one article is about Russia, a second about Colombia, a third about Egypt, and a fourth about Israel. These essays take up most of the pages of the journal. And this issue is far from exceptional.

A lot of cross-cultural work is at least implicitly comparative. A study might, for example, report data from a country other than the author's own country. Nonetheless, authors and readers might have, at the back of their minds, their own society as a kind of baseline against which to assess the findings. Or they might see the study (of, say, an African society) as a test of some proposition drawn from European societies, or the United States. Many other studies are, in fact, genuinely cross-cultural, looking at more than one legal culture. This kind of work is hard to do well. Conventional legal scholars have it easier. It takes no special skill or training (except for language) to compare some section of the civil code of Argentina with the analogous text in the Finnish or Japanese codes. The essential points are right there on the surface. But getting under the skin of one legal culture is hard enough; doing this for two, or more, is monstrously difficult. Difficult: but worthwhile. If we take findings and ideas developed in Country X, and see if they fit Country Y and Country Z, we can move the whole field of scholarship forward.

Comparative studies often explore differences between legal cultures. Exploring similarities is just as important. A striking feature of modern life and modern culture is *convergence*: in many ways, developed countries are becoming more and more alike. And this applies to legal systems and legal cultures as well. Right now, it has become a bit harder to recognize convergence, because

[4] Cfr. 2019 *Law & Society Review* 53 (2, June): 317-634.

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(regrettably) there is an upsurge of narrow nationalism, and even xenophobia, all over the planet. Yet convergence is still a dominant aspect of modern social and legal culture. Everywhere in the developed world, people dress the same, the architecture is the same, the music is the same; a drugstore in Tokyo sells much the same line of products as a drugstore in Stockholm. Cars, planes, computers, air conditioners, clocks, microwave ovens: the toys and tools of modernity are the same everywhere.

There are scholars who argue that this is just veneer; that underneath, abiding essences of national cultures persist; that Japan remains uniquely Japan, and is unlike any other society; and we hear over and over again about American exceptionalism (and, less, obviously, about French, or German, or Italian, or Australian exceptionalism as well). Of course, this has at least a grain of truth. No two societies are the same. But, it seems to me, the similarities far outweigh the differences. Similarities in both high and low culture. Nobody is surprised that young Koreans are great at interpreting Mozart and Chopin—or that Korean pop culture is popular far outside Korea. This is a world where ideas and images circle the planet in seconds. It is a world in which countries share a common technology. They also face the same challenges and opportunities—at least in the developed world, and to an extent everywhere else as well. A Frenchman who visits Tokyo, say, will of course notice all sorts of differences between Japan and France. Visitors, however, will simply take for granted the overwhelming similarities, from the moment they land at the international airport.

The law and society movement is, in my view, itself an example of convergence. Imagine an international meeting—of the Research Committee on the Sociology of law, let us say. On one panel, one scholar presents a paper on Canada; other panelists are from Brazil, Poland, and Thailand. The papers, necessarily, will be in English: the participants share no other language. And yet there has to be a common language, one that will work across borders, or such meetings will be quite impossible. For various reasons, the language today happens to be English. Of course, this is a big advantage for native speakers of English. But English is also the working international language of science, business—and of law and society. It is also the international language of air traffic control: if controllers each spoke their native language—and pilots did the same—international airports could hardly function.

There is also a common international language in another sense, a deeper sense. The scholars who present papers at international meetings share something even more fundamental. It is the very fact that they can talk to each other, that they understand the positions, ideas, and ideologies of their fellow panelists; that they share issues, techniques, strategies; that they grasp what fellow scholars are talking about. They can agree or disagree; they can argue and dispute this point or that. But all this takes place within the common language of the discipline. Scientists all over the world—chemists, physicists, medical specialists—also talk to each other in a common language of shared understandings. The same is largely true for scholars in the law and society movement. They are, more and more, international-minded; and, to a large degree, intercultural. But also, and fundamentally, they are able to communicate because they operate within a common cultural world.

Those of us who are part of the law and society movement are proud that we speak this language; proud that we understand this language; proud that we have made at least a small contribution to the development of that language. Many of us have colleagues and former students dotted around the world. They live in different societies; they work on problems, use techniques, and profess points of view which may seem quite alien. But the common language is there, underneath the surface. I hope that I too have made at least a small contribution to the job of constructing that language.

This meta-language includes a shared recognition of the problems which society faces today. If you go back far enough in time, you would find an enormous gap between, say, Japanese legal culture and British legal culture. Today, the two legal systems, and all others, have to deal with common issues, common problems, common situations. I mentioned air traffic control. Jet travel requires air traffic control; and it must be on a more or less uniform basis. Copyright and patent law; the law of international trade; business law issues in general: all modern societies have to deal with these, on both national and international levels. But these are only the most obvious examples.

Consider, for example, modern family law. This branch of law seems, on the surface, the least amenable to outside influence, the most deeply rooted in tradition and personal choices. Yet family law has changed radically in the last few generations, in country after country. Laws about marriage, divorce, custody, and reproductive rights have been transformed. Modern technology has played a role. The samurai did not worry about in vitro fertilization or surrogate motherhood; nor did citizens of England under Henry VIII. Cultural change has played an even greater role. The history of divorce law is a prime example. What molds divorce law in Chile or Australia seems extremely local; and indeed each society has its own story to tell, and moves at its own pace. Yet the movements have all been more or less in the same direction—all over the world.

The meta-language also includes a shared political culture. This is most obvious in developed countries. It is a culture of democracy and human rights. The club of democracies has grown since the late 20th century. It includes Western Europe, North America, and some of the former Soviet Republics, such as Estonia and Latvia. In Asia, Australia, New Zealand, Japan, South Korea, and Taiwan are thriving democracies; India is democratic, and democracy has gained ground in Indonesia. All of these countries have embraced constitutional regimes; all of them have independent court systems. Almost all of them have given their courts the powerful weapon of judicial review. Moreover, they have signed on to a culture of equality: gender equality, equality for minority groups of all sorts; and they have given courts the power to act as guardians of these rights.

Of course, no country lives up to its constitutional ideals. In every country there are serious shortcomings. And, at this particular point in history—2019—the march toward democracy and the rule of law seems to have stalled in a number of countries; and even gone backwards. Tremendous risks and challenges lie ahead, just over the horizon. A world choking on its own exhaust gases. Rising waters; incredible heat waves; devastating forest fires in California or Sweden; a plague of hurricanes; not to mention political disruptions; and new and more deadly epidemics. Whether present systems can survive, and flourish, and meet these challenges, is an open question.

Democracy and the rule of law require a strong, institutional framework. Institutions do matter. But basically, democracy and the rule of law are matters of custom, tradition, norms: matters in short of *culture*. Otherwise, they are nothing but words on paper. If the culture is fragile, the framework cannot hold. Conventional legal scholarship has very little to contribute to the study of these challenges—challenges to democracy and the rule of law; or for that matter, climate change, or any other social problems. Serious problems demand serious solutions. And serious solutions require serious research. That research has to be grounded in data, in facts of the real world. It has to be rigorous. Only the law and society movement, only the study of law in *context* can do the job. Or even try to do the job.

But can the movement succeed at this very difficult job? As we said, thousands of scholars gather every year for annual meetings of law and society organizations. Thousands of papers are presented at these studies. The meetings are awash with data, arguments, findings, conclusions. It is fair to ask, what it all adds up to. What has the field accomplished?

In all honesty, we can make few sweeping generalizations. We can report few major breakthroughs and discoveries. A few scholars have tried to build grand theories; not very successfully (in my opinion). In any event, none of these theories has been widely accepted. Is this a sign of failure? Not really, I would argue. Once we reject the myth of "legal science," we can no longer expect to discover "laws" or regularities, on the model of physics or chemistry; or even on the model of sociology or economics. Legal systems are complexes of human behaviors and attitudes; they differ from period to period, and from culture to culture. Kidneys and livers function much the same for members of a tribe in the Amazon, bankers in London, or for that matter citizens of the Roman Empire or ancient Egypt. But "law" is much more variable. Every society has some way to make rules and enforce them. Scholars might be able to say useful things in general about authoritarian legal systems or democratic ones; about systems in preliterate societies or in ancient kingdoms; or about legal education, or about attempts to reform gender relations; about crime and punishment; about juvenile delinquency; about the

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regulation of stock markets; about the role of copyright and patent law in modern societies; and a thousand other subjects. But not about all of them together.

Researchers can explore various legal worlds with rigor; and (hopefully) come up with insights. To a degree, this has happened, is happening, and will surely continue to happen. Today, we know a lot more than we did about the way concrete legal systems work, and why they work as they do. We know things that might be, can be, and should be, helpful in formulating sound policy—against drunk driving, for example, or ways to make regulation of air pollution work. More of this important work can be expected in the future. Some of it may well appear in the pages of *Law in Context.*

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Some Reflections on a Research Journey in Law and Society

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ABSTRACT

A research journey is not planned but develops according to where one is geographically, and the politics of the broader world, and of scholarship, at the time. My journey took me from South Africa, through England, to Africa in the period after decolonisation, and finally to an inter-disciplinary School at La Trobe University. My research, with its foci on colonialism, and a post-colonial world that continues to be dominated by the Global North, reflects this.

Keywords – History, Law, Colonialism, Custom, Anthropology, Constitutionalism

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Summary

STUDYING LAW AND HISTORY IN SOUTH AFRICA

The editors asked me to write about my research journey. The idea of the journey implies that one knows where one is going, but my journey was a series of accidents. My primary "disciplinary" orientation is History. I did not set out to study history as an undergraduate but did so in order to get a lift to campus rather than a journey involving the bus and a long walk. But I soon found that it was more satisfactory intellectually than any other offerings in the social sciences. They all seemed to me, to use A. J. P. Taylor's description of Sociology, to be "history with the history left out". I was an undergraduate in Johannesburg during the years in which the University of the Witwatersrand was closed to non-white students, and in which major oppressive pieces of apartheid legislation were passed; so campus life was intensely political. My first experience of the campus was being tear gassed; so, the study of everything was political. As a radical(ised?) undergraduate I demanded (echoes of current South

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African students demanding decolonisation of the curriculum) that we should be taught "radical history", of the Professor J. S. Marais. His reply was simple: "The truth itself is radical". A better response cannot be imagined. It serves as the starting point for any research journey. This still seems to me to be obvious even in a "post truth" era in which radicalism has splintered into various forms of subjectivity. Our Professor was much attached to the ideas of Wilhem Dilthey—a subjective approach to the understandings of the minds of the persons one studied concerning the things that they did. Overarching this, and conflicting with it, was the pervasive Marxism of the struggles of the left in South Africa. Armed both with the mysteries of German *verstehen* and Marxist materialism I set out on my academic journey.[1] My first piece of research, an honours dissertation, traced part of the history of the white Labour Party in South Africa, a curious assembly which championed both conventional socialism, and the exclusive rights of white workers.

After my undergraduate degree I began an LLB which was also a professional qualification for the Bar in South Africa. The law we were taught was deliberately a-political. This was profoundly objectionable to me. I also found it boring (with the exception of the course in legal history which everyone else hated). But in retrospect, the degree was very valuable to me. Most importantly, it taught me to read slowly and carefully. Secondly it taught me to pay as close attention to the other side of any argument, as I did to my own. And thirdly, a legal education in South Africa could not describe an intellectually closed system of rules because South Africa had a mixed legal heritage of Roman civil, and English common law. So, there was never the possibility of thinking about just one way of doing law, which is a mindset that cripples most legal education.[2] And, as anyone who has had a legal education knows, the study of law, with its powerful and logical categories and characterisations, structures the way in which one sees the world. It is hard to escape from, and has no doubt influenced my approach to the social sciences. I also spent enough time as an articled clerk in solicitors' practices to discover that it was not what I wanted to do with my life.

GRADUATE STUDIES AND AFRICA

My political life made it necessary for me to leave South Africa. But I might have done so anyway in that any Anglo-colonial would-be intellectual then thought of Oxford or Cambridge as their natural destination in life. I was rewarded for my politics with a scholarship to Cambridge. I certainly did not want to study law again. I opted for a post graduate research degree in History. But what history? I thought of the English Civil War and the New Model Army, an obvious dream world for a radical South African. But then I thought of what I wanted to do once I had finished. This was 1965. The decolonisation of Africa to the North of South Africa was virtually complete. I was clear that I wanted to work in the new Africa. This pointed towards an African topic–one centred in the experiences of colonialism. I had often fantasised about writing a "History of British Imperial Crimes" in several volumes, so this explains my orientation. But my first choice was to go for the obvious centre of Africa's darkest experience —the Belgian Congo.[3] I spent close to a year working on the horrors of the holocaustal Congolese experience and the reactions to these in Europe only to discover that someone else had just submitted a thesis with themes close to my own. So, I had just over two years to find and finish something else. The topic most current in contemporary Africa was then the white Rhodesian declaration of independence. So, I decided to write an account of how they came to be in this position of power. From this dissertation I published my first book.[4] It had very little to do with law.

[1] *Verstehen* has lost its easy grip as a working method in a "postmodern" world in which readers have become authors and we look for absences as well as presences, suppressions and choices of representation. Marxists have dwindled. The challenge of relating individuals and structures remains. Both positivism and functionalism, the major cores of "social science", (and ultimately law and society studies), were absent from my subsequent innate approaches.

[2] And, as I was to discover as a socio-legal scholar, in an environment in which scholars became globally mobile, it hampered understanding. Very many scholars were, and are, in the habit of referring to "Law", but some have a common law referent, and some a civil law referent. But these are very different.

[3] Cambridge had specified facility in two African languages. Its colonial mindset accepted both French and Afrikaans, perfect for working on documents related to the Belgian Congo in Flemish and French.

[4] Martin Chanock, 1977. *Unconsummated Union. Britain, Rhodesia and South Africa 1900-1945, Manchester*: Manchester University Press. It gives an account of the British attempt to build a white settler-dominated dominion in East and Central Africa as an imperial counterweight to Afrikaner South Africa.

So, what to do next? I would not go back to South Africa. I wanted to work in a newly independent African state. I was offered a job at the University of Malawi, a country much criticised for its political links with the apartheid regime. To me, however, it seemed ideal. The faculty had remarkable young scholars and a strong research orientation in an intellectual climate which strongly felt that the history of this new country needed writing. But how? I wanted to understand not events, but the experiences of colonialism. How could one find this where there was so little in the way of written sources and the people about whom I wanted to write had died? The British colonial regime had kept copious records of its own doings, but they were largely about how to govern people, and less about what they felt. I was drawn towards what I thought of as the cutting edge of colonialism—its courts and means of enforcement—as it was here that I hoped to find the most emotive parts of the confrontations between rulers and ruled. What I found was that these were the arenas in which African subjects were able to speak. They turned out to be able to express their views about the colonial dispensation, and, as it turned out, this was the only arena through which they could influence colonial governments.

Colonial governments wanted to enforce Africans' own "customary laws". But who could tell them what these were, if not Africans? So African interlocutors could, and did, devise versions of customary law that suited particular interests—those of men and elders. As a particularly brutal form of capitalist change was restructuring the lives of Africans under colonial rule, their own social relationships were being wrenched into new forms. Relationships between genders and generations, which were at the core of the "customary law", were undergoing profound changes. Intense arguments about these found their way into the courts. It became very clear that "customary law" was no longer (if it ever had been) something handed down in pristine form from an immemorial past. It was clearly something being constantly remade, in reflection of profound social conflicts, even though it made use of the same traditional language and symbols. To my surprise the usable materials for the study turned out to be archival. Laboriously acquired oral data had to be discarded as it clearly reflected the present and not the past, which is just what my thesis about the continuing creation of custom would have led one to expect.

The archives led me to needing to change the ruling idea of what customary law was, and this led inevitably to a need to review the ways in which law in Africa (and law in colonial situations) had been conceived. This turned the book from one just focussing on the colonial experience, to being a book about law.[5]

This was a book I felt confident to write given that no-one writing African history had a legal background. There was little understanding of what law was, or how it worked. Law was seen as being a body of "rules", which were applied by courts to settle disputes. Above all, law was about authority. The ideas that rules were regularly indeterminate; that they were "interpreted", often ideologically; and that few disputes found their ways to court but were "settled" by cultural norms; were not part of lay knowledge. Colonial lawyers wrote a great deal about African law as it was crucial to their governing agenda. Their framework was evolutionist. African law, like Africans, was primitive. While it could be taught to evolve over a long time period, it was quite different from civilised law. The main feature of the difference was that civilised law was "certain". Certainty was the hallmark of civilised law for lawyers and laymen, the difference being that to lawyers, law was clear, and to laymen it was so nebulous and difficult that they tried to avoid thinking about it altogether. It was better left to the lawyers. Clearly, neither of these approaches could work for a project that wanted to understand law in a world full of change and cultural confrontation.

SOCIAL ANTHROPOLOGY

Who else had written about African law, or better yet, had tried to understand African societies with an even wider focus? The discipline of social anthropology was relatively new when the colonial governance of African got under way. A speculative, racist and evolutionist anthropology had accompanied the European conquest of the rest of the world. In this literature, law was divided between

[5] The book which resulted is *Law, Custom and Social Order. The colonial experience in Malawi and Zambia*. Cambridge University Press, 1985 (Republished Heinemann 1998).

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primitive and civilised and it was often assumed that the existing law of non-European peoples coincided with the law of Europeans in biblical or similarly early times. Henry Maine, in a book which was a part of the legal education of many British lawyers, posited a change from Status to Contract as part of the legal evolution of the Western world. Though this formulation became an ingredient of the legal thought of the colonial world, no-one thought about the travails along the journey towards Contract.

As social anthropology took off after the First World War, it moved away, to an extent, from evolutionism. Based on Durkheimian functionalism, Bronislaw Malinowski's renowned *Crime and custom in Savage Society* (1926) proclaimed that law was not a matter of "codes, courts and constables", that whatever performed the function of law in "primitive" societies was law. What was law's function? It was, in his view, the settlement of disputes. Legal anthropology slid into this groove, and encouraged the metastasising of fanciful approaches about dispute settlement in socio-legal studies. But from the directions that my material pointed to this was inadequate. Both constables (in the sense of an oppressive colonial regime) and codes (furiously competing cultural ideas about what law was appropriate) were distinctly present. The apparent absence of centres of power with the ability to enforce their decisions led many anthropologists to think that there must be some other mechanism at work, mostly ignoring the fact that African powers had been destroyed by colonial conquest. Mediation; preserving social balance; restoring important relationships: all seemed to be at work. But there were also other realities which showed the need to look beyond the theory of one's discipline to the historical facts. The immediate histories of much of pre-colonial Africa had been brutal, often dominated by the slave trade and by the rule of stronger groups over weaker ones. Africans stressed their own cultures' abilities to solve disputes better and more peacefully than British legalism because they did not want to dwell on pre-colonial violence. The British stressed the value of their "rule of law" as the solution to violence. Representations of history always have a function. In this case the appeals to deep culture were ultimately about the legitimacy of the colonial enterprise.

The anthropology of the colonial era was, unsurprisingly, essentially a colonial discipline. Its subjects of research were simultaneously subjects of Empire. Colonial governments funded anthropologists because they were looking for help in understanding how to govern African subjects. This is not a criticism of the many talented people who wrote about African societies, it is simply a reflection of the world in which they lived. Overall their project failed because it was a discipline not attuned to historical change. And, most especially in the area of law, it misrepresented the processes that anthropologists were observing. Taking the observed behaviour as customs representing cultures, they failed to place it within the context of the extraordinary wrenching, by force, of African life into market economies. Once this historical context is understood, what Africans had to say about customs can be seen to be their responses to the current pressures in a new world, not a recounting of the ways of an old one.

Any research, including research about customary law and colonialism, does not take place in a vacuum. The overarching concerns of the politics of the time influence the ways in which social and economic theorists portray the world, and both have a bearing on the asking and answering of research questions. The time at which I was writing was at the end of the first decade of the decolonisation of Africa. Optimism was high. The inheritors of the newly independent states appeared to be popular and legitimate. Their aims, to unify and develop their new countries economically, were tasks that were not only political, but were embraced and theorised by the academic world. All of these countries had a dual inheritance of European and African law. How these were to be brought together, and what the future of "customary law" could be in a modern economy, were questions crucial to the implementation of economic development. So, an inquiry into law in Africa, both imported and indigenous, was far from arcane. My study was to turn out to be controversial because it not only undermined the colonial pretext that it had brought a functioning "modern" law to Africa, but much more so because it undermined the view that what was passing for "African" law at the time of decolonisation was an essentialist cultural product of Africans, "half as old as time". Many African lawyers at this time were of the view that the dual legal systems must be merged if

the overall goal of development was to be reached, and that African law would be the basis of that merger. But how had this African law come into being? In my account it was the product of intense economic changes. These produced defensive actions by men and elders in African societies as their social power over young men and women, who could now be cash earners, was waning. Money also created new powers, among them the ability to buy land from the economically stressed, and this challenged basic African ideas about land rights. Customary law, in other words, was colonial.

AFRICAN CUSTOMARY LAW AND THE NATION STATE

Any empirical study laces one into the complicated worlds of other histories and of "theory" that are implicated within it. A study of the representations made by Africans of the worlds of the "customary", led me inevitably into the literatures of cultural creation and cultural heritage. In the post-colonial period in Africa, discourses about African culture were preeminent, a far from surprising development after centuries of scorn. Unfortunately, despotic African politicians used the cultural arguments to deny the applicability of the universality of human rights to Africa, and to oppose the inclusion of bills of right in African constitutions. Culture had become a weapon in the hands of rulers rather than ruled. I found the literature on advertising (the most pervasive public communication in the capitalist world) to be highly suggestive as a guide to the ways in which culture was being created and represented.[6] As a result I was the first (I claim) to use the term "cultural branding" to describe the ways in which cultures were being created, represented and promoted. This interest led me to write about what I still think have been the misplaced but largely successful efforts to copyright heritage and "traditional knowledge".[7] The role of law in these fields seemed to me to be most problematic.[8]

Anthropology has always seemed to me to be the most vital of disciplines.[9] It is the quintessential discipline of the study of globalisation, though more than often ignored by economists and others. Freeing itself slowly from its dubious beginnings as a way of theorising why some races and cultures were superior to others, it became the locus of enquiry into cultural expression and difference, a discipline which validated what had been scorned. The transformative power of western rule and capitalism has meant that anthropology now must study not original "cultures" but responsive and interrelated understandings. That it should have been vital to my studies of the worlds of the "customary" in law is clear, but I also found myself reading the literature of the anthropology of art in relation to my "heritage" work. From my work on cultural heritage, I was drawn towards the position that the greater the expressions of cultural essentialism, the more they masked resistances to changes which could not ultimately be resisted.

On a private visit to South Africa in the last years of the apartheid regime, I had a series of conversations with a friend who was to become the first head of the post-apartheid regime's Constitutional Court. As we ranged over the nature of South Africa's legal system, he became increasingly alarmed. "If those are your views", he said, "you must write a book about it." I thought I had put South Africa behind me. But I embarked on a project which was to take over ten years.[10] The extraordinary changes that took place in South Africa over the years in which I was researching and writing the book underlined once more the connections between the writing of an apparent account of the "past" and events in the "present". When I had begun the inquiry, in circumstances in which many

[6] A research journey also involves roads not taken. I now think that, if I had my time over again, I would have studied advertising which, like law, is a discourse of misleading.

[7] See "Human Rights and Cultural Branding: Who Speaks and How", in A An-Na'im (ed.). 2002. *Cultural Transformation and Human Rights in Africa*, London: Zed Books; "Branding identity and copyrighting culture: orientations towards the customary in traditional knowledge discourse", in C. Antons (ed.) 2009. *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*. Vol. 14, Amsterdam: Kluwer Law International BV; and M. Chanock and C. Simpson (eds.). 1996. "Law and Cultural Heritage", *Law in Context* 14 (2).

[8] The push for property rights in culture and heritage has been an ultimate submission

[9] I was even once a Visiting Professor in Anthropology.

[10] It resulted in the publication of *The Making of South African Legal Culture 1902-1936. Fear, Favour and Prejudice.* Cambridge University Press, 2001.

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South African lawyers were concerned about the government's increasing contempt for "the rule of law", the prevailing puzzle seemed to be the coexistences of liberal legal forms in a racially oppressive state. By the time I approached the book's end the major concern was how to reconstruct the new state on the basis of a human rights based legal order. A legal history could clearly no longer be predominantly about the formation of two systems of "private law" for whites and Africans, but came instead to be seen through the focus of state construction. In the formation of the South African state in the early decades of the 20th century, the drive at the centre was the establishing of authority and law encompassing all aspects of society. New Statute law, usually based on models found elsewhere in the British Empire, dominated. A determined bureaucracy was the author of the legal enterprise and its main user. From their perspective judges, courts and lawyers were mere irritants, rather than the core of the developing legal order. Law was needed not to limit power, but to create it, and to channel the ways the bureaucracy used its powers, not to protect the rights of citizens.

This led me to think differently about some core beliefs of the law and society enterprise. Law's own version of itself was of a body of doctrine, often validated by a long historical continuity, and applied without reference to persons or politics. Many socio-legal scholars discovered the so-called "gap" between law in the books and law in practice. Law consequently was seen as a sort of deceptive ideology that betrayed its offers of justice in practice. But it became clear to me that law was less about limiting power than it was about increasing and endowing it. Law justified acts of violence and allocated resources. But to understand how it did this, one had to focus on all of the complex discourses around law in a society. *Law, Custom and Social Order* had already shown how limited it is to think about law as just "rules" applied. How then to think about it? Law and society studies correctly placed it "in context". Some emphasised society and economy underlying legal doctrine and practice. But there is also a discursive context. Lawyers' legal discourse is but a part of an interrelated set of discourses about law – bureaucratic, radical, religious.[11]

AFRICAN CONSTITUTIONALISM

The final steps in my research journey went back to Africa, but in a wider global context. I am writing about constitutionalism in Africa. In many ways it is a project which is *prima facie* absurd. African polities are marked by an absence of attachment to constitutional principles or practices. But this is not research about an absence. Both my study of colonialism and law in Central Africa, and of state building and law in South Africa, had essentially been about legal colonialism. The development of a global form of Constitution is another, and very ambitious, form of colonising by law. Constitutionalising has become a worldwide process, driven by the West, to impose a particular form of government on nation states, one which very severely limits their ability to restrict or restrain a global capitalism. The languages of democracy and human rights, in themselves profoundly attractive, are hardened into institutional forms, which are limited in variation. People around the world, endowed with Bills of Rights, are becoming "prisoners of freedom".[12] Africa's continuing struggles with constitutionalism need to be seen in this light. As a historian, with my faith that putting one thing after another in chronological order would explain all,[13] I embarked on a history starting with the decolonisation process which produced independent Africa's first constitutional endowment. The constitutional inheritance of British Africa was hampered by a combination of official ignorance and the meagre nature of common law constitutional thought, and the lack of intention to adhere to constitutional practice among African politicians. The collapse into varying forms of authoritarianism in well known. But the reaction to these periods is interesting. All types of

[11] My interest in the broad range of discourses about and surrounding law differs not only from the legal realist emphasis on law in action—on deeds rather than ideas—but is very different from the emerging study of the contemporary practices of the automation of legal decision-making.

[12] See e.g. Harri Englund. 2016. *Prisoners of Freedom: human rights and the African poor*. University of California Press.

[13] Putting things into chronological order as a means of explanation does not imply a simple attitude towards the past. As Henry Maine wrote, "Sometimes the Past is the Present, much more often it is removed from it by varying distances which however cannot be estimated or expressed chronologically". The past is not "there". What it means and how it is used is "History". The discourses of law are always inherently drawing upon a reservoir of with past representations without which they have little authority. Various pasts are therefore always present in the Present. They cannot go away, for they are the sources of legitimacy and meaning.

government require a structural form. African democrats and socialists, in pursuit of their promised land of socialist development, produced one-party constitutions. African soldiers dabbled with military constitutions. These need to be understood as serious efforts in constitution making, even if they do not conform with western liberal models. Democratic change came, and often went. The bureaucratic nature of state-led development undermined the rule of law. Weak judiciaries, operating within the common law mode, declined interference in politics. The search for democratic forms of government in states manufactured by colonialism, continues. What "one thing after another" can show is a continuing struggle. The project as a whole critiques, through the lens of this African story, the ideas behind the current neo-capitalist florescence of interest in constitutionalism as a mode of governance, and the uses made of its language, especially the language of human rights. The Bill of Rights is considered as an iconic instrument that constitutionalises liberal individualism into state form. The project is linked to other parts of the journey. The work on customary law underlines for me how important it is that the basic common law of any country must be the real source of rights and a rule of law, and that it must be a common law that is an inherent part of that country's culture. Africa's constitutional weaknesses appear to have been less because of failures at the top of the legal structure, but because there was no underlying common law with which Africans identify.

But on re-visiting my scholarly production I am impressed (and relieved) by how radically political it was. And this was the primary way in which it was received. *Law, Custom and Social Order,* which demonstrated that African customary law was not a form of "pre-law" existing in the minds of old men, but a constantly re-created adaptation to change, was a profound challenge to the prevailing official positions.[14] The legal policy makers of Africa's new states initially thought they could simply pick up the late colonial project of codifying custom from the minds of vanishing old men, and relegate it to a position inferior to imported law. But the insistent lesson of the book had been a refutation of the idea that customary law was an early form that came before civilised Western law. In its place, it demonstrated that Western law came first, that it had created customary law. The book and the subsequent articles on property law created the necessary groundwork for a legal politics which could look towards the use of African customary law as the common law of modern states, instead of as an antique survival. It was also a frontal attack on the notion that law is made up of "rules" being "applied".[15] In place of this certainty, it portrayed the constant incursions into rule formations, and applications, of conflicts over economy, gender and generation. The book also had its largest impact in the area of gender. Its portrayal, in considerable detail, of the process through which African men, and their colonial rulers, contrived together to reduce the legal position of women in marriage, and to nullify their rights to land, led to my being labelled an "honorary African feminist".[16]

The South African book traced the fundamental influence of race in the legal system, specifically attacking the idea that the Roman-Dutch law was untainted by racism, and could simply continue as the basis of the legal system of a new state. A quaint notion persisted, and continues to persist, that somehow there was good in South Africa's legal past just because it was legal, that governments and judges adhered to a "rule of law". But the book shows, I hope, that adhering to a rule of law is not in itself a way of protecting people from the power of the state. Any state requires law, to endow its officials with power, and to the control the ways in which they use it. The post-apartheid constitution enacted an elaborate state-of-the-art Bill of Rights.[17] Its new Constitutional Court has delivered inspiring judgements. But a vigorous rights discourse is evidence of the prevalence of wrongs and these wrongs are producing cynicism towards rights-based legal solutions. South Africa remains caught in a tight web of international

[14] So much so that the leading expert on African law in London not only refused to attend a seminar I gave but sent a long-written denunciation that he insisted be read out before I had spoken.

[15] Perhaps I was unconsciously influenced by being told by the senior partner of a solicitor's firm I clerked in that his philosophy was first of all to keep the client out of court. "Remember" he said "that exactly 50% of litigants with a strong case and the best counsel lose".

[16] See S. Ellmann, H. Klug and P. Andrews (eds.). 2010. *For Martin Chanock. Essays on Law and Society. Law in Context* 28 (2). The expression was used in the title of Fareda Banda's contribution to this special issue.

[17] A necessary assurance to both white South Africans and international capital.

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agreements and conventions which make up the textual universe of a new legal positivism. The scope for local solutions is narrow. The issues raised in the last chapter of the *The Making of South African Legal Culture* remain. Its gloomy prediction that state incapacity, rather than state ambition, would be the main challenge to a "rule of law" has come to be.

For a long period of my academic life I saw myself as a "law and society" scholar. But what did that mean to me? I wrote the series description for Cambridge Studies in Law and Society.[18] It aims to publish

> ...work on legal discourse and practice in its social and institutional settings combining theoretical insights and empirical research...The books consider all forms of legal discourse across societies, rather than being limited to legal discourses alone.

Many valuable books have subsequently been published but, while I had insisted in my South African book that one had to consider all of societies' discourses about law in an effort to dethrone legal formalism, I found that towards the end of my association with the series I was regretting that so few of our prospective authors were interested in legal discourse itself. It seemed to me a fault in the Law and Society movement as a whole that it showed increasingly less interest in Law as a system of ideas and found it hard to escape from realist roots which often tilted towards sociological positivism. Leaving the intellectual history of law to legal scholars has been a mistake because discourse creation is, after all, a social act.

One has, I suppose, in trying to address the role of politics in one's research and writing to ask whether one is trying in each empirical work to illustrate and validate one big Truth, or whether one is simply illustrating little truths. And then there is the question of specifically relating one's academic writing to one's political activities (if any). This was not a course I took, political as I was. In the end this was largely due to the fact that I came to Australia by accident and as an émigré was not an engaged part of the society in which I lived. I remained far more engaged, as many émigrés do, by the politics of the places I had come from. Academic life itself is, of course intensely political.[19] Active as I once was, fortunately it is a world remote to me now. I mention it only to underline that an academic life is inescapably political, whatever the stance of disengaged scholarship might suggest. How to sum up where the journey took me to? I contributed in a major way to the understanding of how custom works in law, in shifting the notion that it is from "time immemorial" to something that is continually freshly created. I underlined the destructive threats posed by the spread of western ideas of legalised private property. I illustrated the ways in which essentialised versions of cultures were used by the elites of the South to justify regressive law. I tried, with partial success, to demolish the narrative of the innocence of legalism in the construction of South Africa's racist state. And I am trying to question the assumption of the virtues of the global constitutional project and the particular institutionalised forms of "human rights", as they trap states and peoples in inappropriate state structures. All of the journey's ends are illustrative of the histories of the imprisonment of the peoples of the global South within the enclosure of capitalism, and their reactions to these processes. But one only tends to see these themes in one's writing after it is done. Writing history is rather like Napoleon's legendary description of the tactical secret behind his astonishing military victories: *"On s'engage, et puis, on voit"*.[20]

[18] It is one of the best products of the School of Law and Legal Studies at Latrobe. The other founding editors were Chris Arup and Pat O'Malley. We were subsequently joined by Sally Merry and Susan Silbey.

[19] Henry Kissinger, an academic who later became US Secretary of State, famously remarked that academic politics were so violent "because the stakes are so small".

[20] One engages, and then, one sees.

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Law's Wars, Law's Trials
The Fate of the Rule of Law in the U.S. 'War on Terror'

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ABSTRACT

The rule of law is a foundation of the liberal state. There is broad consensus about its core, extending across the political spectrum. Our own experience tragically teaches that the rule of law is most endangered when those exercising state power feel threatened: during and after wars and in response to social protest.

Keywords – Rule of law, "war on terror"

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Summary:

I. LAW'S WARS

On May 2, 2004 I heard Seymour Hersh break the Abu Ghraib story on National Public Radio. This had personal significance because I remembered vividly when Sy, who is my brother-in-law, had exposed the My Lai massacre 35 years earlier. I felt compelled to explore whether the rule of law would fare better in the US after a terrorist attack than it had in South Africa under apartheid, about which I had also written. I wrote two books to understand which strategies had been most effective to protect the rule of law during the 16 years of the Bush and Obama administrations—because its defenders must maximize their limited material resources and political capital in the seemingly endless "war on terror."

I organized *Law's Wars*[1] around five sites of contestation: Abu Ghraib, Guantánamo Bay, torture, electronic surveillance, and what I grouped under the heading of battlefields: extraordinary renditions, secret prisons,

[1] Abel, Richard L. 2018. *Law's Wars: The Fate of the Rule of Law in the U.S. 'War on Terror'*. New York: Cambridge University Press; Abel, Richard L. 2018. *Law's Trials: The Performance of Legal Institutions in the U.S. 'War on Terror*'. New York: Cambridge University Press.

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targeted killings, and civilian casualties. Here are my provisional conclusions.

First, law matters. Governments operate through law, which demands that those wielding state power give reasons for their actions. The Bush administration sought to clothe itself in legal garb by soliciting secret Office of Legal Counsel opinions from apparatchiki chosen for their political loyalty and eager to curry favor in the hope of career advancement, such as a federal judgeship. They offered specious justifications for the regime's numerous abuses. But though secret laws cannot legitimate, they did create an unbreakable circle of impunity. Lawyers could not be disciplined for writing the memos because of law's inherent indeterminacy. And the memos immunized those who followed them.

Second, sunshine is the best disinfectant. The Bush administration guiltily sought to conceal its actions. The CIA hid "ghost detainees" within existing prisons and built secret prisons to hide others (creating Rumsfeld's notorious "unknown unknowns"). The administration immured detainees in Guantánamo to render them invisible and incommunicado. The military classified the entire Taguba report on Abu Ghraib[2] and much of the dozen other military investigations. The CIA and NSA briefed only the Congressional Gangs of Four or Eight, who were sworn to secrecy. Surveillance was necessarily secret and battlefields inaccessible. José Rodríguez, director of the National Clandestine Service, shamelessly explained why the CIA destroyed videotapes of torture:

> *We knew that if the photos of CIA officers conducting authorized EITs [enhanced interrogation techniques—the Bush euphemism for torture] ever got out…the propaganda damage to the image of America would be immense. … I was not depriving anyone of information about what was done or what was said. I was just getting rid of ugly visuals…. But the government's strategy was inherently flawed.*

Secrecy can never be hermetic. Bureaucracies must document and share information. Officials boast about their achievements. Military Police in Abu Ghraib were infected with their generation's exhibitionism, photographing the sexual abuse of detainees and broadcasting the incriminating evidence. Legislation and adjudication must be public. And hiding information perversely valorizes it (just as a cover-up can provoke more anger than the crime itself).

Revelations have different effects. Empathy may vary *inversely* with the number of victims. There was less concern about American bombs slaughtering dozens of Afghan civilians than the targeted killing of Anwar al-Awlaki. The "war on terror" generated its own iconography: Abu Ghraib detainees piled naked into pyramids; hooded manacled Guantánamo detainees kneeling in front of barbed wire under a pitiless sun. But the focus of these images on the *aberration* rather than the norm limits their effect. By emphasizing the sexualized gratuitous nature of the crimes in Abu Ghraib, the Bush administration could dismiss them as the actions of a few bad apples, whom it was glad to see court martialed.

Third, the buck stops here (in Harry Truman's famous phrase). The executive wields the greatest power and bears ultimate responsibility in matters of national security. But even within the Bush administration there was dissent from his intimates, the FBI, and high military officials. And it mattered *who* occupied the Oval Office. On his second day as president, Obama issued executive orders ending EITs and secret prisons and vowing to close Guantánamo within a year. Unfortunately, he was better at formulating policy than implementing it. He spent his limited political capital on the *Affordable Care Act* (ACA), leaving too little to overcome Congressional resistance to closing Guantánamo. And Attorney General Holder failed to lay the groundwork to prosecute High Value Detainees in federal court in New York.

Fourth, the House of Representatives calls itself the People's House. But though Congress can restrain executive power, Republicans generally supported Bush and thwarted Obama at every turn. Secrecy limited Congress's oversight. Its silence was deemed acceptance. Even when Democratic Senators enjoyed a majority, they failed to use confirmation hearings to extract information, much less block nominees—notably Alberto Gonzales as Attorney General.

Fifth, the US "war on terror" repeatedly violated "Equal Justice under Law", the ideal engraved on the Supreme Court

[2] Officially titled US Army 15-6 Report of Abuse of Prisoners in Iraq (May 2004).

pediment. After the 9/11 attacks, government detained, abused, and deported hundreds of un*documented* Muslims and forced tens of thousands of documented Muslims to register. *Only* non-citizens were rendered to torture, detained in Guantánamo and secret prisons, subjected to EITs, tried by military commissions, or surveilled in the US. And the US refused to expose its *own* citizens to foreign law, demanding extraterritoriality in Afghanistan and Iraq and exfiltrating those not immune.

Sixth, civil society's responses to rule-of-law violations varied greatly. Most Americans ignored Snowden's revelations about NSA surveillance, having blithely surrendered their privacy to the siren lure of electronics and feeling confident the Agency was preoccupied with foreigners. But allied leaders felt compelled to complain about offenses to dignity, friendship, and national sovereignty. Most Americans were content to let detainees languish in Guantánamo (although other countries successfully freed their nationals). By contrast, proposals to transfer Uighurs to the Washington, D.C. suburbs or move other detainees to federal prisons or try them in federal courts sparked predictable and successful NIMBY objections.

Seventh, although most victims of the US "war on terror" were unable to resist, history repeatedly demonstrates the powers of the weak. Guantánamo detainees threw bombs of vomit, feces and urine at guards, engaged in self-mutilation and hunger strikes, and attempted suicide, sometimes succeeding. Although the military responded by forcibly feeding them and concealing their numbers, the protests sometimes improved conditions of confinement. But demonstrations in the US on the anniversary of the prison's opening—most recently, the seventeenth—had no effect, and protests in Muslim countries provoked by false reports of Koran desecration led to deaths and injuries but no change in policy. By contrast, public anger in Afghanistan and Pakistan against civilian casualties sometimes persuaded the US military to modify its tactics.

Eighth, which moral discourse? The most powerful criticism of EITs was deontological. John McCain, whose torture during six years in a North Vietnamese prison endowed him with unique moral authority, famously declared "it's about us. It's about who we were, who we are and who we aspire to be." "War on terror" hawks sought to force adversaries to engage on the terrain of utility. But that discourse, though hegemonic, is fatally flawed. It ignores a fundamental asymmetry: only *Americans* enjoy the dubious benefits of torture, while *others* suffer all its costs. The utilitarian trump card—the notorious "ticking bomb" hypothetical—is premised on numerous unknowns: that only under torture would the suspect disclose *truthful* information *uniquely necessary* and *sufficient* to *stop an attack* otherwise *certain to occur*. Proponents did not and probably could not quantify *any* of these five variables. And if utilitarianism could justify what apologists dismissed as "torture lite", it could justify anything: forcing a suspect to watch his wife raped or his child torn apart, killing a million of "them" to save a million and one of "us."

Before his inauguration, Obama declared: "we need to look forward as opposed to looking backwards." Praising the "extraordinarily talented people" at the CIA "who are working very hard to keep Americans safe," he said: "I don't want them to suddenly feel like they've got [to] spend…all their time looking over their shoulders." Attorney General Holder promised not to prosecute anyone "who acted in good faith and within the scope of the legal guidance" from Bush administration lawyers. And *no on*e has been prosecuted.

This is a tragic error. Only courts can authoritatively answer legal questions. Their silence lets perpetrators and enablers reiterate flawed legal positions. John Yoo keeps repeating his discredited views. Just before Trump's inauguration Alberto Gonzales said the new president could revive waterboarding because he "is head of the executive branch, and he could have the final say if he chooses to exercise his authority on the law".

II. LAW'S TRIALS

For this reason, the companion volume, '*Law's Trials*', addresses the judicial record in six substantive areas: criminal prosecutions, habeas corpus petitions, military commissions, courts martial, civil damages actions, and civil liberties violations.

First, terrorism-related prosecutions generally resembled those for other crimes: appropriate charges, disclosure of exculpatory evidence, thorough voir dire, no undue

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delay, and zealous defense. Although most were resolved by guilty pleas—like all prosecutions—judges in the few trials showed admirable restraint in handling disruptive *pro se* accused, ruled fairly on defense objections (excluding evidence tainted by torture), and correctly instructed jurors, who often deliberated at length because of a single holdout, hanging on multiple occasions. But this simulacrum of the criminal process concealed troubling features. Almost all prosecutions were based on material support statutes rarely used before 9/11, which obviated the need to prove specific intent. Many accused were poor racial minorities profoundly ignorant about the radical Islamist ideology allegedly inspiring them. The government relied heavily on undercover agents and confidential witnesses, who gave or promised suspects huge sums, provided the necessary (but inoperable) weapons, explained how to use them, and badgered the accused into committing criminal acts. Although many defendants alleged entrapment, none could prove it. Almost all received long prison terms, often decades—sentences that might have been appropriate for what they allegedly *intended* but seemed excessive given that almost none caused any harm.

Second, habeas corpus petitions. In its June 2004 *Rasul v. Bush* decision, the Supreme Court upended the belief (reflected in lower court decisions) that aliens held outside the nation's de jure sovereignty could not seek habeas corpus. (The fact that Abu Ghraib broke the day of oral argument may have influenced some Justices). In *Rasul and Boumediene v. Bush,* as well as lower court decisions, judges split into two camps, inhabiting incompatible normative and empirical universes. These differences produced an unusual number of divided panels, *en banc* re-hearings, and appellate reversals. Opinions were saturated with inflated rhetoric, hyperbole, and personal attacks on judicial brethren. Justices like Stevens and O'Connor declaimed ringing endorsements of liberty. Their opponents valorized security in equally freighted language. Justice Scalia pontificated, without any evidence, that allowing habeas review would have "devastating consequences" and "almost certainly cause more Americans to be killed." In the Fourth Circuit, Judge Wilkinson proclaimed that Americans' "paramount right" was the commander-in-chief's unlimited power, not liberty. His colleague, Judge Williamson, luridly warned that terrorists "aim to murder scores of thousands of civilians," who "can be slaughtered in a single action," while "large swathes of urban landscape can be leveled in an instant." In the end, Republican appointees dominating the DC Circuit reversed petitions granted by District Judges, casually jettisoning the deference owed to trial judges as fact finders and concocting a novel presumption that the government's evidence was true. And Congress passed Bush's *Military Commissions Act* (MCA), stripping civilian courts of habeas jurisdiction.

Third, just as Bush sought to insulate detainees from the scrutiny of Article III judges by isolating them in Guantánamo and secret prisons, so he created military commissions to minimize defendants' procedural rights and maximize the likelihood of conviction. Aside from keeping the High Value Detainees (HVD) out of the criminal justice system, however, commissions have been ineffective at best and a shambolic fiasco at worst. The first five prosecutions targeted small fry: two chauffeurs, two juveniles, and a naïve young Australian adventure seeker (David Hicks). Plea bargains prevented commissions from either demonstrating that detainees were "the worst of the worst" (in Rumsfeld's lying words) or showcasing the virtues of American justice. Most received short sentences (partly because of their lengthy detention without trial). Torture precluded some prosecutions (by rendering accused incompetent to stand trial) and reduced the likelihood of conviction (by excluding evidence). The politicization of commissions became embarrassingly obvious when the Pentagon removed three Convening Authorities (CA) and one of their legal advisers, and another CA (a Cheney protégé) quit after aborting al Qahtani's prosecution because he had been tortured. Apparently unable to stomach the unfair process, six prosecutors resigned, the most aggressive of them switching sides. Most commission judges were less experienced than their civilian counterparts; and proceedings were repeatedly derailed as judges were redeployed, completed tours of duty, or retired, sometimes in disgust at the process, most recently in all three pending cases: Pohl in *U.S v. al-Nashiri*, Spath and Schools in the *High Value Detainees* (HVD) trials, and Rubin in *U.S. v. al-Hadi*.

But personnel were the least of the problems. Unrestrained by a *Brady v. Maryland* rule, prosecutors obstructed or delayed discovery. Defense lawyers lacked adequate

resources and had difficulty gaining and keeping the trust of clients who had been harshly abused by Americans, some wearing the same uniform as military counsel. Accused who boycotted proceedings posed difficult ethical dilemmas for their lawyers. Interpreters were expensive, slow, and sometimes incompetent. Lawyer-client confidentiality was repeatedly compromised, sometimes deliberately. Commission judges refused to address *in limine* challenges to their jurisdiction, committing what even the conservative DC Circuit called "plain error" by entertaining charges that were ex post facto or not war crimes. So 17 years after Bush created the commissions, 11 after he sent the HVDs to Guantánamo, and seven after Holder abandoned civilian prosecutions, commission trials are still years away from starting and, given legally mandated appeals, a decade or more from finality—a chaos that was predictable in a criminal process created from scratch and entrusted to a novice institution exposed to political influence. And this is the moment when the Pentagon, in its wisdom, decided to initiate three more prosecutions, for alleged Southeast Asian terrorist plots.

Fourth, the dismal record of self-regulation by lawyers, doctors, clergy, police, politicians, and universities reveals the danger of letting foxes guard henhouses. The military is no different. It deals severely with those who threaten or injure Americans, sentencing Chelsea Manning to 35 years for leaking classified information and Nidal Hasan to death for killing 13 fellow soldiers. But when victims are foreigners in war zones, military justice is to justice as military music is to music. The fog of war obscures vision. Military investigators (often on short tours of duty) are far less expert than the FBI. Their ignorance of local languages and cultures hinders interviews with witnesses embittered by the alleged crime. Investigators often reach the scene weeks later—after evidence has disappeared—and then lose what they collect. Soldiers, who must have each other's backs in combat, display the same loyalty afterwards in the *omertà* of the closed group. They are trained and motivated to commit acts that would be criminal off the battlefield. Law of war demarcations between permitted and prohibited behavior are unavoidably ambiguous. In courts martial, moreover, these are applied by a true jury of the defendant's peers: soldiers of at least equal rank, usually with similar combat experience. And in the name of military discipline, commanders can and do reduce charges and penalties.

Courts martial for alleged crimes in Afghanistan and Iraq had predictable outcomes: acquittals were frequent (whereas they are extremely rare in civilian prosecutions), and punishments were lenient (compared to those civilian courts imposed on military contractors and ex-soldiers for similar offenses). The likelihood of conviction varied inversely with the accused's rank: no officer was convicted for the Abu Ghraib abuses. By contrast, courts martial dealt harshly with actions lacking military justification: Abu Ghraib's sexualized abuse, thrill-seeking murders, rape, and the massacre of women and children.

Fifth, civil damages actions by "war on terror" victims confronted an obstacle course that defeated nearly every plaintiff: the Supreme Court's "disfavor" for *Bivens v. Six Unknown Named Agents* actions, the difficulty of proving a constitutional right was "clearly established" when the harm occurred, exhaustion of administrative remedies, the alleged existence of other illusory remedies (such as criminal prosecution, Congressional action, or elections), qualified immunity, state secrets, and the MCA's jurisdiction-stripping provision. Judges again split into irreconcilable camps. The "rights-oriented" began with Justice Marshall's foundational assertion in *Marbury v. Madison* that courts have a duty "to say what the law is." By contrast, "deferential" judges belittled plaintiffs' injuries as the "inevitable" tragedies of war, where "risk-taking is the rule," and blamed "terrorists" who "cunningly morph into their surroundings." Conservative judges, who routinely invalidated regulations for failing to satisfy a cost-benefit analysis, refused to demand it of the military. Originalists casually invented novel doctrines like "battle-field preemption." Conservative judges who angrily accused lawyers of "lawfare" for representing "war on terror" victims fulsomely praised lawyers representing *terrorism* victims. They made wholly speculative assertions that claims against the *government* would impede its "war on terror," while claims against *terrorists* would eliminate terrorism.

The "war on terror" distorted tort law in other ways. The US paid $2 million to Brandon Mayfield, an American lawyer wrongly detained for two weeks on suspicion of

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terrorism because he had married a Muslim woman, converted to Islam, and represented Muslim clients. By contrast, the government successfully moved to dismiss a claim by Maher Arar, a Canadian it mistakenly rendered to a year of torture in Syria, although his own government apologized and paid him CAD$ 10 million. And both courts and compensation funds were far more solicitous of and generous to US victims of terrorism than to foreign victims of the US "war on terror."

Sixth, the Bush administration responded to the 9/11 attack just as Bin Laden had hoped—by embracing Samuel Huntington's ideological mystification of a "clash of civilizations." Bush lumped together Iran and Iraq in an "axis of evil", oblivious to the centuries-old animosity between these countries, who recently had fought a devastating eight-year war. His casual reference to a new crusade revived Islam's most painful memory. Both the military and the CIA deliberately insulted Muslim beliefs to interrogate and humiliate: stripping detainees before men and women, accusing them of homosexuality, making them simulate sexual acts, forcing them to embrace Christianity, wrapping them in the Israeli flag, desecrating corpses and the Koran, and violating the modesty of their women.

By contrast, courts generally vindicated First Amendment rights, perhaps because protests did not significantly obstruct the "war on terror." And multiple efforts failed to incite a moral panic against Islam. Cynical politicians and demagogues have been unable to block the construction of mosques, notably at Ground Zero. Infantile stunts like burning the Koran or making a film insulting Mohammed grabbed the spotlight their perpetrators craved but were condemned by a broad spectrum of political and religious leaders. And courts opposed campaigns to legislate against the illusory threat of Sharia.

Comparisons across the six legal domains expose the variable influence of politics on law. In four categories—habeas corpus, civil damages actions by "war on terror" victims, electronic surveillance, and civil liberties—outcomes correlated very significantly with whether the judge had been appointed by a Democratic or Republican president. Among damages claims, judges were nearly twice as favorable to those by *terrorism* victims as they were to those by "*war on terror*" victims. By contrast, there were no significant differences in in judicial reviews of military commissions; and in criminal prosecutions, Democrats favored the prosecution *more* than Republicans.

One reason for these differences is that in cases where politics *was* significant—habeas petitions, civil damages actions by "war on terror" victims, civil liberties, and electronic surveillance—plaintiffs were brandishing law as a *sword* against the government, whereas in cases where politics was not significant—criminal prosecutions, military commission reviews, and courts martial—defendants were invoking law as a *shield*.

Ambiguity had different consequences across domains. Civilians were harshly punished for material support, even though many might never have acted without encouragement and assistance by informants, and almost none caused any harm. By contrast, US soldiers who killed or wounded Afghan or Iraqi civilians successfully invoked the fog of war to avoid responsibility. Circumstances that *never* diminish responsibility in civilian prosecutions, such as revenging a buddy's death or harsh living conditions, and even aggravating factors, like substance abuse, excused or mitigated culpability in courts martial. Although the entrapment defense *never* succeeded in civilian prosecutions, courts martial acquitted defendants who had not been given Miranda warnings, even officers who knew their rights. Court martial convictions of Americans were overturned because of unlawful command influence; but far more egregious political interference in HVD trials—such as prejudgment by the commander-in-chief—never derailed a military commission. Civilian courts convicted almost every accused. Courts martial often acquitted because soldiers were tried by a jury of their peers. If military commissions ever try the HVDs, the jurors will be their enemies—true victors' justice.

III. THE FATE OF THE RULE OF LAW

The most important lesson of these books is a paradox: the fate of the rule of law—whose *raison d'être* is to immunize law from political distortion—itself depends on politics. Party control of the White House and Congress was the single most powerful determinant. Republican senators blocked Obama's judicial nominations and have enthusiastically confirmed Trump's. The conclusion is

inescapable: defenders of the rule of law *must* engage in politics, including the electoral process.

I began my research expecting to find the rule of law far more resilient in the US—a hegemon wounded but not existentially threatened by the 9/11 attacks—than it had been in South Africa, whose small white minority desperately clung to power under apartheid. But the rule of law in the US has suffered more defeats than victories and faces even greater threats under Trump, who neither understands nor values it. Concerned that my books might induce despair and political passivity, I collected nearly 200 examples of efforts to confront a wide variety of grievous social wrongs: wars and their crimes; genocide; Hiroshima; sexual and other abuse of vulnerable populations by powerful men and cover-ups by religious, media, educational and athletic institutions; government mistreatment of racial, religious, ethnic, sexual and other minorities; colonialism; political persecution; wrongful convictions; human experimentation; and accidental mass injuries. Despite the enormous diversity of time, place, actor, and subject matter, the responses display one striking similarity: they took a generation or more. Perpetrators must relinquish power or die, and their immediate descendants remain defensive. The worse the wrong, the greater the resistance to admitting it. Yet as the #MeToo movement shows, there often is a snowball effect: voicing one wrong inspires other victims to complain, and an apology by one perpetrator increases pressure on others.

These examples recalled the lessons of South Africa. After the National Party constructed apartheid in 1948, it took nearly half a century for Blacks—85 percent of the population—to win power in the first democratic election. Victims of the US "war on terror", by contrast, are fewer in number, non-citizens, isolated in Guantánamo or dispersed across war-torn nations, with little ability to influence the world's greatest power. But I have to believe their time will come and hope those victims and their champions, who have tenaciously defended the rule of law since 9/11, draw strength from the successful struggles of South Africans and other oppressed peoples and inspiration from Martin Luther King Jr.'s promise that "the arc of the moral universe is long, but it bends towards justice."

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Atticus Finch – Alive or dead? A Socio-legal Question

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ABSTRACT

In this article, the fictional lawyer Atticus Finch serves as a reference point for a broader discussion of socio-legal studies and its relevance today. Depicted in Harper Lee's 1960 novel *To Kill a Mockingbird*, Finch came to occupy an exalted position in the cultural, political and legal landscapes of the late twentieth century. For generations of students and citizens, Finch served as a model of what it was to be just, civil, honourable and brave. However, in the politically charged and deeply divided context of 2019, this article asks if Atticus Finch is dead. Has the "hero lawyer" and all that he stood for been displaced? And if so, who killed him and what does that mean for the socio-legal quest?

Keywords – Law and Society, Lawyers, Globalisation, Racism, Literature

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Summary

INTRODUCTION

Sometimes I wonder whether Atticus Finch is dead or whether he ever existed at all. Don't misunderstand me. I do realize that Atticus is a fictional character, but I also know that throughout the late twentieth century Harper Lee's stoic Southern lawyer stood as a talisman of decency, empathy and justice for many within, and well beyond, the borders of the United States. However, the ascendance of Donald Trump and Trumpism, the swirling of fake news, and the regrettable need for movements such as *Black Lives Matter* and *#MeToo*, lead me to question whether the qualities embodied by Atticus have ever really been put into effect in any lasting sense.

In thinking about my socio-legal perspective, I find myself turning to Atticus. My relationship with him started in the 1970s and has grown and changed over the years in ways that say more about my own journey than it does about him. For much of my life, it seemed that Atticus did not change at all. He appeared as solid as a rock, as

collected and calm as he had ever been. Unlike his real-life contemporaries—Martin Luther King Jr., the Kennedy brothers and Marilyn Monroe—neither rumour, innuendo nor revelation seemed to have sullied his reputation. At the end of the twentieth century, his star was still shining bright. However, today it is fading. I find him now to be as much a source of frustration as inspiration. Atticus was once wonderful, but was he ever, and is he now, enough? To explain my malaise, it is perhaps best that I start by introducing him to you.

MEET ATTICUS

In introducing Atticus, I have to apologise if I appear to be going over ground that is all too familiar. My need to do so has partly been sparked by a conversation I recently overheard at an airport gate. A young woman who was perhaps 15 or 16 years old was detailing to her family the reading she was expected to do for school. Like generations before her, she wasn't impressed at the prospect of required reading. Nor was she excited at the inclusion of *To Kill a Mockingbird* within it. As she so adamantly put it, "I don't read books about animals." The comment amused me—she clearly had the wrong end of the stick about the book—but it also jarred me. As an almost past middle-aged white Australian queer woman, I feel like Atticus has always been around and that everyone has at least heard of him. That perception is partly a coincidence of timing.

It was in 1960 that Atticus burst onto America's cultural and politically charged landscape. As one of the central characters in Harper Lee's novel *To Kill a Mockingbird*, his standing was initially intertwined with the book which quickly won critical and popular acclaim. In 1961, Lee was awarded the Pulitzer Prize and by the end of the following year the book had sold more than 500,000 copies and been translated into ten languages (Johnson 1994, p. 13). A cinematic adaptation bearing the same title and featuring Gregory Peck as Atticus premiered in Hollywood on Christmas Day 1962. Valentine's Day 1963 was chosen for the film's New York opening. With one of Hollywood's leading men embodying Atticus and a script that recast him as *the* main character in the narrative, his popularity was sealed. Academy Awards for Best Actor and Bested Adapted Screenplay followed along with another six nominations. While the immediate success of the book and film are notable, the prominence of *To Kill a Mockingbird* and Atticus Finch as cultural markers over subsequent decades is more remarkable. Based upon its polling, the American Film Institute has recognised Atticus as "the greatest hero in 100 years of film" and *To Kill a Mockingbird* as the best trial movie ever made (AFI 2011). A PBS survey which concluded in October 2018 and which garnered over 4 million votes saw Lee's novel emerge as the most popular ever amongst American readers (Reints 2018).

Eric J. Sundquist, who has traced the intertwining of Black and Jewish experiences in American representational practices post-holocaust, has described *To Kill a Mockingbird* as "the most widely read novel on the problem of racism in the United States" (Sundquist 2005, p.12). He attributes this partly to the appeal of Scout, Atticus's innocent, tomboyish ten-year-old daughter who narrates what is effectively a coming of age story. It is through Scout's eyes that we learn about life in the fictional town of Maycomb, Alabama. We learn of the ordinariness of everyday ideas and practices that maintain divisions of race, gender, and class, and which manifested themselves ultimately in injustices so profound they were deadly. Scout's detailing of her father's stoic defence of Tom Robinson, a black man wrongly accused of raping a white woman, lays bare such injustice but at the same time, serves as a vehicle for championing the ideal of law and the incorruptibility and honour of those committed to its realisation. If there ever was an embodiment of the "heroic lawyer", it is Atticus Finch.

Harper Lee completed the first draft of *To Kill a Mockingbird* in 1957. At the time she was living in New York, having left her hometown of Monroeville, Alabama, 13 years earlier. But Lee's Maycomb was based upon Monroeville and there is no doubt that in weaving her narrative she drew heavily upon the figures and experiences of her childhood. The 1933 trial of Walter Lett, a black man who lived near Monroeville, has been identified as the most likely inspiration for the Tom Robinson case (Shields 2007, p. 117-20). Lee was seven years-old when Lett was found guilty of raping an impoverished white woman. The flimsiness of the evidence against him most likely helped

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the public campaign which would eventually lead to his death sentence being commuted to life imprisonment. James Miller has described Lee as offering a "Scottsboro narrative", a reference to the infamous 1931 case which resulted in nine black youths being convicted of supposedly raping a white woman on board a freight train (Miller 2009). Eight were sentenced to death but a flurry of legal actions ensured the sentences never took effect. Even so, for Black men in Alabama in the depression years of the early 1930s, death at the hands of the law was less likely than lynching. Lynchings numbered almost twenty per year (Johnson 1994, p. 6).

Miller suggests that for Lee, the Scottsboro case remained "an important touchstone for gauging the potential of the South for civilized behaviour" (Miller 2009, p. 221). However, events which coincided with the writing of her first novel, might just as readily have served as evidence that the South was slow to change. In 1955, 15-year-old African-American Emmett Till was murdered by two men. The circumstances and manner of this death, and the subsequent acquittal of his killers, highlighted for all to see the stark reality of racial violence in the South and the impotence of the criminal justice system to counter it. In the same year, Rosa Parkes was arrested on a Montgomery bus for breaking a segregation ordinance, and the following year, despite the Supreme Court ruling in *Brown v. Board of Education*, incensed Southerners sought unsuccessfully to prevent Autherine Lucy from enrolling at the University of Alabama.

By setting her novel in earlier times, Lee elided the injustices of the present. Race-based segregation and violence could be reflected upon as vestiges of the past against which good white men—or at least one good white man—had fought. As Sundquist has noted:

> *The novel harks back to the 1930's both to move the mounting fear and violence surrounding desegregation into the arena of safer contemplation and to remind us, through a merciless string of moral lessons, that the children of Atticus Finch are the only hope for a future world of social justice (Sundquist quoted by Miller 2009, p. 221).*

But events contemporaneous to the writing of *To Kill a Mockingbird* also evidenced a readiness on the part of many to recognise the injustices of the past and present and to work towards their eradication in the future. In that context, Lee's novel proved an important tool in the battle for hearts and minds, especially those of young adults. It was quickly incorporated into junior high and high school curricula and even today remains as one of the books most frequently set as required reading for American students. (Johnson 1994, p. 14). But the popularity of the book, like the seriousness of the issues it dealt with, were not confined to the United States. My introduction to it as a student in an Australian public school was equally prescriptive. My battered copy dates from 1977. It is the sixth printing of a 1974 edition and has a bright orange cover that screams "over 11,000,000 copies sold". In Australia, earlier events such as Paul Robeson's 1960 tour and the 1965 journeying of the Freedom Riders led by young indigenous law student Charles Perkins evidenced distinct but related concerns. Whether Lee had intended it or not, *To Kill a Mockingbird* quickly became part of the trans-pacific exchange of ideas concerning race, law and injustice. But at its centre, was not a black woman or man, but a white Southern man of genteel stock—Atticus Finch.

Whether discussed in high school English classes or in university law schools, Atticus came to be lauded as a figure whose actions and thinking warranted praise and emulation both inside and outside of courtrooms. David Margolick, a legal writer for the *New York Times*, described one aspect of what might be called "The Atticus Effect". In his view, Atticus Finch was a man:

> *who taught a community and his two young children about justice, decency and tolerance, and drove a generation of real-life Jems and Scouts to become lawyers themselves. (quoted in Johnson 1994, p. 17)*

Over the decades since its publication, many have publicly testified to the "moral" and "life lessons" that might be learnt from *To Kill A Mockingbird* and from Atticus (Maxwell 2018). These lessons have been applied in varying contexts and for varying purposes. Some such as American lawyer Claudia Carter have argued for a style of lawyering that builds upon and exemplifies Atticus's compassion, responsibility to others and gentleness beyond the courtroom (Johnson 1994, p. 17). Australian lawyer Greg Barnes has explicitly drawn upon lessons from Atticus Finch to critique Australian politicians treatment of race

issues, and in particular, the treatment of asylum seekers (Barnes 2010). Similarly, over the decades, Atticus has provided inspiration and sustenance for liberal lawyers working on behalf of death row clients in the United States. And then there are "lessons on manliness" as suggested by Brett and Kate McKay in 2011. They listed six:

1) A man does the job no one else wants to do
2) A man lives with integrity everyday
3) The most important form of courage is moral courage
4) Live with quiet dignity
5) Cultivating empathy is paramount
6) Teach your children by example

But today I've been reading about Donald Trump and his response to the latest accusation of sexual assault against him. It has come from E. Jean Carroll, a New York based writer, who has written of an incident which she says occurred in the 1990s. It is consistent with the predatory and demeaning behaviour outlined in the string of previous allegations and, of course, it has been swatted away just as brusquely and narcissistically. As Trump put it, "she's not my type" (Wagner 2019). That Trump's presidency is built upon a "politics of debasement" and division is all too clear (Ott 2016). That he is frighteningly popular amongst young white men who perceive themselves as silenced and wronged reminds us of the fragility of change (Huber 2016). The slogan "Making America Great Again" champions a return to a less tolerant past and one without Atticus Finch. And so, I'm left wondering if Atticus Finch is alive or dead. And if he's been killed, who did him in?

THE SUSPECTS

If Atticus and his legacy are dead, or at the very least waning, how are we to explain this? There is the possibility of death by natural causes. Perhaps Atticus has simply been around too long and others have emerged to take his place in our hearts and minds. Or might it be that the passage of time, accompanied as it is by constant change, has rendered him and all that he supposedly embodies irrelevant. At this point in time, this is a proposition I find difficult to accept. I am not saying that Atticus was faultless, but I am saying that empathy, personal integrity, and care for others are attributes that should be considered as important today as they were when Atticus first appeared on our cultural landscapes. If Atticus is disappearing, it is under the combined weight of more than 50 years of scrutiny and there is an expansive list of those who have contributed to it.

Despite its popularity, or more correctly because of it, *To Kill a Mockingbird* has the distinction of being one of the most challenged books in modern American history. The first calls to censor it emerged in the mid-1960s following the book's inclusion as a standard work in school curricula and came from Southern white conservatives who listed profanity, sex scenes and immorality as the grounds for their complaint. However, at least one analyst has suggested that what was really being objected to was the "candid portrayal of Southern white attitudes" (May in Johnson 1994, p. 15). In writing the novel, Harper Lee had certainly sought to bring the life of the South to life. In 1964, she offered this thought on her reason for writing:

> *the South still is made up of thousands of tiny towns. There is a very definite social pattern in these towns that fascinates me. I think it is a rich social pattern. I would simply like to put down all I know about this because I believe that there is something universal in this little world, something decent to be said for it, and something to lament in its passing (Shields 2007, p. 241).*

But it is clear that Lee's position within the South was very particular. Commentators share the view that she modelled Atticus upon her own father Amasa Lee, who was an active player in civil life as a lawyer, legislator and newspaper owner. As his daughter, Lee enjoyed a relatively privileged and comfortable existence which stood at odds with the life experiences and circumstances of most of the southerners she sought to write about. In the midst of battles over desegregation, it is hardly surprising that those who expected to be entitled simply by virtue of their whiteness would find the book, and its central character Atticus, objectionable. The lynch mob that gathered to claim Tom Robinson comes to mind. It is a pivotal moment in Lee's tale. Atticus faces off with the men, whose working lives are evidenced by their overalls and sun-scorched faces, their heavy shoes and sullen looks. Among them is Mr Cunningham, an impoverished farmer who has availed himself of Atticus's legal services and the father of a young boy who goes to school with Scout. In the

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company of Atticus and white society he is a respectable and respectful working man, but his membership of the lynch mob speaks to the racialised underpinnings of the world in which he exists and his efforts to hold on tight to whatever status and power he has. The dispersal of the lynch mob might be read as a moral victory for Atticus and as a testament to his courage in defending Tom, but it does not mark an acceptance of his position by them. Nor should it be assumed that only poor whites might object to Atticus. Men of education, wealth and status have also been well represented in lynch mobs as in the ranks of the Ku Klux Klan. In 2016, Donald Trump's visit to the University of Iowa was met with students chanting "If it ain't white, it ain't right" (Huber 2016, p. 220). It may be that the mob is growing and has never let Atticus Finch out of its sights.

The second suspect in the demise of Atticus may come as a surprise but it shouldn't be. It's the usual suspect—the mother—in this case, Harper Lee. In 2014, two years before her death, the notoriously reclusive author authorised the publication of a new novel, *Go Set a Watchman* (Lee 2015). The news of this "long lost" book, the manuscript of which had been recently found in a bank vault, immediately roused interest and expectations. Fuelled by its publisher and the multi-faceted industry spurned by the success of *To Kill a Mockingbird*, cultural and literary critics along with generations of appreciative and in many cases adoring readers eagerly awaited its release. However, anticipation was soon replaced by disappointment as readers and reviewers were presented with a book that was less mature in its writing than its predecessor and, more troublingly, threw into doubt the very things that had made *To Kill a Mockingbird* so appealing and so seamless for so many. At the heart of dissatisfaction stood Lee's depiction of Atticus. In a review featured in *The New York Times*, Michiko Kakutanis summed up the problem:

> *The difference is that "Mockingbird" suggested that we should have compassion for outsiders like Boo and Tom Robinson, while "Watchman" asks us to have understanding for a bigot named Atticus. (Kakutanis 2015)*

In *Go Set a Watchman*, Scout appears as twenty-six-year-old Jean Louise who is returning to her childhood home to visit her aged and increasingly disabled father. In many ways, she is an older version of her younger self. She remains energetic, a little tomboyish and curious, but she is also restless and unfulfilled. In returning to Maycomb from New York, she finds the fixed mindsets and unchanging ways of her hometown and its people stifling. It is the 1950s, not the 1930s, and the Supreme Court's ruling in *Brown vs the Board of Education* is reverberating across the South. Jean Louise soon discovers things about the past and the present which change her view of her father. She finds a racist pamphlet, *The Black Plague*, in the living room and watches Atticus introduce to the Citizen's Council a man who delivers a racist speech. She learns that as a young man Atticus had once attended a meeting of the Ku Klux Klan, and that he now stands opposed to the activities of the National Association for the Advancement of Coloured People. The South, as he puts it, is not ready for civil rights and by attempting to advance it, the bench of the Supreme Court has acted unconstitutionally and irresponsibly. Adding to her confusion is the fact that Calpurnia treats Jean Louise as almost a stranger. By the time she leaves Maycomb, the fundamentals that shaped her childhood are in tatters and Atticus is no longer her moral guide but a mere mortal.

A note from the publisher which appears in *Go Set a Watchman* suggests that the manuscript for this book was written separately from *To Kill a Mockingbird*. However, others have noted the obvious parallels and similarities in the texts. These range from shared characters and events through to identical passages. Some have argued that *Go Set a Watchman* was in fact the first draft of *To Kill a Mockingbird* and that it was subsequently rewritten to make it more subtle and appealing. Hence the emergence of Scout as child narrator, the larger emphasis on the trial of a black man, which in turn, provided a mechanism for the re-presentation of Atticus as heroic. When spruiking the manuscript of Go Set a Watchmen in 1957, Lee's literary agent Maurice Crain promised potential publishers it would be "an eye-opener for many Northerners as to Southern attitudes, and the reasons for them, in the segregation battle" (quoted in Lee 2015). Cain's description may well have rung warning bells for those hoping to attract rather than repel Southern readers. But in no way should the failure to publish the novel be read as evidence of a lack of its authenticity. It is widely acknowledged that

To Kill a Mockingbird drew heavily upon Lee's childhood experiences. There is no reason to believe that *Go Set a Watchman* is any different. Given its timing, it may indeed reflect Lee's own journey and struggles as she gradually came to recognise those aspects of Southern life that were as unpalatable as they were unavoidable.

Intriguingly, read now, Lee's 1957 manuscript pre-empts almost sixty years of subsequent critique from a third group of suspects who, for the lack of a better description, I will refer to as "socio-legal left". Amongst this number I count a myriad of people who, having distanced themselves from the aura of law, have contemplated at length the deification of Atticus, its basis and its effects. Their critique has come in waves, reflecting changes in politics, priorities, and popular and intellectual thinking over time. It has also consisted of discernible but interrelated strands, each derived from particular standpoints and starting points. The one that has proved to be the most powerful and sustained accuses *To Kill a Mockingbird* of condoning institutional racism. This critique informed objections to the book that were lodged in the 1970s and early 80s, and in 1992, was forcefully expressed in Monroe Freedman's "obituary" for Atticus which appeared in the American periodical *Legal Times*. In "Atticus Finch, R.I.P." Freedman, one of America's leading professors of Legal Ethics, challenged what he described as the "mythological deification" of Atticus. He argued that far from being "a paragon of social activism or being motivated by true compassion, Atticus acted out of an elitist sense of noblesse oblige" (quoted in Phelps 1994, p. 511-12). Freedman accused Atticus at best of failing to overtly challenge existing structures, and at worst, of tolerating and sometimes even trivialising and condoning the mechanics of race and class that made his life so comfortable whilst so grievously undermining the dignity and existence of others. Atticus, he reminded readers, had not sought to defend Tom Robinson but rather had reluctantly agreed to do so at the request of someone else. As a lawyer, legislator and community leader in a segregated society, Freeman concluded that Atticus was living "his own life as the passive participant in [a] pervasive injustice" (Quoted in Johnson 1994, p. 18).

Freedman's critique spurned a furious reaction, especially by some from within the legal profession. He was accused of presentism in applying the context and values of the 1990s to the fictional account of the 1930s, and thus failing to recognise that at that time southern lawyers who defended, much less advocated for justice for African-Americans, were non-existent. The importance of Atticus as a source of continuing inspiration to old and young lawyers was emphasised by the president of the American Bar Foundation. In a letter to the editor of the *Legal Times* he asserted that Finch "rose above racism and injustice to defend the principle that all men and women deserve their day in court represented by competent counsel, regardless of their ability to pay" (Quoted in Johnson 1994, p. 19). After two months of attacks across various fora including the *New York Times* and leading law journals Freedman announced that his report of the death of Atticus Finch had been premature. The "mythical deification" of Atticus, as he put it, had been "illustrated by Atticans who wrote to equate my rejection of Finch, literally, with attacking God, Moses, Jesus, Ghandi and Mother Teresa" (Quoted in Phelps 1994, p. 512).

But the concerns that Freedman raised were not to go away. Indeed, they were to be added to. Greater attention was beginning to be paid to Atticus Finch as a man, and a particular sort of man. Undoubtedly, the identification and dissection of the "man of reason" in feminist critiques provided one impetus for this. Qualities that were admired in him—objectivity, rationality, courage and dependability—were rendered suspect once considered within the framework of Cartesian dualisms (Lloyd 1994). Atticus was now identified, in representational terms, as fitting within an "heroic tradition" in which men and those qualities traditionally associated with post-enlightenment masculinity have been depicted and championed as being central and necessary to law. Margaret Thornton uses the term "benchmark men" to refer to "those who embody a constellation of characteristics, conventionally associated with dominance, namely, whiteness, Anglo-centricity, heterosexuality and able-bodiedness" (Thornton 2002, p. 4). She goes on to note how "benchmark men" have historically dominated the constitution of Western legal fraternities and also come to represent and embody law

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within popular culture (Thornton 2002, p. 7-8). Atticus Finch, who plainly embodies these characteristics, might well then be understood as a man of law in the most celebrated, idealised and criticised sense.

The intersections between race, gender and class came increasingly to the fore. In 1994, the *Alabama Law Review* devoted most of its Winter edition to discussing *To Kill a Mockingbird*. Alongside an article by Freedman[1] which offered a spirited elaboration of his position were contributions that placed the novel in broader historical, cultural and literary contexts. Amongst these is an insightful unpacking of the socio-spatial dimensions of Maycomb by Teresa Phelps. In her "rereading" of the novel, she revealed much about the composition and distribution of the town's population, the social standing of each of the four distinct groups[2] within it as well as the degree to which each were considered entitled to access and to be protected by law (Phelps 1994). Quite rightly, Phelps identifies Atticus as occupying a vastly different position from that of the impoverished and disenfranchised living at Maycomb's social and geographic margins. It is not only race but also class and gender distinctions which she argues underpin and perpetuate this inequality. Why is it she asks, that neither Atticus nor any of the town's "ordinary people" concern themselves with the orphaned children of Bob Ewell who are "left to slouch and swear their way into the future that promises never to share in the community life of Maycomb" (Phelps 1994, p. 530). And, in particular, what of their failure to recognise Mayella Ewell as a victim of physical and sexual violence at the hands of her father? (Phelps 1994, p. 524)

In 1999, in an essay entitled "Reconstructing Atticus Finch", Steven Lubet pushed the law's failure to protect Mayella once step further by asking "What if Mayella Ewell was telling the truth?" (Lubet 1999, p. 1339). The idea seems almost inconceivable at first hearing as the narrative and historical reality of African-American men meeting their death after being wrongly accused of the rape of a white woman is so familiar. Indeed, Phelps might well be right in surmising that no-one reads the book for the plot as the outcome of rape trial is never in doubt' (Phelps 1994, p. 512). Yet it is Atticus's defence of Tom Robinson, both inside and outside of the courtroom, which provides the primary basis for his exaltation. As Lubet so compellingly points out though, if Atticus stands any chance of succeeding at all it is at the expense of Mayella Ewell. Compared to those around him Atticus appears gentlemanly, but he is also calculated and ruthless in a way that only the law allows. His defence of Tom Robinson can't be separated from his understandings of how Maycomb worked, and the dynamics of race, class and gender infused within it. Thus, Lubet highlights how Atticus "rightly or wrongly, designed his defence to exploit a virtual catalogue of misconceptions and fallacies about rape, each one calculated to heighten mistrust of the female complainant" (Lubet 1999, p. 1351). He argues that in examining Mayella and Tom, Atticus set out to elicit details which in combination created a potent image of the alleged victim as a woman driven by sexual fantasy, who was sexually voracious, spiteful, confused, and ultimately so ashamed, she could do nothing else but lie. What Atticus offers, Lubet argues, is a multidimensional rendering of the "she wanted it" defence (Lubet 1999, p. 1351-3).

In analysing Atticus's tactics, Lubet questioned whether Atticus actually proved anything that he claimed. He is critical of Atticus for failing to recognise the class and gender-based assumptions informing his world view and which manifested themselves in the type of defence he pursued. But Lubet was also bothered that such a defence should be regarded as allowable and ethical. Thus, he offered a critique of the adversarial system and the types of lawyers and lawyering it enabled. His observations proved

[1] Freedman lists these "enviable array of qualities" as follows: "He is a loving, patient and understanding father, successfully coping with the burden of being a single parent. In his personal relations with other people, black and white, he unfailingly treats everyone with respect. Professionally, he is a superb advocate, a wise counsellor, and a conscientious legislator." (Freedman 1994, p. 482)

[2] The four groups identified by Phelps are: "the ordinary people like us"—the white, genteel folk like Atticus who live in the township of Maycomb, have access to the law and see themselves as legally entitled; "the Cunningham's who live out in the woods", who are white, respectful of their social superiors, willing to improve themselves through education and hard work and who have some access to the law; "The Ewells down at the dump" who are white, dirt poor, without manners or education, and who are untrustworthy, dissolute, carnal in their habits and inclinations, with no legal entitlement, no access to justice; and "the negroes" who are further divided into two groups—the respectful such as Calpurnia and those who stand for Atticus in the courthouse and the trouble-making who question their place and refuse to be subservient. Significantly, the film version of *To Kill A Mockingbird* only features African Americans who are respectful in their dealings with whites.

so confronting that when published in the *Michigan Law Review*, they were accompanied by responses from a panel of legal academics , one of whom warned that Lubet was taking "revisionism in a distinctly postmodern direction, if not to a radically new level" (Atkinson 1999, p. 1370). But Lubet was certainly not alone. By the closing years of the twentieth century, a growing number of socio-legal scholars, some identifying as lawyers and others not, were questioning Atticus's status as a "lawyer hero". Atticus claimed to have faith in the law but when confronted with the prospect of the eccentric hermit Boo Radley being tried for murder, he shies away from it. Placing Boo on trial, he tells Scout, to even expose him to the curiosity of Maycomb's townsfolk, would "be sort of like shootin' a mockingbird" (Lee 1974, p. 280). In 1998, legal ethicist, Tim Dare, concluded this decision was neither legally ethical nor heroic. He instead described it as:

> *the stuff of tragedy. A principled man has been confronted by the inability of principles by which he understands himself to resist evil, and realizes he cannot risk another loss. He abandons the principles and adopts a fiction. Whether or not it is wicked to try people in the secret court of men's hearts now depends upon which men's hearts. (Dare 1998, p. 50)*

ATTICUS: DEAD OR ALIVE?

As I write, Atticus Finch has reappeared, this time on the stage of the Schubert Theatre in New York. It is just over seven months since the play *To Kill a Mockingbird* made its Broadway debut and while it has received glowing reviews from critics, it seems that audiences are more doubtful as to its worth. Today, the website *Broadway World*, for example, reports that critics rate the play 8 out of 10 stars, whilst readers rate it a lowly 3.47 (Broadway World, 15 July 2019). The problem may well be that the portrayal of Atticus is not what is expected by Northern liberal audiences who remain largely wedded to the idea of him as a paragon of moral and lawyerly virtue. It is certainly that image which Harper Lee's estate tried to maintain when it filed a lawsuit against the play's producer claiming that Aaron Sorkin's script departed from the contractually required representation of Atticus as being—as in the novel—a model of "wisdom, integrity and professionalism" (quoted in Gizzo, 2019). Once the play eventually debuted, it quickly proved a box office hit, becoming one of the highest grossing non-musicals in Broadway history. But those who have attended have been confronted by a version of Atticus who is an accommodationist when it comes to racism and conflicted in his quest for justice. "It's not clear" as one commentator has recently observed, "whether Atticus is enjoying a revival or taking his final bow." (Cep 2018)

Far off Broadway, there is no doubt that Atticus has lost much of his lustre. The question of whether *To Kill a Mockingbird* is suitable reading for school children has become increasingly commonplace in North America. In 1996, Nova Scotia's Department of Education removed it from required reading lists and in 2017, the Biloxi school district in Mississippi did the same, saying that racist language within the book made some people uncomfortable (Saney 2003) (Chen 2017). But of course the objection runs deeper than that with it long having been argued that the derisory term "nigger" which appears 48 times in the novel is demeaning and offensive in that, irrespective of the context in which it is used, it summons to life all the stereotypical generalisations that African-Americans have been forced to labour under and which still endure today (Saney 2003, p. 99-100). Why then, it is asked, should *To Kill a Mockingbird* be chosen, above all other books, as the first book that children read about race and injustice? Does its lack of an African-American perspective, and the fact that it champions a white saviour whilst being is totally devoid of any black characters who exercise agency, not make it even more unsuitable? (Marer 2018, Randall 2017) And as Alice Randall leads us to ask, what damage might be caused by a book that "encourages boys and girls to believe women lie about being raped?" As she points out *To Kill a Mockingbird* is "often read by children in wildly different—and sometimes profoundly damaging—ways" (Randall 2017).

The question of how the novel is read and indeed taught has extended into law schools and has particular significance for Atticus. While still a staple in discussions of legal ethics, his once unquestionable values and actions have now become moot points to be debated, judged and, where thought inappropriate or unsound, discarded. Cynthia Bond, a clinical professor of lawyering skills, argues

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that she still finds value in *To Kill a Mockingbird* but that it must be supplemented by varying texts—autobiographical accounts, films and documentaries—which provide differing accounts of "the complex interconnections between race and law" (Bond 2018, p. 207). Bond suggests that Lee's other novel, *Go Set a Watchman*, might also provide a useful starting point for facilitating discussion of Atticus's "less admirable beliefs and broader political context" (Bond 2018, p. 205). At the end of the day, Bond argues that dismantling the construction of Atticus as a lawyer hero is essential in fostering students to become socially engaged and reflective professionals.

Over more than twenty years, I too have sought to engage students in the dismantling of Atticus. My decision to do so began with a nagging discomfort, a sense that something just wasn't quite right about the story and the man at its centre. Perhaps it had something to do with the scene which establishes Atticus as a man of courage and action before his children and his community. He shoots a rabid dog dead in the street. I still find the scene unsettling and ominous. This is a man who will protect his community, but who is his community and who or what are the dangers to it? As the answers to these questions have become clearer to me, so too has my disappointment at Atticus' inability to recognise the racially-based injustices existing within his community and law's role in their inscription and maintenance. In his final summation to the jury that will judge Tom Robinson, Atticus praises America's courts as "the great levellers" in which "all men are created equal". He goes on to say:

> *I'm no idealist to believe firmly in the integrity of our courts and in the jury system – that is no ideal to me, it is a living working reality.... I am confident that you gentlemen will review without passion the evidence that you have heard, come to a decision, and restore this defendant to his family. In the name of God, do your duty (Lee 1974, p. 209-10).*

Atticus's final statement is so passionately delivered that for a very long time, I and no doubt many others, took it as evidence of his faith in the law and its capacity to do justice. If he had any doubt at all about justice being done that related to the quality of jury, not the institution of law. As he notes, "a court is only as sound as its jury, and a jury is only as sound as the men who make it up" (Lee 1974, 210). I have finally come to the conclusion, however, that there are only three ways to interpret Atticus' assertions and neither of them add cause for his continued deification. One interpretation is that Atticus's statement is simply part of his strategy to gain the acquittal of his defendant, rather than a statement of fact or personal belief. In this reading, which is consistent with one line of thought presented by Lubet, Atticus is simply a legal technician using every avenue allowable to increase his chances of achieving Tom Robinson's acquittal. Understood in this way, Atticus' summation exemplifies law as "constitutive rhetoric":

> *as a set of resources for claiming, resisting, and declaring significance...a way of asking and responding to questions; of defining roles and positions from which, and voices with which, to speak; of creating and maintaining relations; of justifying and explaining action and inaction (White 1985, p. 207).*

If Atticus' summation is not understood in this way, and instead is accepted as evidence of his faith in the law, then we are faced with two other possibilities. The first is that Atticus is astonishingly ignorant or blind to the reality faced by many; namely, that far from being great levellers, the courts, like the law generally, as they existed at that time constituted a significant force in facilitating the maintenance of a social order that was blatantly unjust in its treatment of significant segments of the population. Monroe Freedman's controversial condemnation of Atticus as a "passive participant in that pervasive injustice" comes to mind again (quoted in Johnson 1994, p. 18). The second possibility is that Atticus did believe in what he was saying at the time of the summation but subsequently loses his faith in law. This view is advanced by Tim Dare who highlights how Atticus acquiesces to Sheriff Tate's plan to spare Boo Radley from prosecution. Within this reading, Atticus acknowledges that the law cannot protect the recluse and, in so doing, emerges as a tragic figure who has either lost or abandoned his faith in law. Even more tellingly though, it is at this point that Atticus becomes part of the process by which guilt or innocence is determined in private by a privileged few rather than by a jury of community members operating in a public court of law (Dare 1998, p. 44).

To Kill a Mockingbird has never in my view been primarily about Scout or Tom Robinson. It is Atticus who has always been at the centre of it, even to the point, as Charles Shields has noted "that Tom's fate, which means death, seems less important than Atticus's losing the case" (Shields 2007, p. 226). In light of almost 60 years of critique, much of it based not just in careful reflection but on experiences of marginalisation, it seems implausible that Atticus can continue on as a hero for the future. The case against him is now overwhelming, but understanding Atticus and his actions within his context, still remains important to me. My changing perceptions of Atticus have been part of a broader battle of mine to understand the nature and significance of law and to position myself in relation to it. It strikes me that the work of socio-legal scholars is too often dismissed, confused or mistaken as reflecting a nihilistic mission to destroy law. As legal anthropologists and a platoon of socio-legal scholars have shown us, and indeed as *To Kill a Mockingbird* illustrates, to live in a world without some form of law being enacted seems as improbable as divorcing law from power. To my mind, if there is a distinguishing purpose for socio-legal studies, it is to expose law for what it is - a socio-historical and very human construction that is as complex and flawed as those who create and interact with it. To recognise the ways in which law can be manipulated and exploited flows on from this, as does the responsibility to acknowledge injustices and to work towards the protection and empowerment of those who have or are at risk of experiencing them. Given this, we might still learn much from Atticus Finch, be he dead or alive.

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Lessons from the Financial Crisis and Other Banking Scandals

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ABSTRACT

The Global Financial Crisis (GFC) had dire implications for the UK, creating massive unemployment and years of austerity. This paper looks at the underlying causes of the crisis, together with the reasons why financial regulation in the UK failed to prevent the financial crash. The UK sought to learn the lessons from its failure, and many inquiries, research reports and books have explored the causes and compounding factors. The book "Capital Failure" identified that trust was fundamental to the working of the financial sector, and that the erosion of trust and trustworthy behaviour has had a disastrous effect. Australia escaped relatively unscathed from the GFC, yet recent inquiries into the banking and superannuation sectors have revealed a similar dramatic decline in trustworthiness and ethical standards of behaviour. The article examines how the Australian banking environment evolved, the implication of recent developments including Fintech and Regtech, and what lessons Australia can learn from overseas experience.

Keywords – Financial crisis, Financial markets, Trust, Accountability, Regulation

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Summary

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INTRODUCTION AND PURPOSE

A period of low global interest rates and a drive by governments and central bankers to encourage home ownership created a major, unsustainable, credit boom. In the US subprime mortgages were "sliced and diced" into collateralised debt obligations, given attractive risk ratings from credit rating agencies, and bought by yield-seeking financial institutions around the western world. Combined with lack of attention to the overall liquidity of the system, these factors combined to cause major institutions, such as Lehman Brothers, to fail.

When US house prices collapsed, mortgage delinquencies caused the failure of these mortgage-backed securities. The collapse in value of the securities led to a liquidity crisis as the quality of banks' lending policies suddenly looked questionable, some US institutions failed, and uncertainty spread as to which financial institutions were most exposed to mortgage losses and liquidity shortages. Short-term wholesale funding disappeared, and the Bank of England had to intermediate to provide daily liquidity. Northern Rock,[1] which relied heavily on short term wholesale funding, was the first UK bank needing to be bailed-out.

The results of the banking collapse for the real economy in the UK were brutal: lending to and investment by the corporate sector collapsed. The greatest downturn since the Great Depression saw a one million increase in UK unemployment and wages fell by 5% to below 2007 levels (Bank of England 2019). The sudden collapse in asset values meant that banks had to sell more assets to restore their balance sheets, leading to a vicious cycle of fire-sale prices. The British Government established a Bank Recapitalisation Fund, which provided bailouts to the Royal Bank of Scotland (RBS) of £20 billion, and £17 billion to HBOS and TSB.

The cost of the bailouts was borne by taxpayers and the wider community, and many years of austerity began. There was a great deal of anger that bankers had received huge rewards, seemingly unrelated to the value of the work undertaken, which they kept even when the collapse came. There had been no "calling to account"—bankers had effectively privatised their gains and socialised their losses (Lambert 2014). These feelings of anger and mistrust were fuelled also by numerous examples of misselling of financial products and abuse of financial instruments. Pensions and life insurance had been widely missold, and the LIBOR interest-rate fixing scandal in 2012 was the last straw for many.

The Parliamentary Commission on Banking Standards described "a collapse of trust on an industrial scale" (PCBS 2013). The incoming Governor of the Bank of England discussed the "fundamental loss of trust" that followed when banks became more concerned with making profits than helping their clients (Carney 2013). The Archbishop of Canterbury, Justin Welby, argued that "economic crises are a major problem when they're severe. When they are accompanied by a financial crisis and a breakdown in confidence, then they become a generational problem" and the only way to "fix this mess" is through a change in culture (Welby 2013).

In the aftermath of the Global Financial Crisis (GFC), the UK's financial sector was put under the spotlight. Numerous inquiries, reviews, books and academic research projects explored what had caused this catastrophic failure of the UK financial system and what needed to be changed to avoid a repeat. These included a four-year research project at Oxford University in which we participated, and which led to the publication of *Capital Failure* (Morris and Vines 2016).

By contrast, Australia got off relatively unscathed from the GFC. Financial institutions had much less exposure to sub-prime investments and had much greater liquidity (in part a result of Australia's compulsory superannuation system). The Australian economy was relatively debt free and running budget surpluses. Australian fiscal stimulus (partly in the form of $900 cheques given to those on low incomes) helped Australia weather the world-wide recession, aided by the strong stimulus instituted by China.

The praise heaped on Australian banks bred complacency. Former Treasurer Peter Costello said: "In the aftermath of [the GFC] some of these bankers started to believe it was due to their genius, they should take the

[1] Famously, Northern Rock had just increased its dividend to shareholders, having reviewed its capital requirements under the Basel Accords and determined that it had capital to spare.

rewards and they took the eye off the ball which was the customer." (Murdoch 2018). Ten years later, an Australian Royal Commission has, belatedly, exposed many failings in the Australian financial system.

The purpose of this article is to look at the many lessons that were learned in the UK as to what went wrong, what changes were made in response, and what these and the recent Royal Commission's findings imply for financial regulation in Australia.

WHAT WERE THE UNDERLYING CAUSES OF THE FINANCIAL CRISIS?

Capital Failure attempted to distil the key features/characteristics of financial institutions, markets and individuals that helped to create the financial crisis (Morris and Vines 2014). It found that lack of regard for trust and accountability was central to what went wrong.

The starting point for this lack of regard was a misplaced belief in efficient markets. Throughout the period of the "Great Moderation", a lightly regulated financial system was thought to work well, even if the individuals operating within the market are selfish.

Adam Smith described the effects of self-interested motivations:

> *It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their interest. We address ourselves not to their humanity but to their self-love ... [The Wealth of Nations, Book IV, chapter 2, para 2]*

Furthermore, Smith argued that these self-interested motivations could (in some circumstances) give rise to good outcomes:

> *Every individual ... neither intends to promote the public interest, nor knows how much he is promoting it .... He intends only his own security; and by directing that industry in such a manner as its produce may be of greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. [The Wealth of Nations, Book IV, chapter 2, para 9]*

Twentieth century economists formalised Adam Smith's insight about "the invisible hand" in the *First Theorem of Welfare Economics*. This argued that a well-functioning competitive market will give rise to efficient outcomes—in which no person can be made better off without some other person being made worse off—even if all economic actors are pursuing selfish interests.

Since the Great Depression financial markets had been heavily regulated. That led to credit rationing and many households were unable to borrow. However, as the demand for financial services increased (with the rise of banking and saving, the demand for home-ownership and mortgages, and the encouragement of pensions), policy-makers believed that financial markets should be opened up to foster competition and innovation. Mistaken belief in efficient markets meant there was very little focus on the trustworthiness of the financial services provided and the need for financial service providers to be explicitly concerned with the interests of clients (Jaffer, Morris and Vines 2014).

Changes to industry structure and remuneration arrangements conspired to erode the ethical behaviour and the trustworthiness of the financial sector. Systems that exerted peer-group pressure were dismantled, self-regulatory arrangements were replaced with administrative controls and, encouraged by incentivised remuneration, selfish behaviour became widespread. The UK's "light-handed" regulation became a model for international regimes—with disastrous results.

Why was belief in efficient markets so misplaced for financial services? The answer lies in the characteristics of financial services and products which meant that the strong assumptions required for perfectly competitive markets did not hold (Jaffer et al. 2014). These key characteristics comprise asymmetric information, complexity, uncertainty, moral hazard and conflicts of interest. They gave rise to high leverage on the part of financial firms, excessive risk taking, extraction of economic rents and the mispricing of risk. Moreover, the adverse implications of these characteristics were magnified by remuneration systems and an over-emphasis on shareholder value in capital markets.

The presence of asymmetric information makes financial services trust-intensive. Customers do not have access to the information or expertise needed to assess

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the quality of the products. In addition, many products involve long time frames and uncertain outcomes, making the value difficult to assess over the short and medium term. These problems of asymmetric information worsened as financial products became more complex. Thus, the *Turner Review* opined:

> *For it seems likely that some and perhaps much of the structuring and trading activity involved in the complex version of securitised credit, was not required to deliver credit intermediation efficiently. Instead, it achieved an economic rent extraction made possible by the opacity of margins, the asymmetry of information and knowledge between end users of financial services and producers, and the structure of principal/agent relationships between investors and companies and between companies and individual employees. [The Turner Review 2009, 59]*

Not only are financial products often highly risky, but the risk tends to be dispersed amongst multiple players. This diversification served to make knowledge of the product more difficult again, ultimately amplifying the risks.

The fact that customers do not understand the products being sold enables firms to extract monopoly profits, through high fees and high prices for products. Those tasked with assisting consumers, trustees, fund managers or asset managers, may also over-charge or have insufficient expertise to protect their clients (Jaffer, Morris and Vines 2014).

Conflicts of interest arose with the growth of integrated financial institutions. In pre-Big Bang London, the different agents (brokers, fund managers, investment advisors, wealth managers) were largely independent. With the emergence of universal banks, conflicts of interest arose, and the imposition of fiduciary duties became more difficult to sustain (Jaffer et al. 2014). At the retail level, customers were sold unsuitable products. At the wholesale level contract law was used to over-ride the fiduciary duties that would otherwise have applied to so-called "sophisticated customers". Complex products were created and sold without regard to the risk of their failure or the fact that a related party may have had an interest in their failure. The misselling of Lehman bonds to Australian local authorities was one such example (O'Brien 2014).

Remuneration structures also played an important role in eroding trustworthiness. Academic work on the principal-agent problem argued that performance bonuses would align the interests of managers and shareholders. However, in financial services this created incentives for the product provider to take or even manufacture risks because the costs that eventuate fall almost entirely on the customer (O'Brien 2014). Where there is significant uncertainty and asymmetric information, it is relatively easy for managers to set up arrangements that yield high returns for clients (and high bonuses) in the short term, while imposing severe tail risks which may take years to materialise.

Moral hazard also played a role in encouraging the excessive leverage of financial firms. Originally (in the early 1800s), banks in England and Wales were owner-managed. If a bank failure wiped out depositors, it wiped out the manager-owner too (Davies 2014). However, the link between depositor safety and managers' returns has been weakened over time, with the creation of banks that were "too big to fail" and an implicit government guarantee.

Before deposit insurance existed, depositors had a strong reason to monitor the risky activities of their banks. Furthermore, there was an expectation that banks would bail each other out if there was a liquidity crisis. Capital levels were much higher and leverage correspondingly lower. However high leverage also delivers high returns to shareholders, and high remuneration to executives. Risky investments such as derivatives multiplied. The government's implicit guarantee further encouraged firms to engage in risky behaviour, as taxpayers would cover the cost of catastrophic failure.

Poor corporate governance also played a role. Weak and inexpert boards did not properly understand the risks that were accumulating. Compensation schemes encouraged excessively risky behaviour. Board independence and oversight was eroded as management became more powerful. Weak and inconsistent accounting standards enabled the arbitrage of regulations, and the absence of formal shareholder engagement left management free to pursue their self-serving goals (Arnd and Berg 2010, n. 13).

WHY DID FINANCIAL REGULATION FAIL IN THE UK?

Financial regulation failed to keep up with a rapidly changing financial sector. There were errors of omission—most noticeably no-one had identified the implicit subsidies building up as firms became too big to fail. Nor was anyone focussed on the systematic risk in the system as a whole (Jaffer, Knaudt and Morris 2014). Some of the failures were intrinsic to the regulatory process—such as incentives to arbitrage regulatory rules. But some of the problems were seriously exacerbated by regulation itself: regulatory requirements distracted management and contributed to an abrogation of responsibility by key parties. It also produced information that was ill-suited to the needs of users.

The tripartite system of splitting oversight between the FSA, the Bank of England and the Treasury was widely acknowledged to have failed. The Basel Accords were intended to bring risk management up to best practice, but no-one focussed on the implications of the explosion of securitised credit for the risks of the system as a whole (Basel Committee on Banking Supervision 2019).

Arrangements for lender of last resort and deposit insurance were introduced to prevent liquidity problems turning into insolvency. Although it was recognised that moral hazard is created by deposit insurance, the extent of hazard was greatly magnified by the sheer scale of risk-taking. Banks became "*rationally careless*" about the pricing of risk and the market for risk ceased to work (Wolf 2011).

The Basel Accords required a capital minimum of 8% of total assets for banking institutions. However, the weights used to reflect relative riskiness were arbitrary and did not allow for the fact that the assets were illiquid. Furthermore, they served to blind management to the true riskiness of their business. For example, Northern Rock had borrowed heavily in wholesale markets to fund its mortgage portfolio. After announcing that it was compliant with Basel II, Northern Rock promptly increased its dividend payout. Shortly afterwards the demand for its mortgage backed securities collapsed and Northern Rock became insolvent.

Further regulatory failures stemmed from the belief in efficient markets. Regulators believed that greater disclosure of information could counteract information asymmetries. Instead users were swamped with information which exacerbated existing cognitive biases. Gatekeepers, such as auditors and Credit Ratings Agencies (CRAs) suffered from a lack of independence, while securitisation itself reduced the amount of information available to investors.

Similarly, the FSA had been reluctant to regulate financial products, in fear that product regulation would stifle innovation and reduce choice for customers. Instead reliance was placed on conduct of business rules, with customers assumed to choose products that suited their needs. This approach failed at both the wholesale and retail levels, with pricing for ill-conceived products detached from true risks. At the same time, the ever-increasing complexity of products weakened the ability of boards and regulators to implement and enforce appropriate controls and further weakened the effectiveness of disclosure.

HOW DID THE UK RESPOND?

One of the first regulatory reviews after the GFC was the Turner Review, which examined the growing scale and complexity of banks, and found poor risk management, inadequate boards, remuneration policies that encouraged excessive risk taking, conflicts of interest amongst the rating agencies and a lack of understanding on the part of investors of products and their associated risks (FSA 2009). Its recommendations included measures to improve banks' capital adequacy and liquidity, and reduce leverage, a bank resolution regime to ensure the orderly wind down of failed banks, revisions to remuneration policies, a shift in the FSA's supervisory approach to focus on risks and outcomes, technical skills and probity, and the introduction of counter-cyclical capital and liquidity measures.

The *Independent Commission on Banking*, headed by Sir John Vickers, was asked to look at how to reduce systemic risk, mitigate moral hazard, reduce the likelihood and impact of firm failures, and make recommendations regarding competition in the banking sector. The Vickers Report recommended that UK banks' retail operations

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should be "ring fenced" to insulate them from riskier investment banking activities, secure their continued operation in the event of failure and reduce the costs of bailouts (ICB 2012). The Commission also made recommendations intended to improve the loss-absorbency of UK banks and improve competition in the banking sector through the divestiture of Lloyds Banking Group, making the cost of bank accounts more transparent and easing the process of switching.

David Walker was asked to review corporate governance in UK banks, in the light of the failure of the banking system. The *Walker Report* set out a series of recommendations intended to establish new ethical standards for bank behaviour (Walker 2009). It called for active and accountable boards, capable of questioning management's approach to risk, more intrusive supervisory roles for regulators in the governance of risk, and enhancements to remuneration controls.

The FSA's report on the failure of the Royal Bank of Scotland (RBS) found that executives and the board made "a series of bad decisions", but that there was no fraudulent or dishonest activity (FSA 2011). In particular, the FSA concluded that their actions were not sanctionable in the absence of any codes or standards against which to judge their performance. However, the report was controversial, and was itself reviewed by the House of Commons Treasury Committee. Their report found limitations in the FSA's ability to assess the failures of executives and the board as well as finding governance issues in the regulator itself (HCT 2011).

Subsequently the FSA was disbanded and replaced by two new regulatory entities. The Financial Conduct Authority (FCA) now regulates the conduct of 58,000 financial services firms and financial markets in the UK. It aims to ensure that financial markets work well, and consumers get a fair deal, through consumer protection activities, enhancing market integrity and promoting effective competition. The Prudential Regulation Authority (PRA) is part of the Bank of England and is the prudential regulator of around 1,500 banks, building societies and other financial entities.

Following the LIBOR scandal,[2] the Parliamentary Commission on Banking Standards was established to inquire into professional standards and culture in the UK banking sector, and to make recommendations for legislative and other reforms. The Commission's Final Report, *Changing Banking for Good*, addressed the responsibilities of senior executives and the board of directors (PCBS 2013). The recommendations sought to make executives and board members fully accountable for their decisions and the standards of their banks, through a new licensing regime underpinned by Banking Standards Rules, a "Senior Persons Regime" with enforcement powers and a new criminal offence for reckless mis-conduct in the management of a bank, a new remuneration code to better align risks and rewards, and powers for the regulator to cancel all outstanding deferred remuneration for senior bank employees in the event that their banks need taxpayer support.

The Basel Accords are being revised and efforts to apply regulation to the shadow banking sector are underway. In addition, the Financial Conduct Authority (FCA) is planning much more intrusive product regulation to protect customers, to intensify supervision of risk mitigation, improve redress to customers and change incentives where necessary.

The many other reports and investigations into the GFC are too numerous to mention. They include reports, articles and speeches by senior regulators and researchers at the FCA, the Bank of England, independent think tanks and government entities and parliamentary committees. The many academic contributions include Rajan's *Fault Lines* (Rajan 2010), *The Future of Finance* (Turner et al. 2010), and our book *Capital Failure: Rebuilding Trust in Financial Services* (Morris and Vines 2014).

[2] The London Interbank Offer Rate (LIBOR) is calculated daily and is supposed to reflect the interest rate banks pay to borrow from each other. For a period of at least seven years, a number of major financial institutions reported artificially low or high interest rates in order to benefit their derivatives traders, thus undermining a major benchmark for interest rates and financial products.

STEPS REQUIRED FOR A TRUSTWORTHY FINANCIAL SYSTEM

Trust is crucial to the workings of the financial sector. When customers purchase a financial asset, they expose themselves to the risk that the promised returns will not be delivered or that the asset will lose much of its value at some point in the future. Thus, the purchasers need to trust the provider that a good return will be received (Jaffer, Morris and Vines 2014). In the absence of trust, potential purchasers will invest less in financial assets, to the detriment of both the industry and the economy.

For the reasons outlined above, the trustworthiness required of the financial sector requires a stronger form of trust than the economist's view that a person can be trustworthy even if they are motivated by self-interest. Indeed, although Adam Smith is famous for his characterisation of the "invisible hand", he in fact placed great emphasis on "other-regarding" motivations. His *Theory of Moral Sentiments* opens as follows:

> *How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it. (Smith 1776/1976)*

Such other-regarding motivations can arise for different reasons. They can come from "pro-social" motivations, where people are altruistic and seek outcomes which are good for other people. They can come from procedural motivations, such as professionalism, which require that a task be undertaken well and according to accepted standards. Lastly, they can follow from a desire for approbation—Adam Smith's understanding of human motivation (Gold 2014).

From this distinction between self-interested and other-regarding motivations there follows the distinction between weak trust and strong trust (and trustworthiness). Weak trust emerges even under self-interested motivations. However strong trust, and strong trustworthiness, emerge only if there are other-regarding motivations.

In the financial sector, trustworthy behaviour cannot be sustained by weak trust alone. As shown by Noe and Young, it is difficult to detect dishonesty in the presence of uncertainty. Those purchasing products need to rely on other-regarding motivations since dishonest behaviour is unlikely to be apprehended (Noe and Young 2014).

In many situations, individuals will have a multiplicity of motivations, so that framing can be used to encourage other-regarding motivations. In particular, adjustments to legal and regulatory frameworks can be used to adjust the way that issues are perceived by the key agents. For example, fiduciary duties have often been attenuated or eliminated altogether by contractual agreements which give financial intermediaries too much power and create incentives for incompetent or predatory behaviour (Getzler 2014). Reining in the trend to cut back fiduciary duties and clarifying the nature of such duties and remedies would encourage professional motivations in the financial sector.

Codes of conduct can also be used to influence motivations, and are part of the task of professionalising the industry (de Bruin 2014). To be effective in influencing norms of behaviour, however, codes of conduct need to embed values which are important to individuals. These include fairness, integrity, objectivity, competence, confidentiality, professionalism and diligence.

Capital Failure (2014) identifies accountability as a key issue for the financial sector. Some observers see formalised structures of accountability as an alternative to trust. The managerial approach to accountability typically employed sets standards/targets for performance and then measures success through a "tick box" approach. However, ticking boxes cannot substitute for informed judgement of performance and even well-chosen indicators can create perverse incentives. An intelligent system of accountability supports rather than supersedes the placing of trust. It provides good evidence as to whether it is likely the claims of the person or institution seeking to be trusted are true.

O'Neill (2014) suggests that an intelligent system of accountability comprises a definition of required actions: a set of obligations or duties of those who ask to be trusted. Intelligent accountability then imposes an obligation on individuals/organisations to render an account of their performance. It also requires informed and independent judgement on the adequacy of performance, and the communication of evidence on performance by those

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responsible for holding to account. O'Neill argues that well-structured professions and institutions can support the meeting of obligations, in a way that managerial accountability cannot. But genuine professional integrity grows out of strong institutional structures. These include many of the things that have been lacking in financial services: institutional and financial separation, robust systems for dealing with conflicts of interest, serious remedies for failure, and support for professional culture.

The financial sector has thrown up many obstacles to trustworthiness:

a. The emphasis given to shareholder value has encouraged short-term profit maximisation at the expense of trustworthy behaviour
b. High leverage has reinforced the incentives to take excessive risks, since shareholders gained all of the upside, but their downside was limited (as it was shared with credit holders and taxpayers)
c. Remuneration structures have worked directly against trustworthy behaviour by rewarding the creation of tail risk

Many of the regulatory responses that have emerged in the UK are important in terms of addressing these. Remuneration proposals have focused on the need to align incentives with the long-term interests of banks and their shareholders. However, these will only encourage strong trustworthiness if financial institutions articulate the standards which are expected from those who work for them, and if their remuneration standards reflect these standards. The Parliamentary Commission into Banking Standards warned of the difficulty of aligning incentives with the interests of others, with potential for gaming remuneration criteria and rules, the ability of sales-based remuneration to continue informally, and the complications that ensue as staff move between employers (PCBS 2013).

Proposals such as the retail ring fence seek to limit the extent of the government guarantee, with proposals that target high leverage seeking to ensure that the consequence of risk taking are borne by shareholders.

However, few of the reforms are aimed at encouraging strong trustworthiness directly. What is required is a structure of accountability which covers four key steps:

1. A description of the obligations to be delivered
2. Identification of the responsibilities of different players
3. Establishment of mechanisms to encourage and enforce trustworthiness
4. Rendition of an account of performance and methods of holding the individual to account for that performance.

Part of the public's anger over the role of the banks in the GFC rests on the failure of those concerned to take responsibility for their actions. For example, under questioning by the Financial Crisis Inquiry Commission, Lloyd Blankfein, Chairman and CEO of Goldman Sachs claimed that "the standards at the time were different." (Harrington 2011). He did not admit to a lack of personal responsibility, or to a failure in fiduciary duty, or to any public obligation on the part of either himself or his banking colleagues.

The third step is to establish the mechanisms intended to secure and support the delivery of obligations. A wide range of such mechanisms has been used by professions and organisations, including codes of conduct, reputational indices, membership and powers of exclusion, and fraud investigation units. Different mechanisms work to support different types of strong trustworthiness: for example, membership of a professional association and codes of conduct seek to encourage procedural motivations. Reputational indices and fraud investigations support motivations based on esteem and approbation. Ethics committees and ethics training are designed to support pro-social motivations directly. These mechanisms can be reactive (such as exclusion upon wrong-doing) or preventative (e.g. education, elimination of conflicts of interest). Mechanisms to redress transgressions need to be proportionate, but at the same time provide serious remedies for failure.

The final step is to require those with responsibility to render an account of the adequacy of their performance in delivering their obligations, and to hold them to account for that performance. It requires an informed and independent judgement about what has been done (in comparison with what ought to have been done), and this assessment needs to be communicated in an accessible manner. While recent proposals address obligations, responsibilities and enforcement, there has been relatively

little consideration of how performance can or should be judged intelligently.

CAN FINTECH AND REGTECH HELP TO IMPROVE TRUSTWORTHINESS?

In more recent years, technology has transformed the way banking is done (often dubbed Fintech). Online banking is now the norm in developed countries, card payments are increasingly automated, and smartphones are used for many purchases (Pikkarainen et al. 2004). New technologies are enabling person-to-person (P2P) payments, with Apple, Google and Venmo following Paypal in providing these services. Banks increasingly use technology to enable Customer Relationship Management (CRM), and improve their assessment of lending risk. Loan origination systems (LOS) are enabling community banks to expand their commercial and industrial loans (Shevlin 2019). These changes have improved financial inclusion and efficiency, and reduced banking costs. But they have also introduced greater opacity into the system and reduced personal interaction between bankers and their customers.

Technologies that have yet to have their full impact include *Blockchain* and *Artificial Intelligence (AI)*. AI is being embodied into many banking systems, with machine learning now used to identify potential commercial credit request needs, validate credit, perform vendor order execution and enhance CRM. *Chatbots* are now used extensively for account opening and in marketing. As their use grows, the ability of regulators to understand evolving bank processes is likely to be reduced.

The use of technology to facilitate regulation (RegTech) is emerging both by the regulators themselves and by financial institutions. The automation of due diligence, using data that is tailored to each firm's risk management, is now becoming the norm. In March 2015, a report by the UK Government Chief Scientific Adviser (2015) stated that

> *FinTech has the potential to be applied to regulation and compliance to make financial regulation and reporting more transparent, efficient and effective – creating new mechanisms for regulatory technology, RegTech.*

IMPLICATIONS FOR AUSTRALIA

Although Australia is connected to the global financial system, and is affected by global events, it has many features which make it unique and somewhat separate. The evolution of Australia's financial system, and its regulation, has been somewhat haphazard. Repeated changes of government within a short electoral cycle, and a tendency to reverse policies set by previous administrations, have led to some incoherence. Australian politicians and regulators have, in the main, been unwilling to challenge the dominant banks and other financial institutions, and Australian requirements on disclosure lag the rest of the developed world. Misguided policy choices have led to a collusive oligopoly of the main banks, which are only lightly regulated by multiple regulators, and an overly complex industrial structure. Importantly, the introduction of compulsory superannuation contributions has created a large and complex industry for the management of pension fund assets which has in turn eroded personal savings.

Australia was slow to implement the reforms which followed the GFC in other countries. Because Australia's government stepped in with a guarantee of all new borrowing,[3] the GFC did not provide the impetus for reform which emerged elsewhere. Australia was also less exposed to the risks which led to the GFC, partly because superannuation contributions had led to a substantial accumulation of wealth managed by the major institutions (thus strengthening their balance sheets and providing liquidity), and partly because the Asian financial crisis had reduced the industry's appetite for risk. It is only in the last few years, following exposure of various particularly troubling scandals, that Australian politicians have focused on improving the trustworthiness of the industry. It is now clear that similar problems to those which overwhelmed the UK, US and Europe do exist in Australia, and that steps need urgently to be taken to improve the trustworthiness of the financial sector.

[3] Allowing the banks to use the Commonwealth Government's AAA credit rating created a "bailout" estimated to be worth A$120 billion, see Verrender (2017).

[4] In 1953 banks accounted for 88 per cent of the total assets managed by financial intermediaries (Edey and Gray 1996, p. 4).

[5] Comprising insurance, superannuation funds and investment vehicles such as unit trusts.

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HOW DID THE MODERN AUSTRALIAN SYSTEM EMERGE?

The development of the wider Australian financial services industry prior to 1970 occurred to some extent through trial and error, with changes to investment strategies and industry structure responding to the booms and busts of the business cycle. First equities, then property, then metals, then specialist and international funds, waxed and waned in popularity as bubbles inflated and burst. Increasing internationalisation, following trends in UK, US and Canada, encouraged local innovation and in due course the entry of foreign players to the Australian marketplace (Fraser 1994, p16).

The extensive deregulation of the banking industry which followed the *Campbell Inquiry* in the 1980s permitted banks to sell life products and also to take over life companies (Commonwealth (1981). This combined with technological innovation and privatisation to generate a steep rise in the size of the financial services sector, from around 100% of GDP in the early 1980s to over 200% by 1992 (Edey and Gray 1996, p .6).

New banks and other financial institutions, including foreign-owned, entered the market and life offices grew rapidly, with some demutualisation. This began a process through which the major banks re-established their dominance, both through organic growth and through acquisitions.

Life companies, in response, diversified into other financial markets, and even entered the banking sector themselves. International banks (such as Citibank and HSBC) entered the market, and established new non-bank financial institutions (NBFIs) both separately and in joint venture with local banks. Financial deregulation also triggered a credit boom, which contributed to the growth of the sector, and fuelled asset price rises which in turn enabled investment funds to achieve exceptional returns.

The Australian financial system thus changed from a closed structure focused mostly on traditional banking activities in the 1950s and 1960s,[4] albeit with a vibrant life insurance industry and a relatively small managed funds sector serving wealthier customers,[5] to a much larger multi-layered system with a wide array of providers and intermediaries. As in the UK, this change occurred in response to growth in demand for financial services from a wider range of customers, driven by increasing wealth among middle-class families, increased desire to save in anticipation of greater longevity, concern to avoid the effects of inflation, and to optimise taxation. However, the changes were also guided by numerous political and regulatory interventions, notably deregulation (in the 1980s), the introduction of award superannuation and industry funds (from 1986), compulsory superannuation contributions[6] (from 1991 onwards), and the privatisation of state-owned financial institutions.

The introduction of compulsory superannuation contributions was intended to provide a well-financed retirement for Australia's people[7]. However, there is today a growing sense of unease about the level of retirement income that the system will provide (Hewett 2010), a lack of trust in the industry and its advisers (Brandweiner 2012)[8], and a steep rise in the numbers of those who are choosing self-management of their superannuation fund.[9]

The introduction of compulsory contributions was in part necessary because Australia had been slow to introduce effective state provision for those not in the public sector or in the larger companies that ran their own schemes. Australia had a worse problem of poverty among the old than most other OECD countries, and a particularly poor income replacement rate for retirees. In the late 2000's, Australia's income replacement rate for the over 65's was the lowest among 34 OECD countries (69% of national mean income compared with the OECD average of 86.2%) (Pascuzzo 2014).

The 1997 *Wallis Committee* reported on the Australian Financial System, including superannuation arrangements.[10] The inquiry considered, *inter alia,* changing

[6] The Superannuation Guarantee Charge concept was introduced by Paul Keating, shortly after becoming Prime Minister in 1991. Australia is unique among developed countries in requiring all employees to make such contributions.

[7] A statement of the political intent behind this decision is to be found in Dawkins (1992).

[8] See Brandweiner (2012). Concern about lack of trust is sometimes also expressed by advisers, see, e.g, Brown (2012).

[9] Through self-managed superannuation funds ("SMSFs"), Slattery (2011).

[10] See Hanratty (1997) for a useful summary and critique.

customer needs, technology driven innovation, regulation as a driver of change, the changing financial landscape, cost and efficiency, conduct and disclosure, financial safety, stability, co-ordination and accountability, and deregulation. The Wallis Committee recognised that the nature of these investments meant that households would bear a greater proportion of risk directly than they had done in the past. The Committee recommended greater encouragement of member choice in superannuation as a solution.[11]

The Wallis Committee recommendations led to the *Financial Services Reform Act 2001* (FSRA). This introduced new licensing provisions and mandatory product disclosure rules in an attempt to introduce consistency across different types of financial product.[12] The result was that regulation of the products and operations of fund managers became more aligned with wealth management products (insurance, investments and superannuation) than with that of securities and securities dealers. The FSRA also replaced the provisions of the *Insurance (Agents and Brokers) Act 1984* to impose stricter disclosure requirements on life insurance companies.[13]

The Australian superannuation system is complex, with over half a million funds of many different types, over 300 platform products, and with extensive outsourcing of key functions to numerous intermediaries. Complexity, lack of disclosure of investment costs, and many degrees of separation between fund members and those who manage their funds, have emerged as serious problems, as have principal–agent, conflict of interest and rent extraction issues. Combined with weak competitive pressures and governance systems, and insufficient legal and regulatory constraints, the result is a system that does not serve its members well.

Recent empirical estimates suggest that over the last twenty years, the Australian superannuation industry has delivered some A$700-900 billion less return for its members than it could have if the compulsory contributions had simply been invested in a passively-managed balanced fund.[14] The problems which have led to this outcome include a history of incoherent policy processes; fees and charges which are high by international standards; extensive outsourcing; and multiple funds per member which have increased costs and reduced focus. In Australia, legal, regulatory and governance systems appear to have been inadequate to curtail rent-seeking behaviour by advisers and managers.

There are many pivotal moments when key policy decisions were made, including decisions to outsource administration and management of the industry funds, the privatisation of the state-owned banks and insurers, deregulation of the financial services industry, and the development (and repeated variation) of tax concessions for superannuation. Subsequently, policy responses to the various inquiries into the system, in the face of persistent lobbying by an increasingly influential industry, reinforced these early decisions. The wholehearted acceptance of market-driven approaches under the Clinton and Blair administrations in the US and UK during the 1990s also provided justification, albeit misguided, for Australian policymakers.[15]

REGULATION OF THE AUSTRALIAN SYSTEM

The legislation which followed the *Wallis Inquiry* set up the current regulatory structure, which consists of five regulatory agencies: *ASIC, APRA, the ATO, the Reserve Bank of Australia (RBA) and the Australian Competition and Consumer Commission (ACCC).* The ATO has responsibility for smaller funds, with less than four members, the RBA is responsible for financial system stability and for the regulation of the payments system,[16] and the ACCC has various powers to protect competition in the financial

[11] The Commonwealth Government had previously announced a policy of choice of fund in 1996 and introduced a detailed proposal in the 1997 Budget. The relevant Bill was defeated in the Senate in August 2001 but reintroduced in 2002. Select Committee on Superannuation, Parliament of Australia (2002).

[12] Explanatory Memorandum, *Financial Services Reform Bill 2001 (Cth).*

[13] This reinforced the provisions of the *Insurance Act 1973* (Cth) and *the Life Insurance Act 1995* (Cth), which require a registration system and also provide for basic supervision of insurers, brokers and agents.

[14] For a more detailed discussion of the problems with the Australian Superannuation system, including these estimates, see Morris (2018).

[15] For further discussion of how misguided beliefs in efficient markets misled policymakers, see Greenspan (2008), Borio (2009), Raghuram (2010).

[16] Through the Payments System Board under new legislation, the *Payment Systems (Regulation) Act 1998* (Cth) and the *Payment Systems and Netting Act 1998* (Cth).

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system (although it has no direct remit for consumer protection).

ASIC was given additional responsibility in 1998 to regulate the market for financial products and services.[17] It now enforces legislative provisions relating to investments, insurance, superannuation and deposit-taking activities (but not lending); is responsible for the registration of companies, auditors and liquidators; supervises futures markets; implements the provisions of the FSRA; monitors and assesses compliance with a variety of codes of practice;[18] and has a range of market integrity and consumer protection responsibilities.[19] ASIC is funded by the Commonwealth Government, although it also receives fees and charges from companies.

APRA commenced operations on 1 July 1998, as a result of the *Australian Prudential Authority Act 1998*.[20] APRA is largely funded by industry levies, and is supervised by a full-time executive group of between three and five members appointed by the Governor General. APRA is responsible for the prudential regulation of *Authorised Deposit-taking Institutions* (ADIs) (banks, building societies and credit unions)[21] as well as friendly societies, life and general insurance companies, and superannuation funds. It has powers to revoke licences, issue enforceable directions and in extreme cases to intervene in management.

The commercial law framework for superannuation funds in Australia is based on the law of trusts. Superannuation funds are usually "express trusts" and the trustees of superannuation funds are in principle "status-based" fiduciaries.[22] Prime responsibility for the viability and prudent operation of the superannuation fund rests thus with trustees. Trustees may be either a company with a Board of Directors or a group of people (who may also be the members). Trustees, in their role as fiduciaries, are in principle subject to an "inflexible rule" which prevents them putting themselves in a position where their interest and duty conflict.[23]

Trust law does provide some protection to members, though this is constrained in various ways. In the Australian superannuation industry, enforcement of the provisions of the SIS Act mostly concern breaches relating to malfeasance by individuals, which can give rise to a civil penalty order or criminal liability.[24] Other breaches can in principle result in the superannuation fund losing its complying fund status, and hence its privileged tax status.[25] The main effect of the latter could be that members transfer assets to another, complying fund. Individuals may also be barred from acting as directors.[26]

Recent inquiries have suggested that the financial and superannuation systems need to be made more efficient and accountable and have suggested reforms. These include the Ripoll Inquiry into corporate scandals and failures (following the GFC)[27] and the *Super System Review* (ibid.). The recent *Financial System Inquiry*[28] has led to both the *Reserve Bank of Australia* and the *Australian Treasury,* questioning whether the transfer of risk to members and the large costs of the system are appropriate.[29]

[17] This is the role that the *Wallis Inquiry* envisaged for the CFSC.

[18] Including the *Code of Banking Practice*, the *Credit Union Code of Practice*, the *Building Society Code of Practice* and the *Electronic Funds Transfer Code of Practice*.

[19] ASIC took over these roles from the ISC and from the ACCC.

[20] APRA was intended to carry out the role that the Wallis Inquiry envisaged for the APRC.

[21] Under the depositor protection provisions of the *Banking Act 1959* (Cth). All ADIs are required to hold assets in Australia at least equal to their deposit liabilities in Australia.

[22] But see Edelman (2013). Edelman notes that the courts usually regard status as simply informing about what the fiduciary has undertaken to do, see *Beach Petroleum v Kennedy* (1999) 48 NSWLR 1, 188.

[23] See Bray v Ford [1896] AC 44, 51; *Phipps v Boardman* [1967] 2 AC 46, 123; Glover (2002).

[24] Donald (2013); SIS Act pt 21.

[25] *Income Tax Assessment Act* 1993 (Cth) pt IX.

[26] *Corporations Act 2001* (Cth).

[27] Parliamentary Joint Committee on Corporations and Financial Services (2009).

[28] The *Financial System Inquiry,* chaired by David Murray AO, was announced by the Prime Minister, Tony Abbott, on 20 November 2013; see Prime Minister of Australia (2013).

[29] Reserve Bank of Australia (2014); Department of Treasury (2014).

In 2017, a Senate inquiry began into a scandal whereby planners working for Commonwealth Financial Planning (CFPL), a subsidiary of CBA, were accused of putting clients' money into risky investments without their permission, and forging documents. ASIC was also accused of being complacent in its investigation of the rogue financial planners (McGraph and Janda 2014). The inquiry recommended that a Royal Commission be established to investigate this and other questionable behaviour in the financial sector.

ROYAL COMMISSION FINDINGS

Although the Ripoll Inquiry, which was triggered by the collapse of Storm Financial, highlighted many concerns over the trustworthiness of the Australian industry, its founder Bernie Ripoll still believes that the problems have not been addressed.

> *When it comes to financial services, people don't trust the system or the sector, or for that matter, really, government to be able to protect them fully and properly. Financial planning doesn't have professional standards, a code of conduct, defined educational standards and the commitment to a fiduciary type duty to customers that real professions have. (Bernie Ripoll 2018, quoted in Robertson 2018, p. 4).*

This conclusion was reinforced by the findings of the Royal Commission, which reported on 4th February 2019. The report highlighted:

> *conduct by many entities that has taken place over many years causing substantial loss to many customers but yielding substantial profit to the entities concerned. Very often, the conduct has broken the law. And if it has not broken the law, the conduct has fallen short of the kind of behaviour the community not only expects of financial services entities but is also entitled to expect of them. (Royal Commission 2019, 1)*

And placed the blame squarely on the shoulders of the management of the financial services industry:

> *There can be no doubt that the primary responsibility for misconduct in the financial services industry lies with the entities concerned and those who managed and controlled those entities: their boards and senior management. (Royal Commission 2019, 4)*

The Royal Commission heard cases of customers being charged for services they had never received, and people being charged these fees even after they had died. The final report made 76 recommendations for reform, and suggested more than 20 prosecutions involving the major banks, at the discretion of the regulators, some criminal, some civil, and some both. The regulators were put on notice to perform better, and if ASIC did not prosecute more often the Commission recommended that it become simply an investigative body, with prosecuting powers granted to some other body.

In response to the Commission, the Australian government has committed to introducing legislation which ensures that mortgage brokers will be required to act in the best interests of borrowers, that conflicts of interest between brokers and consumers will be removed by banning trail commissions and other inappropriate forms of lender-paid commissions on new loans from 1 July 2020, and ensuring superannuation fund members only have one default account (for new members entering the system). It also committed to protecting vulnerable consumers by clarifying and strengthening the unsolicited selling (antihawking) provisions, prohibiting deduction of any advice fees from MySuper accounts.

The ASIC Chairman, James Shipton, noted "the serious matters referred by the Royal Commission of possible breaches of financial services laws" and committed to prioritising these investigations.[30] In February 2019 ASIC published a detailed update on implementation of the Royal Commission recommendations.[31] It is committed to implementing all of the 46 recommendations in its area of responsibility, including 11 that will extend ASIC's remit and powers, and 23 recommendations which will impose new requirements or restrictions on the entities regulated by ASIC. A new system of Close and Continuous Monitoring (CCM) was initiated in 2018.

APRA responded positively to the Royal Commission, agreeing that there are a number of areas where APRA's

[30] See https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-020mr-statement-from-asic-chair-james-shipton-on-the-final-report-of-the-royal-commission-into-misconduct-in-the-banking-superannuation-and-financial-services-industry/

[31] https://download.asic.gov.au/media/5011933/asic-update-on-implementation-of-royal-commission-recommendations.pdf

[32] See https://www.apra.gov.au/media-centre/media-releases/apra-responds-royal-commission-final-report

[33] Detailed responses are available at https://www.apra.gov.au/sites/default/files/table_with_apras_responses_to_royal_commission_recommendations-v1.pdf

[34] See https://www.afr.com/business/banking-and-finance/rba-treasury-warn-regulatory-response-to-hayne-commission-risks-credit-crunch-20181001-h16322

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prudential and supervisory framework can and should be strengthened.[32] It has provided detailed responses both to the Commission's recommendations, and to the Government's response. In most cases, suitable changes to regulation are being implemented.[33] Importantly, it has committed to publishing accountability statements consistent with the Banking Executives Accountability Scheme (BEAR) by the end of 2019.

The Reserve Bank of Australia (RBA), while also welcoming the Commission's work and findings, cautioned against a too-severe regulatory response which might curtail lending to home buyers and business.[34] However, the RBA accepted that "culture and governance within financial institutions need improving" (RBA 2019, p. 4).

WHAT CAN AUSTRALIA LEARN FROM OVERSEAS EXPERIENCE?

Although there have been numerous previous inquiries into both the Australian superannuation and wider financial services industries, it has taken a Royal Commission to highlight how many of the problems exposed by the GFC also exist in Australia. Relying on trustworthiness of advisers, managers, trustees and board members does not seem to be sufficient to protect consumers and pension fund members. We believe that unless strong trustworthiness can be created in the financial industry, the problems that clearly exist throughout the system will continue to be detrimental.

The complexity of the Australian industry, and of the contractual structures it relies on, make the identification and prevention of de facto collusive behaviour and anti-competitive use of cross-subsidies very difficult for regulators (such as the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC), and the prudential regulators), or the courts to identify and combat.

Unfortunately, fiduciary duty is frequently set aside in Australian financial services, where apparently well-informed consent is given, and the courts have usually regarded contracts as taking precedence over fiduciary duties. In addition, trust law has limited effectiveness in a world of member choice and flexibility of trust deed (Donald 2007). Trustees' fiduciary responsibilities therefore need to be strengthened.

Because of the vast funds which have been accumulated since the introduction of compulsory superannuation contributions, the financial services industry in Australia, and its potential for untrustworthy behaviour, is to a large extent focused on superannuation funds. A further market failure which requires regulatory intervention is the difficulty that members have in acquiring suitable products to help them manage risk. Their need to do this on an individual basis has been created by the choice of Defined Contributions (DC) as the main basis for Australian superannuation. As a result, individuals face both longevity and market risks (including the risk of needing to pay excessive fees because of principal-agent, conflict of interest and rent-seeking problems).

There are too many regulatory agencies, with inadequate focus on the costs imposed by financial institutions. Various legislative changes have weakened the force of trust law and fiduciary duties. The legal and governance framework has failed to prevent principal-agent and conflict of interest problems, including inadequate enforcement and recognition of fiduciary duties and duties of care.

The Australian government's commitment to introducing many of the Royal Commission recommendations, as well as the commitments made by the regulatory agencies, if suitably implemented, should address some of the more glaring problems. However, we still believe that more far-reaching reforms, which draw on international experience, are needed.

In other work, we have recommended rationalisation of regulatory institutions; better use of trust and competition law, and codes of conduct; full and effective disclosure; and the introduction of a new, publicly-administered, fund with a mandate to provide a low cost, passively-managed investment vehicle for Australia's superannuation funds. The latter suggestion would provide a benchmark against which the performance of other funds could be judged, and provide an alternative for those unable or unwilling to make suitable choices for themselves (Morris 2018).

[33] Detailed responses are available at https://www.apra.gov.au/sites/default/files/table_with_apras_responses_to_royal_commission_recommendations-v1.pdf

[34] See https://www.afr.com/business/banking-and-finance/rba-treasury-warn-regulatory-response-to-hayne-commission-risks-credit-crunch-20181001-h16322

But in many ways these suggestions deal with the symptoms, rather than the underlying cause, of the malaise which currently infests the Australian financial sector: a lack of basic trustworthiness. To fix this requires a fundamentally different approach to policy. As in the UK, attention needs to be given to how to create strong trustworthiness (ie that driven by a genuine regard for customers and clients) within the sector. We have set out above the actions that need to be taken to establish trustworthiness in the financial system. Achieving this in Australia requires the four steps set out in our Oxford work: full definition of obligations, identification of the responsibilities of different players, establishment of mechanisms to encourage and enforce trustworthiness and proper holding to account.

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Between Constancy and Change: Legal Practice and Legal Education in the Age of Technology

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ABSTRACT

In legal practice, as in other professions, the increasing use of technologies is not new. However, it is generally agreed that the latest round of new technological development, such as AI and big data, has presented, and will continue to present, challenges to the legal profession in a much more profound way. If the legal profession must adapt to technological changes, so must legal education. Technologies in legal education present us with three sets of considerations: the adoption and adaptation of technologies to teaching and learning; the study and research of disruptions and other impacts of technologies in society to assist in formulating legal responses to them; and the preparation of future lawyers.This paper first examines the impact of different technologies on legal practice and responses from the profession. Upon examining the opportunities and challenges brought about by new technologies, the paper will further discuss how legal education, especially its curricula, might respond to changes and challenges. It is argued that, like the way they adapted to globalisation, legal education and legal practice will meet new technological challenges and, as such, there is no reason to believe that there is not a bright future for legal education and the legal profession.

Keywords – Legal education, Technology, AI, Curriculum, Learning and Teaching, Legal Profession

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Summary

INTRODUCTION

Developments in technology in the last few decades have changed the way people communicate, revolutionised business processes and further propelled globalisation. The legal profession, though not generally responding to changes quickly, is increasingly recognising that changes are inevitable. In legal practice, as in other professions, the increasing use of technologies to maximise efficiency and productivity and to improve communication is not new. However, the latest round of new technological developments, such as AI and big data, has presented, and will continue to present, challenges to the legal profession in a much more profound way.

Ever since AlphaGo beat a 9-dan professional Go player in March 2016, we have been hearing frequently that artificial intelligence ("AI") is changing everything, the doomsday is closing in, and an "AI apocalypse" is perhaps already upon us (Ferose and Pratt 2018)[1]. More recently, consultancy group McKinsey has estimated that 22 per cent of a lawyer's job and 35 per cent of a law clerk's job can be automated (Winnick 2017). Another report by Deloitte has suggested that 40 per cent of all law jobs are at risk of automation (Deloitte 2016, Krook 2018). Obviously, predicting the future in this technological age is difficult, if not impossible, as the Universities Australia (2018) has recently conceded that "[t]he economy – and the labour market – are changing at breakneck speed. It is impossible to predict the full impact of the current structural shifts."[2] Nevertheless, research seems to confirm that, at least, between 13 per cent and 23 per cent of lawyers' tasks could be automated (Law Society of Western Australia 2017). Although it is agreed that there will not be a sudden "big bang" change, it is also suggested that the eventual impact will be radical and pervasive (Susskind and Susskind 2015, p. 231).

In fact, as early as 2013, Susskind had predicted that changes to the legal industry would be more radical in the next two decades than those in the last two centuries (Susskind 2013, p. xiii)[3], and without much doubt the greatest transformation has been brought about by technological innovations (Canick 2014). It should, however, be recognised that, as the Foundation for Young Australians (2017, p. 9) has rightly pointed out, although occupations such as lawyering are identified as most likely to be affected by modern technologies,[4] automation and globalisation will affect every job. In other words, lawyers are not alone in facing serious challenges brought about by the rapid development of technologies.

It may seem alarmist, but it is not unreasonable to ask whether legal practice and, by implication, legal education, is doomed, as a result of the application of modern technologies. The answer will very much depend on how the legal profession adapts to the new environment, as it is succinctly stated by the Law Society of Western Australia (2017, p. 6) that "… the difference between those who will thrive in the future legal profession and those who will struggle will largely revolve around who adapts best to technological changes."

If the legal profession must adapt to technological changes, so must legal education. Conversely, how legal education responds to technological development will also determine the future of legal practice in many significant ways.

This paper first examines the impact of technologies on legal practice and responses from the profession. Upon this examination, the paper will then discuss how legal education, especially its curricula, might respond to changes brought about by technologies, so as to ensure that future students will not only receive intellectual cultivation but also acquire sophisticated skills that are transferrable and adaptable in the age of technology.

ADOPTION AND APPLICATION OF TECHNOLOGIES IN LEGAL PRACTICE

2.1 OVERVIEW OF CURRENT PRACTISE

Legal practice is generally considered to be a conservative profession. However, the huge expansion of legal education in the last 30 years or so in Australia and elsewhere means

[1] Of course, 2016 was not the year we began to hear such warnings; we had heard them much earlier. See further discussion below.

[2] See also Perlman (2018). For some of the recent predictions, see College of Law (2018), Neuburger (2017), Lat (2017).

[3] A second edition of the book was published in 2017. Susskind and Susskind (2015) also extended this study to include all major professions.

[4] But it is claimed by some that the legal profession is one of the most disrupted sectors of the consulting industry today. See Fenwich et al. (2014, p. 354).

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fierce competition for business among law firms, big and small.[5] It is against the backdrop of this competition that the adoption of technologies in legal practice becomes inevitable (Vogl 2016), despite the fact that the adoption of technologies is more likely to reduce the "billable hours" — the essence of business for most law firms.

The application of many of the new and emerging technologies improves economic efficiency and productivity. While many of them are replacing the standard and routine work of lawyers (especially paralegals and researchers), other technologies are assisting in establishing deep insight (such as that facilitated by the use of big data) that was not available before.[6] AI is developing rapidly, making inroads into various areas of the traditional legal practice, from assisting in performance of due diligence, to legal writing to predicting results.[7]

The application of technologies not only leads to changes within traditional law firms, but also leads to the emergence of the so-called "New Law", that is, new forms of legal practice that are hybrid practice combining elements of traditional law firms with new business models made available through the use of technologies, including the various online legal services and virtual law firms.[8] In Australia, a law firm exclusively using AI to provide tax and estate law services was launched in 2017.[9] As such, it has been claimed by some that AI will cause the "structural collapse" of law firms and threaten the "very existence of the profession".[10] More recently, it has been "revealed" that the latest area in which AI outperforms humans is in reviewing legal documents (Leary 2017). In a controlled environment resembling how lawyers work, AI and 20 lawyers reviewed the same Non-Disclosure Agreements to identify risks associated with the documents. The accuracy rate for AI was 94 per cent, whereas the average for lawyers was 85 per cent. On average it took 92 minutes for the lawyers to review the documents, but AI only required 26 seconds.[11] Similarly, when AI and lawyers were asked to predict the success of claims, AI once again beat the lawyers by more than 20 per cent, achieving 86 per cent accuracy.[12]

The ILTA 2018 Technology Survey reports that all the large law firms with more than 700 attorneys which participated in the survey indicated that they are pursuing AI and Machine Learning projects (International Legal Technology Association 2018). AI is, however, only one of many modern technologies that are being introduced into legal practice. Treating technological advancement as one of the greatest issues facing the legal profession, the Law Society of Western Australia provides the following illustrations:

> *New technologies available include cloud computing; electronic document management systems; artificial intelligence, virtual law firms; online dispute resolution; electronic courts and electronic filing of court documents; use of social media and blockchain — just to name a few.*[13]

There is little doubt that each of the modern technologies will have a major impact on law, legal practice, and the legal profession generally, and together their impacts will be massive.[14] At the same time, each of the technologies presents

[5] In Australia, there were only 21,623 legal professionals (including judges, magistrates, barristers, solicitors and legal officers) in 1986. By October 2016, there were 71,509 practising solicitors in Australia. The 2016 statistics are based on: The Law Society of New South Wales (2017); the 1986 statistics are based on the Australian Bureau of Statistics 1947-1986 Census of the Commonwealth of Australia (ABS, Canberra) quoted in Anleu (1991).

[6] For an outline of specific activities where technologies are being utilised, see Law Society of New South Wales Commission of Inquiry (2017). For a brief introduction of new technologies being used by large Australian law firms, see Moses (2018), Boran (2018), Marr (2018), Ferose and Pratt (2018).

[7] See Goodman (2016), Rayo (2017), Donahue (2018). For a detailed examination of AI in four specific areas, see United States Government Accountability Office (2018).

[8] For a detailed study of the various "virtual" and online legal practices, see Law Society of New South Wales Commission of Inquiry (2017, ch. 3).

[9] The service is called the Artificially Intelligent Legal Information Research Assistant ("Ailira"). See Davis (2017). The Ailira website suggests that it is expanding its business scope: https://www.ailira.com/. Virtual law firms were not a new species in legal practice in 2017. See further discussion below.

[10] See the various claims referred to in Law Society of Western Australia (2017).

[11] The experiment was conducted by LawGeex, a leading AI contract review platform. See Leary (2017)

[12] The "Case Cruncher Alpha", conducted in the UK, see Davis (2017).

[13] Law Society of Western Australia (2017). For an excellent and detailed study on the use of technologies and their impact on legal practice, see Fenwich, Kaal and Vermeulen (2017). See also Susskind and Susskind (2015, p. 66-71).

[14] In addition to a large number of academic studies, two reports by the legal profession are of particular relevance to the understanding of the impact of technologies on legal practice, the legal profession and legal education in Australia: Law Society of Western Australia (2017) and Law Society of New South Wales Commission of Inquiry (2017) FLIP Report. Outside Australia, see American Bar Association Commission on the Future of Legal Services (2016). It should, however, be pointed out that there are also dissenting views that believe that such talk about disruption of the legal industry by technologies is significantly exaggerated, see Vogl (2016).

different challenges that legal practitioners must address, ranging from the protection of clients' confidential information to privacy protection (especially in cases of breaches of network security), from automated interpretation of data to lawyers' ethical obligations in assessing such interpretations, and from allowing public access to big data to "legal services" provided by non-lawyers in the use of law-related AI tools (Law Society of New South Wales Commission of Inquiry 2017, FLIP Report).

It would be wrong to assume that technologies only or mainly affect legal practice in its narrow meaning. Courts and tribunals are equally under pressure to change, to adopt and to utilise technologies, and to "modernise" themselves. Indeed, we are witnessing paperless trials, online dispute resolution, e-filing, e-Court, e-discovery, and many other e-practices as part of the formal court processes.[15] In the United States, using algorithms to assess the likelihood of recidivism or rehabilitation has been adopted to assist judges in sentencing for many years (Monahan and Skeem 2015). Needless to say that technologies are also increasingly applied by government agencies to automate certain decision-making.[16]

2.2 IMPACT AND CHALLENGES

As already mentioned, among all modern technologies, AI has currently presented the deepest and most profound impact on law, legal practice and legal education.[17] The impact of AI is far more than improving efficiency and productivity: AI has the potential to replace lawyers in many of the traditional areas of practice, and indeed, it is generally agreed that AI can be more accurate and efficient in tasks demanding high technical skills.[18] As such, the advancement of AI technologies and their application can be seen as threatening jobs and opportunities. This is especially so if AI is examined from a developing perspective: at the moment, it is generally agreed that AI would replace low-level skills, thus impacting on paralegal and junior lawyer jobs (Marr 2018). But in the longer term, it is also agreed that AI could replace some high-level skilled roles currently performed by lawyers (Deloitte 2018).

Lawyers have a duty to provide their services competently, and, in the age of technology, they are consequently expected to be competent in the use of modern technologies (Law Society of New South Wales Commission of Inquiry 2017, FLIP report). This then begs the question: have lawyers discharged such a duty if they have rendered their services with the assistance of technologies (such as AI) but have no basic understanding of how such technologies work? (Law Society of New South Wales Commission of Inquiry 2017, p. 41). Not surprisingly, the American Bar Association now requires, through its Model Rules of Professional Conduct, that lawyers' duty of competency includes understanding changes in technology, and many states in the United States have now adopted a rule to this effect, requiring technology-specific learning in continuing professional development.[19] There are also some implicit suggestions in practice notes issued by Australian courts (such as the Federal Court of Australia and the Supreme Court of Victoria) that lawyers are expected to have some basic understanding of technology in a legal context, at least in terms of the application of technologies.[20] It seems that, in the age of technology, legal practitioners need not only consider economic efficiency and productivity, they actually need to be competent in technologies. Importantly, as the FLIP Report clearly revealed, clients expect that technologies are used by law firms and that lawyers are competent and sophisticated in the use and application of these new technologies (Law Society of New South Wales Commission of Inquiry 2017, FLIP report, p. 24-26).[21]

[15] For a summary of these applications, see Law Society of New South Wales Commission of Inquiry (2017, ch. 5) FLIP Report.

[16] For a discussion on the application of technology by government agencies, see Moses (2018).

[17] Others, however, believe that blockchain technology will be the most important technological innovation to impact various services industries. See Fenwich, Kaal and Vermeulen (2017, p. 263).

[18] See Boran (2018), Marr (2018), Ferose and Pratt (2018).

[19] The American Bar Association amended Rule 1.1 Comment of the Model Rules of Professional Conduct in 2012 to include a competence component in relating to technology. It can be accessed at <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/>. For further discussions, see Law Society of Western Australia (2017).

[20] See, eg, Federal Court of Australia (2016). See also Horton (2017).

[21] The FLIP report, while acknowledging competition and changing client expectations as other important reasons for the adoption of technologies, insists that "the most compelling reason for lawyers to take an interest in the technology is because the right tools optimised to a lawyer's needs and individual practice ultimately made the job far more enjoyable, and far more effective and efficient" (2017, p. 31).

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Legal practice is not all about technical matters and skills; it is fundamentally about achieving justice and fairness through not only interpreting and applying the law, but also by advancing the law with empathy, compassion, and a strong sense of justice and ethics. Lawyers need to be masters, not servants, of technology.[22] Even in interpreting and applying the law, technical skills and rules—the underlying mechanisms for AI technologies in law— are in fact rules laid down by human beings.[23] These technologies and mechanisms create their own risks and limitations, and understanding these risks and limitations is critical for legal practice (Moses 2018).

In many ways, data analysis algorithms thus far are mostly advanced methods of statistics. It is human beings who continue to control what data is entered and how to interpret the results produced. Also important, as the Australian Human Rights Commission has pointed out, AI can entrench or even exacerbate gender bias and stereotyping (and thus inequality) when it is used as a tool of "predictive policing," or other AI-based decision-making.[24] Research has demonstrated that, when using AI for sentencing, black people will likely be treated as presenting a medium or high risk of re-offending (and thus be more likely to attract a custodial sentence or a longer sentence) because of past data suggesting that is the case.[25] Although infringement notices, whose offences are relatively minor but the sanction against which accounts for more than 90 per cent of criminal matters, are already determined by algorithm in Australia (Lansdell et al. 2012, Bagaric 1998) to adopt algorithms to determine sanctions against more serious crimes which may attract custodial sentence need further considerations.[26] Relying on technology alone can lead to injustice, whether we are dealing with big data or applying AI technologies. Human beings must remain in the driving seat. While recognising that AI systems and human beings have different strengths and weaknesses, only prudent combination with a well-designed and thoroughly vetted AI system to assist human decision-making may reduce bias in practice.[27]

Further, in terms of the nature of technology, a useful distinction is made between automating (sustaining applications of technology) and innovating (disruptive applications of technology) (Law Society of New South Wales Commission of Inquiry 2017, p. 36). Simply put, automation will improve efficiency as well as accuracy, but innovation will present entirely new methods of lawyering. Neither, however, can be based on human experiences, nor do they "replicate human processes of reasoning, judgement and intuition" (Google ND, p. 36-41), or possess such human elements as the capabilities of creativity, empathy, compassion, and emotional intelligence (Krook 2018). That is where the limit of technologies lies, at least for now, and where constancy and change coexist.

CHALLENGES TO LEGAL EDUCATION

3.1 AN OVERVIEW

As discussed above, it is principally competition that has forced law firms to adopt and adapt to new technologies. Similarly, efficiency and productivity are among the major considerations for the application of technologies in university teaching and learning. Such an application is, however, only a small part of the challenges that universities face today. A much more fundamental issue is how universities will produce graduates who are capable of adapting to technology, but also understanding of the underlying principles of the applied technology.

At the same time, however, technologies have brought about many previously unknown consequences that need legal responses. This provides opportunities for research or, more precisely in the current funding environment, more research funding opportunities. From a legal perspective, the adoption

[22] See Nussbaum et al. (2018), Kirby (2018), Krook (2018).

[23] See discussions in Ashley (2017). It analysed, among other things, the implementation of different technological methods to obtain data and the use of rule-based approaches to classify statutory provisions.

[24] Australian Human Rights Commission (2018, p. 7 & 28-30). See also Moses (2018, p. 360-362).

[25] See Australian Human Rights Commission (2018, p. 29). The Issues Paper lists many more such examples (pp. 28–30). See also United States Government Accountability Office (2018).

[26] Stobbs, Hunter and Bagaric (2017) have taken a favourable view on using AI in sentencing, however, they have also suggested that precaution needs to be taken and wide ranging and rigorous trial of the process is essential. On the other hand, Freeman (2016) has taken a very critical view on using algorithms in sentencing by the US courts.

[27] See for a general discussion Google (ND, p. 21-26).

and application of technologies and their impact on society also lead to the regulation of them. This naturally means both challenges and opportunities in teaching, research and global collaboration. In this sense, modern technologies truly present challenges as well as opportunities, and it is critically important that we keep in perspective that the application and regulation of technology are, at least at the moment, at the centre of our concern.

In a nutshell, technologies in legal education present us with three sets of considerations: the adoption and adaptation of technologies to teaching and learning; the study and research of disruptions and other impacts of technologies in society to assist in laying down new laws to regulate them; and the preparation of future lawyers. Each of these issues is considered in turn.

3.2 THE ADOPTION AND APPLICATION OF TECHNOLOGIES IN TEACHING AND LEARNING

We have long ago thrown away notepads and note cards. Nowhere can we find the old-style overhead projectors in classrooms these days. In their place we find computers and computer-linked projectors. Libraries are nowadays dominated by discussion rooms and work stations and, of course, the all-important café. Books are mostly held in storage, rather than on bookshelves, and e-books are generally welcomed by both students and academics.[28] These are some of the most basic indications of the adoption of technologies in teaching and learning. In fact, we have much more fundamentally changed the way we deliver our teaching, with blended learning, flipped classrooms and online delivery as typical examples of such changes, as well as many more other experimental and innovative methods of teaching delivery.[29]

Law schools globally are adopting increasingly sophisticated computer tools in teaching and learning.[30] However, the application of technologies in legal education is primarily driven by technicians and university managers, whose principal considerations are long-term economic efficiency and productivity.[31] Further, one could also argue that the adoption of technologies meets the demands of the students who take a rather different path in their approach to university learning and in their understanding of university experiences. After all, "student-centred learning" seems to be the catchphrase in today's higher education.

The application of technologies in teaching and learning, in addition to sustaining economic efficiency and productivity in the long run, creates opportunities and challenges. There is little doubt as to the benefit of massive open online courses ("MOOCs") in providing opportunities to many students who would otherwise not be able to access legal education.[32] At the same time, we as legal educators also grapple with many difficulties, and some of them challenge the assumptions of the purposes of education in general.

The application of technologies, especially blended learning and online delivery, often leads to a major problem — that students stay away from campuses. The Australian Department of Education and Training has thus conceded that, in its own words, "digital learning environments can result in lower student retention rates" (Department of Education and Training 2018, p. 5). Face-to-face discussion and debate, interpersonal networking and socialising, extracurricular activities (and skills), critical debate about the value of justice and morality, and so on — all once part of the most valuable university experiences — are increasingly absent from the learning experiences of many students. One wonders whether human exchanges and experiences on campus truly are timeless values in education.

In addition, teaching law is not all about helping students to understand black-letter law, though it is an important part of legal education, it is also about inspiring students to pursue a better future of the world. For thousands of years we have had books that cover far more knowledge than a single teacher or group of teachers can possibly have, but we still go to university. Technology can certainly change the way we teach and learn, and technology-aided delivery might in

[28] For discussion on e-book preference, see Library Journal (2018).

[29] For some recent discussions on the use of technologies in law teaching, see Ryan (2018), Hiller (2018), Buchan, Cejnar and Katz (2018).

[30] For a detailed discussion, see Binford (2014).

[31] It seems that law academics are reluctant to embrace and disinterested in embracing technology-based teaching methods. See Binford (2014, p.165–9). See also Canick (2014, p. 675–80), Fenwich, Kaal and Vermeulen (2017, p. 353). Although the discussion in the latter two articles is in an American context, it is largely true in Australia as well.

[32] See the detailed discussions in Buchan, Cejnar and Katz (2018).

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fact be more engaging, but can these changes replace the benefit of face-to-face communication?

It is reasonable to say that the adoption of technologies in teaching and learning has had mixed results, and that much improvement remains desirable. As Fiona McLeod SC (2018, p. 504), the then President of the Law Council of Australia, has reminded us:

> *I would urge that there is still a place for aural learning in the physical classroom. That by speaking and listening we use different neural pathways imbedding deep memory; deeper memory than by watching or distracted listening.*

3.3 REGULATION OF THE USE OF TECHNOLOGIES, AND OPPORTUNITIES FOR LEGAL RESEARCH

Technologies present both risks and opportunities, and law must respond to technological developments accordingly. An example that demonstrates two starkly contrasting sides of technology is big data and its application. The potential benefits of big data are obvious, and are to be welcomed. LexisNexis, for instance, now holds more than 60 billion documents and 2.5 petabytes of legal data in its data platform (Wilkins 2017). Access to such large databases is invaluable to lawyers, researchers and students. But there are other kinds of large databases that hold extensive personal information, some of which has not necessarily been collected legally or ethically. The personal information harvested from more than 80 million Facebook profiles without their permission by data analysis firm Cambridge Analytica is a case in point (Isaak and Hanna 2018).

These databases of personal information, collected legally or otherwise by private companies and governments, are also liable to breach and the data therein misused and abused. The recent security breach of a medical database in Singapore is another example of why large databases of personal information are of concern (Davies 2018). Here once again, the issues presented are multifaceted and multidimensional, complicated and inter-related, and ultimately have fundamental concerns for the protection of human rights.[33] Much research is needed in relation to cybercrime and cyberterrorism, privacy, genetic profiling, online bullying, online racism, big data breaches and regulation, and many other areas.[34]

Another disruptive technology blockchain, the invention which underlies cryptocurrency such as Bitcoin and smart contracts, has also caused great difficulties for regulators (Walch 2016, Fulmer 2019). As an efficient and secure tool which can be used to record transitions, decentralisation in blockchain challenges many industries as well as government worldwide.

In addition, developments in biomedical and bioengineering have presented fundamental ethical issues which are yet to be addressed by regulators. The gene-edited baby claimed by Chinese scientist Jiankui He in late 2018 has caused outrage worldwide (Saey 2018). Should parents be allowed to choose using genome editing to prevent disease or improve intelligence or physical characteristics of unborn babies?[35] In other areas of controversy, such as stem cell therapies and cloning, most countries are yet to reach consensus and lay down laws to regulate them. Even technologies which have been around long enough and subject to regulation, such as genetically modified (GM) foods, or reproductive technology such as IVF, are still topics of ongoing public debate. We are not only grappling with understanding new technologies, we are also frequently being presented with timeless ethical questions as new technologies emerge and are applied. Can law really address some of the most fundamental ethical issues presented — is the use of those technologies playing God? Adding to the list are of course issues concerning equal access to technologies as well as issues relating to the impacts of technology on law and legal practice.

While technologies present risks, they also present massive opportunities for research, especially for collaborative research internationally, as most countries would face more or less the same problems. Thus, just as it happened in the United States a few years ago (Canick 2014, p. 680), large-scale initiatives and centres have now begun to emerge in Australian universities and, very encouragingly, some of these initiatives are in cooperation with the legal industries.[36] Additionally, technologies offer us various tools and mechanisms

[33] An excellent start to understanding the scope and depth of technological impact on society and people is Australian Human Rights Commission (2018).

[34] See Australian Human Rights Commission (2018); Rule of Law Institute of Australia (2016).

[35] For general discussion, see Knoepfler (2016).

[36] See, for example, UNSW Media (2017) and Ormsby (2018).

for research, well beyond "finding the law" (Galloway 2017). They also promote the dissemination of knowledge, facilitate circulation of research results, and assist in international collaboration for research. Here once again, we continue to see constancy and change coexist without much controversy: we now apply new technologies to undertake research and disseminate results, but the fundamental purpose of research remains the same — that is, to advance our understanding of law and society through scholarship and knowledge.

3.4 CHALLENGES TO LEGAL EDUCATION – TECHNOLOGIES AND CURRICULUM DESIGN

The most fundamental and difficult challenge to legal education is not about utilising technologies in teaching, learning and research, although that is useful, it is the question of how legal educators prepare law graduates for future practice, not just as lawyers but also as practitioners in law-related fields. This seemingly simple question is deceptively misleading; to answer this question, if we do not do so in a simplistic manner, is to reopen debate on the nature of higher education and the relationship between higher education and vocational training, between treating legal education as humanitarian studies and as professional training, between acquiring the capacity to think critically and independently and acquiring practical knowledge and skills; and, ultimately, the determination of the core functions of legal education. In this broad context, the accommodation of teaching technologies in the already overcrowded law curriculum is much more than a technical issue.

To consider any changes to law curriculum to accommodate technology in teaching we need to recognise that, in the last three decades or so, higher education in Australia has undergone some unprecedented changes, restructuring and transformation.[37] These changes are frequently described as "intense turmoil", "unsettling", and as causing "crisis" in identity. With them are, of course, tensions, conflicts and uncertainties (Fitgerald 2012).

Not very long ago we described a university (and hence academic work and academic identity), as an institution that is "autonomous, self-governing with particular privilege and public duties", and governed in a collegial manner (Fitgerald 2012, p. 2) We hold dear such values as intellectual freedom, autonomy, collegial authority and leadership (Fitgerald 2012, p. 7). It was claimed that "[i]f the disciplined pursuit of truth was the university's purpose, untrammelled freedom of thought was its condition and lifelong tenure its guarantee." (Manne 2012, p.2) But we now know and have accepted that such a perception is largely romantic and idealised, even though, to a certain extent, it was practised and pursued at different times in history. The reality is that, since the mid-1960s, the non-vocational disciplines are no longer at the heart of the university, and humanities have become increasingly a less important part of the life of the academics, not by choice but by necessity (Manne 2012, p. 3).

Not surprisingly, legal education in Australia in the last 30 years or so has undergone some very significant changes, most vividly described by the eponymous author of the Pearce Report, Emeritus Professor Dennis Pearce, that "[t]he past may have been a different country — but so is the future." (Pearce 2018, p. 56) It is a story of transformation and one that has no end (Coper 2018, p. 4). Without going into detailed discussion of this transformation, suffice it to say that such changes have caused a "longstanding, if not timeless, tension between legal education as professional and vocational, on the one hand, and, on the other, as liberal and humanitarian." (Coper 2018, p. 4). More specifically these are "tensions between theory and practice, between general education and professional education, and between knowledge and skill." (Coper 2010)

The transformation of legal education, fundamental as it might be, has not changed the basic belief widely (though not universally) held by the legal profession in the continuing importance of acquisition of traditional knowledge, signified by the compulsory nature of the Priestley 11 subjects.[38] Such an insistence on the knowledge-based prescription does not, however, prevent a quiet change in curriculum that "seeks to balance the acquisition of knowledge, skills, and values … to develop the skills of research, analysis, independent and critical thought, problem-solving, communication, advocacy, negotiation, and so on." (Coper 2018). At the same time, there is an ever increasing demand for expansion of the knowledge

[37] In fact, it is also true in the United Kingdom, Canada, New Zealand and other English-speaking jurisdictions.

[38] The Priestley 11, though officially introduced in 1992, can be traced back to the 1982 McGarvie Report: Council of Legal Education Academic Course Appraisal Committee, "Legal Knowledge Required for Admission to Practice" (Report, Council of Legal Education 1982). See Rice (2018, p. 222)..

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base. Indeed, for quite some time the law curriculum has been grappling with issues such as globalisation (hence international and comparative perspective), sustainability, indigenous perspective, wellness and resilience, and gender (Galloway 2017, p. 1-2). Adding to the list are the arguments for inclusion of statutory interpretation, legal history, jurisprudence, experiential learning, clinical legal education, and so on.[39] This inevitably leads to competition for time and priority in the already crowded curriculum.

The reform of the curriculum, if any, is also complicated by the fact that law students come to study law for all kinds of different reasons with different career expectations, and almost half of them have no intention to practise law upon graduation.[40] The teaching of practical skills, although not precisely defined,[41] clearly needs to be balanced against the need for a generalist education, if so many students are to end up in careers other than legal practice.

The bottom line is: do we educate students towards becoming critical and independent thinkers or towards becoming skillful practitioners? Can we achieve both?[42] In light of the long list of skills demanded by the legal profession, are we able to teach them all? Or can we reduce these practical skills to the minimum essential skills such as analytic thinking, ethical reasoning and policy-based analysis, as suggested by Professor Rosalind Dixon? (quoted in Saw 2018). In the age of "information overload", it is important that we keep in mind that our fundamental role is to shape how we understand and appreciate law (Edelman 2012).

If the impact of technology on law and legal practice is pervasive and disruptive, and the disruptive technologies might soon "obviate … many, if not most, of the traditional legal skills and characteristics of traditional lawyers" (Fenwich, Kaal and Vermeulen 2017, p. 354), then we need to differentiate legal skills demanded by the legal profession and identify new ones that our future graduates will need as additional skills (Perlman 2017). However, these additional skills will also need to be transferable and "non-automatable" (Department of Education and Training 2018, p. 4). While machines are good at replicating knowledge and replicating abilities, we need to shift our learning focus to skills harder to be automated, such as unique human characteristics of empathy, leadership and integrity (AlphaBeta 2019).

According to the Foundation for Young Australians, by 2030 workers will spend almost 100 per cent more time at work solving problems, 41 per cent more time on critical thinking and judgement, 77 per cent more time using science and mathematical skills, and 17 per cent more time using verbal communication and interpersonal skills (Foundation for Young Australians 2017, p. 4). For future lawyers, they need to understand people, processes, experience, and security behind the technology to ensure that technological solutions actually provide values (Lat 2017), not bias or discrimination.

One can always argue that future lawyers should be able to critically evaluate technology, its application and its limitations as well as implications, and critical evaluation is, of course, the traditional skill that a law school must offer. In short, it is not about teaching students to be technological experts, but teaching them to understand the principles underlying the technologies within a framework of a broad education in social science, while also equipping students with various practical skills, including technological competency.[43] Indeed, it is strongly argued that, despite the advancement of technologies and the need to respond to changes brought about by them, traditional skills such as critical and analytical thinking and problem solving, and values of legal practice

[39] See discussions in Lindgren, Kunc and Coper (2018, chpt. 5).

[40] See International Legal Education and Training Committee (2004, p. 9).

[41] While not strictly defined, the now defunct International Legal Services Advisory Council once listed the following practical skills for law curricula: problem solving; legal analysis and reasoning; legal research; factual investigation; communication; counselling; negotiation; litigation and alternative dispute resolution, mediation and arbitration; management of legal work; recognising and resolving ethical dilemmas; drafting skills; promoting of justice and fairness; and professional development. See International Legal Education and Training Committee (2004, p. 8). Another good reference to skills is the 1992 MacCrate Report in the United States which outlined systematically the various fundamental skills, such as legal research and analysis, problem solving, communication, and court and alternative dispute resolution methods and procedures, as well as ethics: see Canick (2014), citing American Bar Association Section of Legal Education and Admissions to the Bar, "Legal Education and Professional Development — An Educational Continuum" (Report of the Task Force on Law Schools and the Profession, American Bar Association, July 1992).

[42] The emphasis on teaching practical skills is not without controversy. It has been argued that: "the core role of a law school is not to teach students to learn or memorise hundreds of cases. Nor is it to teach our brightest students how carefully to distinguish any factual scenario before them from a decided case. Instead, the most important role should be for students to read far fewer cases and instead to focus much more upon history, context and theory." (Edelman, 2012)

[43] This clearly was the principal theme that emerged from the 2017 conference on legal education in Australia: see Lindgren, Kunc and Coper (2018), a collection of papers presented at the Future of Australian Legal Education Conference in August 2017.

such as ethical propriety and social responsibility, must all be instilled in future lawyers. At the same time, there are new skills, such as emotional intelligence, digital literacy, teamwork and collaboration, that are demanded by the evolving legal practice (Legg 2018; Appleby, Brennan and Lynch 2018). Here once again lies the coexistence of constancy and change, and contemporary skills learnt for changes are also to reinforce the learning of the constancy.

As already mentioned, predicting the future and the kinds of skills essential for the future is a risky business, but the needs identified above can be of assistance in guiding our design — or, more precisely, adjustment — of the law curriculum to meet future needs. Further, it is generally agreed that the new skills, generally referred to as technical literacy, required for technology-driven society is not to undermine the acquisition of traditional knowledge and skills for legal practice (Law Society of New South Wales Commission of Inquiry 2017, FLIP Report, p. 77). In other words, despite some severe criticisms of the Priestley 11,[44] we are unlikely to move away from this compulsory requirement, at least not in the near future. It is also worth pointing out that the demand for new skills will be on top of what have already been recognised as new skills for a globalised world, such as competency in international and comparative law.[45]

Nevertheless, we need to ensure that our future legal practitioners will not only be capable of adapting to changing technologies and innovation, but will also fully understand the legal and ethical issues involved in the use of modern technologies. To understand these issues will necessarily demand a basic understanding of the operational principles of the various technologies, so as to avoid the increasingly common situation in which legal practitioners are asked to deal with issues that they do not fully understand due to rapid technological development (Fenwich, Kaal and Vermeulen 2017, p. 379), or entrenching the mismatch between skills taught and skills needed in practice (Deloitte 2018). The teaching of digital literacy should be part of the teaching of general legal skills (Horton 2017), and any training in the use of legal technology will need to result in skills that AI will not be able to automate, such as the very "human" capabilities for creativity, empathy, compassion, and emotional intelligence (Krook 2018). The then President of the Law Council of Australia, Fiona McLeod SC pointed out:

> *We need a basic understanding of the operations and language of predictive coding, computational analysis and "learning" and to understand the rules, assumptions and heuristics or bias in programming*.[46]

However, it would be wrong to assume that we have a consensus that law schools should teach these technologies. Some are very critical, believing our law schools might have failed to innovate and our existing teaching methods — teaching students to apply the law to a set of facts, precisely the skill that is currently being automated — excludes student discussion on morality, emotion and empathy, the "human" skills that are now required (Krook 2018). Thus, one view argues for the complete redesign of law curriculum to "future proof" the future graduates (Turner 2016) and another view questions whether law schools are the right place to teach such technical skills (Saw 2018, Grady 2018)[47]. Still others remind us that the technologies taught at the law schools might not be the ones that will be used by the law firms by the time the students graduate (Curphey 2018). There are also arguments that a law degree is an academic degree and, as such, students might be better advised to undertake technology courses at their practical legal training (PLT) stage (Hall 2017).

As already discussed above, the present focus of many universities is on adopting technologies to facilitate transformation of the delivery of teaching and learning content. While these practices will familiarise students with some new technologies, they are far from equipping students with technological competency. There is a misconception that today's students are already technologically savvy, when in fact

[44] It is characterised as overly content-based and "pedantic", and as such, has attracted continuing debate as to whether it stifles innovation. See Coper (2018, p. 6–7). It is reported that the former Chief Justice of Australia Robert French once described the Priestley 11 as a "dead hand" on curriculum reform and needing urgent revision: see Krook (2018).

[45] See the International Legal Services Advisory Council (2004). See also discussions in Coper (2012).

[46] McLeod (2018, p. 506). Others have, however, identified the capacity to work in multidisciplinary teams and with software engineers, basic coding for lawyers, basic mathematical principles for coded technological solutions in law, and the development of basic conceptual coding skills as necessary for future law graduates, see Fenwich, Kaal and Vermeulen (2017, p. 379–82).

[47] Grady (2018) states that lawyers need not to know "the intricacies of how the program worked".

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their understanding of technology is shallow, and they lack, in particular, skills to evaluate sources of information and underlying principles in technologies (Canick 2014, p. 665).

One needs to recognise too that, for legal educators, teaching technological competencies is a tall order, as few of our current legal academics are well acquainted themselves with technologies, and we are probably not required to understand these matters in the first place. Not surprisingly, technological proficiency is not considered a key outcome in legal education, and where technologies have been accepted, mostly warily, they are expected to serve the purpose of achieving traditional educational objectives (Canick 2014, 664). However, times have changed and we need to act now or otherwise we will be forced to do so soon. The Australian Government has announced a review of the Australian Qualifications Framework ("AQF") to ensure that the AQF meets "the expectations of students, the education sector and the domestic and international employment markets", including addressing the changing nature of work and providing the high-level skills and knowledge required for the future workplace (Department of Education and Training 2018, p. 18).

In the absence of any consensus, individual law schools in Australia and in other countries have now begun to introduce some new electives, such as law apps, cyber law, computer coding for lawyers, cloud computing, and law-based hackathons, among others, and the various subjects are offered at both undergraduate and postgraduate levels as well as training modules[48]. Most of the subjects are introduced in an ad hoc manner, and only a handful of law schools are making major reforms to their curriculum to prepare the future lawyers (Cohen 2018, Nussbaum, K 2018). The internet search results of Australia law schools teaching technology-based subjects seem to suggest that few law schools have considered the introduction of such subjects in light of the nature of higher education, the student cohort, overcrowding of the curriculum, and justification for the choice of a particular subject. In light of the fragmented and ad hoc practice among Australian law schools we might ask: if technical competency is a question of competency in discharging lawyer's duties, should such a subject be made a compulsory or core subject in the law curriculum? (Law Society of New South Wales Commission of Inquiry 2017, FLIP Report, p. 78)

In the context of Australian legal education, a most comprehensive argument for teaching law technology in Australia is mounted by Kate Galloway, a prolific writer on legal technology from Bond University. Galloway argues for a whole of curriculum approach (or what she calls an "immersion approach") to digital literacy, and urges legal educators to consider digital technologies in the broader context of the law (Galloway 2017, p. 2). Her argument is essentially technology-driven, arguing for digital technologies to be embedded within teaching and learning — that is, for them to be integrated into all law subjects (Galloway 2017, p. 15). This seems to be a rather idealistic approach, echoing an earlier argument for an integration-based approach to globalisation of law and legal education (Office of Learning and Teaching 2012, pp. 79-82). While it is true that there should be no limit to the broader contexts of the law (Galloway 2017, p. 3), it is nevertheless doubtful whether such an approach is also practical. As discussed above, there has been an increasing demand for inclusion of the various subject matters in the law curriculum and, although each has been argued for embedment in the law curriculum, none can, to this day, claim to have been so integrated. In this context, legal technology is just one of the latest demands for inclusion, albeit the one having the most radical impact on law and legal practice. Further, such an approach assumes that the legal academics are not only willing, but also digitally literate, or could easily become digitally literate.

While we strongly believe that there is a need to teach law students about some technical issues, we also recognise the need to have such teaching accommodated within the existing Priestley 11-dominated curriculum. More importantly, perhaps, despite the technological changes, there are certain constant values in higher education, such as critical and independent thinking, interpersonal communication and negotiation skills, and adherence to ethical practice. These fundamental values need to be coupled to an understanding of technological

[48] Internet search by the author suggests that no fewer than twelve Australian law schools are currently offering law technology subjects in various forms. For further descriptions of and discussions on legal technology teaching in Australian law schools, see FLIP Report (2017, p. 78), Lambert (2016), Taylor (undated). For discussions on law technology teaching in selected law schools in Australia, see Lindgren, Kunc and Coper (2018, chpt VI). For a discussion of law technology courses in the United States see: Canick (2014, p. 680–1), Perlman (2017). For a summary of law technology courses offered in the United States, Canada, Australia and Europe, see Singleton-Clift (2017). For a discussion on international recognition of the importance in teaching law technology, see Thanaraj (2017).

development and the underlying principles of technology; skills learnt from the latter will then reinforce the learning, and assist in the application of the fundamental values. With this rationale, we believe that the "conventional" Priestley 11-led curriculum should refocus on fundamental values in legal education through the teaching of the curriculum in a broad social science context (Nussbaum, M 2018). With this reorientation to teaching the constancies, we should then introduce two technology subjects that deal with changes. We would imagine a "law and technology" subject to introduce law students to an understanding of the ever-evolving new technologies, and another subject on "coding for lawyers" to explain to students the underlying principles of coding and algorithms. These two subjects would not produce specialists in technology, but graduates who would be confident in technology as well as fully aware of the limitations and potential biases in the products of technologies such as big data and AI. We do not think there would be any particular harm if this was made compulsory in the law curriculum.

CONCLUDING REMARKS

We should recognise that changes brought about by the development of science and technology are a fixed feature of legal development in all legal systems.[49] In this sense, the topic of law and technology is in fact not new, nor should it be as frightening as it seems to be.

We should, however, also recognise that the current round of technological impact on law and legal education is massive and developing extremely rapidly. We have never faced any more severe challenges until now, and what we are witnessing at the moment is only the beginning of it. Indeed, modern technologies, especially AI and big data, have presented us the biggest challenges. In this sense, the future could look daunting, but it could also be promising.

In responding to such changes, we must not lose sight of the fundamental mission of higher education; that is, "higher education is about cultivating knowledge and analytical skills that can be of enormous value well beyond the workplace—and encouraging wide-ranging intellectual enquiry" (Universities Australia 2018, p. 12). Learning to effectively use technology is to ensure that future graduates will be technologically confident and proficient, but a law graduate is not, nor needs to be, an expert in technology. We should also recognise that nothing can be future-proof, as we do not know exactly how technology will develop and what kind of impact any new developments might make. However, there are values and skills that are more endurable and more capable of adaptation than others, and such values and skills are the ones that machines lack until now, such as critical analysis.

Law, after all, is a human science that demands a "human touch", and that calls for human values and empathy, in addition to rationale and reason, and none of which can be replaced by machines. As such, it is premature to pronounce the death of legal practice or legal education. In fact, common law has always been an evolving system that adapts to changing times. The common law system has proven, time and again, that it is capable of preserving the "skeleton of principles" while adapting to contemporary issues and demands.

The same can be said about legal education, which is a reflective, flexible and constantly changing system. Like the way legal education adapted to globalisation, legal education will meet new technological challenges and, as such, there is no reason to believe that there is not a bright future for legal education and the legal profession, even though our future could indeed be thrills and spills, and it is reasonable to believe that we will continue to make use of technologies as we have done so for decades, not that technology will make use of us.

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[49] As early as the 1960s, legal educators were asking how law and legal education might respond to the exponential growth in scientific knowledge during the modern era: see, eg, Miller (1967, p. 29-39).

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Reflections on My Journey in Using Information Technology to Support Legal Decision Making—From Legal Positivism to Legal Realism

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ABSTRACT

In this paper I discuss my transition from legal positivism to legal realism and how this has impacted upon my construction of legal decision support systems. As a child living with parents who were heavily engaged in politics, and who had disastrous experiences with the twin evils of fascism and communism, I was encouraged to become a scientist. But my interest was always in law and politics. Constructing legal decision support systems was a pragmatic balance between my skills and interests. So I began constructing rule-based systems. But gradually I became aware of the discretionary nature of legal decision making and the need to model legal realism. Through the use of machine learning I have been able to develop useful systems modelling discretion. The advent of the world wide web has allowed the wider community to become more aware of legal decision making. It has fostered the concept of online dispute resolution and provided tools for self-represented litigants. Most importantly, we have become aware that the major impediment to the use of technology in law is not the lack of adequate software. Rather it is the failure of the legal profession to address user centric issues.

Keywords – Artificial intelligence, legal positivism, legal realism, legal decision support systems, online dispute resolution

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Summary

MY BEGINNINGS

Both my parents were born in Poland between the two world wars.[1] Their parents had been born in the late nineteenth and early twentieth centuries, in various parts of the old Russian Empire. They were Eastern European Ashkenazi Jews who despised the Czar and joined the BUND, a socialist non-Zionist Jewish political party. Indeed my paternal grandfather was a trade union organiser and member of the Jewish Community Council of Vilna. He spent many years in a czarist prison for his pains.

A detailed discussion by me of my parental grandparents can be found in Zeleznikow (2011). They were both murdered before I was born, by the twin evils of Fascism (Hitler) and Communism (Stalin). This led my father to see everything as black and white!

My parents met when they were students at the University of Lodz in 1946. Their intention had been to create a new Jewish life in Poland. However, when it became obvious in 1948 that Poland would have a Communist Government, they fled to Paris, where they lived as refugees for three years. I was born in Paris in 1950. The first of three children. A detailed history of my parents' experiences in the Holocaust can be found in the book Café Scheherazade by Arnold Zable (Zable 2003).

My parents arrived in Melbourne in March 1951—a place they considered as the end of the world. But things continued to remain black—I contracted polio in 1953. Fortunately, I survived with only very minor impediments.

Growing up in Melbourne in the 1950s and 1960s was not easy. My father, who had trained as a Yiddish teacher in Poland, worked in labouring jobs. My mother, who had trained as a doctor, was home caring for me. Initially I went to school on crutches, and later had a limp. And there were innumerable visits to the Royal Children's Hospital. There was also the anger my father had imbued me with—apparently, in an incident I cannot recall, I beat a child at school, because his parents were German.

In Melbourne, my father continued his involvement in politics. He joined the New Australian branch of the Australian Labour Party and was in constant conflict with the left-wing administration of the Victorian branch. After a few years, the branch was disbanded, and the secretary, Bono Wiener, my father's best friend, was expelled from the party.

My parent's involvement in politics[2] influenced my interests. I was to become Vice President of the Victorian Branch of Young Labour, in 1974, but ended any active involvement in politics once I went to the United States to become an assistant professor of mathematics.

At school, I excelled in mathematics and history. I loved reading about law and was passionate about becoming a barrister! However, the 1960s were the era of the space race, culminating in the first moon landing in July 1969. Males were encouraged, if possible, to study science.

My mother did not want me to study law— she felt that whilst I might have the skills to be an excellent barrister, I would be a disastrous solicitor. She pointed out my surfeit of organisational skills, my impatience with performing trivial tasks and my ability to lose everything. She felt there would be a greater future for me in science.

As luck would have it, the timetable of Matriculation subjects at Elwood High School in 1968 only allowed me to take the Renaissance History subject. I had wanted to take Revolutions —after all I was passionate about politics and revolutions. A renaissance history class, focussing upon literature and art, was not what a sports loving, politics mad boy wanted to learn about. I only obtained a second-class honours for my history subject, but received a first class honour in Pure Mathematics.

MY LIFE AS A UNIVERSITY STUDENT AND ASSISTANT PROFESSOR OF MATHEMATICS

So in March 1969, I commenced study in a Bachelor of Science at Monash University. I had zero interest in science and abhorred conducting laboratory experiments. I enrolled in two mathematics subjects, chemistry and psychology. Yes, psychology was a laboratory-based science subject at Monash University in 1969. From 1970 onwards, I only studied mathematics – so I have a First Class Bachelor of Science degree, having only studied two

[1] My father was born in Vilno. Poland is now known as Vilnius, Lithuania.

[2] Both of them received life memberships of the Australian Labour Party.

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laboratory based subjects.[3] Both of these laboratory-based subjects were first year subjects.

By December 1972, simultaneous with the election of first Australian Labour Party government in twenty-three years, I graduated with a first-class honours degree. I was uncertain what to do next! I liked studying and working at a university (I had my first experience tutoring at a university in 1972), so I abandoned my idea of being a barrister and decided to study for a PhD.

My research was in abstract algebra—essentially showing if the multiplicative semigroup of a semiring had certain properties, then it would follow that the additive semigroup would have additional structure (Zeleznikow 1979). Whilst this research has now been found to have implications for automata theory and computer science, the research was very theoretical. According to Google Scholar it has only been cited 17 times over the last forty years—and half these citations came from my follow up work.[4]

During my postgraduate student years, I became very involved in politics. I was elected Vice President of Victorian Young Labour (1974-5) and to the Caulfield City Council (1977-9). My experience in party and electoral politics led me to the conclusion that politics did not reward performance—but rather connections and dogmatic adherence to the party line. Ability and competence were not necessarily a virtue.

Thus I decided not pursue a political career. Even though I was on the Public Office Selection Committee of the Victorian Branch of the Australian Labour Party, which was an ideal platform for seeking a position in parliament, I felt I could make more valuable contributions to society via academia. Further, I felt university life would be more certain.

In June 1979, I submitted a thesis for the PhD degree and soon after was offered an Assistant Professorship in Mathematics at Northern Illinois University in De Kalb Illinois. At that time there was a worldwide glut of pure mathematicians and the likelihood of my receiving an academic position in Australia was limited.

This led me to an existential crisis—would I take up the Northern Illinois offer or take the safe route and stay home. I decided on the first choice, leaving my family and any potential political career. It is a decision that I have never regretted.

Over the next six years, I immersed myself in travel, running marathons,[5] theatre and US politics. When I had the time, I wrote the occasional research article to appear in mathematical journals. However, I was always aware that there were no mathematics academic jobs in Australian universities and I did want to return to Australia.

The idea of studying to be a lawyer persisted. In 1982, I took the Law School Admissions Test.[6] I was accepted to study Law at Monash University in 1983. But at that time, I had commenced a relationship with an Australian psychologist who had been awarded a postdoctoral fellowship at the Massachusetts Institute of Technology. She did not want me becoming a student and returning to Australia. I managed to find a position as an Assistant Professor of Mathematics at Mount Holyoke College in South Hadley MA. Mount Holyoke is one of the seven sisters—prestigious, private all women colleges.

My partner and I returned to Melbourne in January 1985, when I started a graduate diploma in Computer Science. My goal was to retrain as a computer science academic! Any notion of being either a lawyer or politician had been abandoned.

MAKING THE TRANSITION TO ARTIFICIAL INTELLIGENCE AND LAW RESEARCH

In March 1985, I was back with first year students, studying Computer Science at the University of Melbourne. I had great difficulty mastering computer hardware and software engineering. But I was fascinated by the notion of artificial intelligence. I very soon decided that artificial intelligence was the area in which I would conduct research.

[3] To receive a Bachelor of Science degree at Monash University in 1969, one had to complete at two laboratory-based subjects.

[4] Abawajy et al. (2013), Hannah et al. (1980), Zeleznikow (1980), Zeleznikow (1981), Zeleznikow (1984).

[5] As of May 2019, I have run 197 full marathons.

[6] This was a requirement for potential law students who had matriculated more than ten years previously. It did not matter than in the thirteen years since matriculating I had completed a first-class honours degree and PhD and had taught at Australian and US universities for ten years.

Even before the reaching the half way stage of my graduate diploma in computer science, I was offered a lectureship at the Royal Melbourne Institute of Technology. A year later, I received a French Government Scientific Fellowship to conduct research at Université Paris VI.

But exactly what research would I conduct? There was much interest in logic programming at the University of Melbourne. Professor John Lloyd, who had worked with me in the university's mathematics department ten years previously, encouraged me to work in the domain. At that time, there some significant work was being conducted at Imperial College London on using logic programming to analyse the British Nationality Act of 1986 which appeared in the paper by Sergot et al. (1986). I looked at the application with awe! With my then positivist outlook, influenced by parental mentoring, political action and a Pure mathematics PhD, I then believed this was the future of law—having robots replace judges in making legal decisions. It took me many years to abandon this approach. But my exposure to legal decision making influenced this change.

At the same time, I moved to the Department of Computer Science at La Trobe University. There I was fortunate to attract computer science students who wanted to work with me on artificial intelligence. They included George Vossos, Andrew Stranieri, Mark Gawler, Emilia Bellucci and Jean Hall. I also attended a Victorian Society for Computers and Law meeting where I met a young lawyer Dan Hunter. Dan also had a computer science degree.

Following discussions with Dan, I started to realise that the work by Kowalski et al. (1986) failed to accept many of the inherent fallacies of using logic programming to model law—such as imprecision and vagueness. Investigating these issues led to a book and many papers by Dan Hunter and myself.[7] Dan Hunter has continued to become a prominent legal scholar, focusing upon research in intellectual property.[8]

Perhaps my most fortuitous action was to read a paper in the Communications of the Association for Computing Machinery by Don Berman and Carole Hafner (Berman and Hafner 1989), about the benefits of artificial intelligence for law. Don was a law professor at Northeastern University in Boston Massachusetts whilst Carole was a computer science professor at the same university. They became the co-founders of the artificial and law community. I wrote to Don about his seminal work. He immediately replied and invited me to Boston. I stayed with Linda (Don's wife) and Don in Brookline MA in December 1990. I and a combination of my wife, children and Dan Hunter have stayed with Don and his family almost every year since 1990. Even though Don passed away in 1997, I will never forget his compassion, intelligence and mentoring of me.

Our laboratory on artificial intelligence and law at Latrobe University was named after Don Berman. Members included Andrew Stranieri, George Vossos, Dan Hunter, Mark Gawler, Emilia Bellucci, Jean Hall and Subha Viswanathan.[9] It folded in 2002, after I had left for the University of Edinburgh and Andrew Stranieri left for the then University of Ballarat. During its time, the laboratory taught graduate courses on artificial intelligence and law (Don Berman taught the inaugural course in 1992), hosted visitors, received numerous large Australian Research Council grants, built systems for Victoria Legal Aid, published research articles and graduated PhD and honours students.

One of the attendees at Donald Berman's course at La Trobe University was Domenico Calabro, then Director of Education at Victoria Legal Aid (VLA). Domenico saw the potential benefits that artificial intelligence had for enhancing access to justice, especially for public interest law organisations. Over the next fifteen years, we partnered with VLA to build them useful systems.[10] In return VLA gave us important legal advice.

My first work in the domain of artificial intelligence and law, was to model the then Victorian Workers

[7] These include Zeleznikow and Hunter (1994), Hunter et al. (1993), Hunter and Zeleznikow (1994), Vossos et al (1993), Zeleznikow and Hunter (1992), Zeleznikow and Hunter (1995a), Zeleznikow and Hunter (1995b).

[8] See https://www.swinburne.edu.au/business-law/staff/profile/index.php?id=dhunter last accessed 12/7/ 2019.

[9] Now Dr. Subha Chandar.

[10] In particular with regards to eligibility for legal aid (Zeleznikow, J. and Stranieri, A. 2001. The use of Legal Decision Support Systems at Victoria Legal Aid. Proceedings of ISDSS2001- Sixth International Conference on Decision Support Systems Brunel University, London: 186-192. and plea bargaining (Hall et al. 2005).

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Compensation Act. The work was suggested by Alan Schwartz at Anstat Legal Publishers and conducted in conjunction with a Melbourne solicitor Graeme Taylor.[11] As we said in Zeleznikow (2003):

> *The German Conceptualist movement assumes that judges are almost totally constrained by rules. Every attempt is made by adherents to this theory to determine one single correct meaning for every term in every rule in a legal system. Once this is achieved, legal reasoning reduces to the logical application of facts to rules. ... The fundamental limitation not addressed by this view of law can be reduced to two significant omissions; the failure to model open texture[12] and the failure to provide an analysis of how justification differs from the process used to arrive at decisions.*

Given our desire to move beyond rule-based systems[13] when modelling law, we commenced the IKBALS (Intelligent Knowledge Based Legal Systems) project. IKBALS (Zeleznikow 1991) used the object-oriented approach to build a hybrid rule-based/case-based system[14] to advise upon open texture in the domain of Workers Compensation. IKBALSI and IKBALSII both deal with statutory interpretation of the *Accident Compensation (General Amendment)* Act 1989 (Vic). The Act allows a worker who has been injured during employment to gain compensation for injuries suffered. These compensation payments are called WorkCare entitlements. IKBALS focuses on elements giving rise to an entitlement.

The original prototype IKBALSI was a hybrid/object-oriented rule-based system. Its descendant, IKBALSII, added case-based reasoning and intelligent information retrieval to the rule-based reasoner, through the use of a blackboard architecture.

The defeat of the Victorian Labour Government in October 1992 led to significant changes in the relevant legislation and abandonment of the specific system dealing with Workers' Compensation. However, we were still determined to use a hybrid agent architecture to build a legal knowledge based system and thus searched for suitable application areas and domain experts. We were fortunate to find an interested legal partner in the Credit Law domain (Allan Moore of Allan Moore & Co). The resulting integrated deductive and analogical system was called IKBALSIII (Zeleznikow et al. 1994).

Meanwhile I was also working with Dan Hunter[15] trying to justify to legal practitioners that they should be interested in the application of artificial intelligence to law. Whilst numerous journal articles and a book resulted from our collaboration, there were no substantive practical applications. We had to wait a further two decades for this to occur.

My discussions with Dan Hunter and Don Berman gradually changed my legal philosophy. I became aware of the concept of legal realism that judges make decisions for a range of reasons which cannot be articulated or at least are not apparent on the face of the judgement given. Under this paradigm, there are unwritten or recorded reasons for judicial decision-making. Our challenge was to construct legal decision support systems based upon legal realism. Our approach to this challenge was to consider using machine learning.

USING MACHINE LEARNING TO SUPPORT LEGAL DECISION MAKING

Don Berman challenged us to investigate whether there was any possibility of using machine learning to model law. Machine learning is that subsection of learning in which the artificial intelligence system attempts to learn automatically (Lodder and Zeleznikow 2010). Previously law had primarily been modelled using rule-based reasoning and case based reasoning. Indeed, in the early 1990's, our laboratory published many articles on rule-based and case-based legal expert systems.

Dr. Richard Ingleby, then a senior lecturer in law at the University of Melbourne suggested that we might to use

[11] Of Tony O'Brien and Associates, Solicitors.

[12] Open textured legal predicates contain questions that cannot be structured in the form of production rules or logical propositions and which require some legal knowledge on the part of the user in order to answer.

[13] Rule-based reasoning involves using a system of rules of the form: IF <condition(s)> THEN <action>.

[14] Case-based reasoning is the process of using previous experience to analyse or solve a new problem, explain why previous experiences are or are not similar to the present problem and adapting past solutions to meet the requirements of the present problem.

[15] First at Freehills, then Deakin University and finally at the University of Melbourne.

machine learning to investigate how Australian Family Court judges exercise their discretion when distributing marital property following divorce. Dr. Ingleby introduced us to Family Court Judge Tony Graham, who assisted us in obtaining access to the appropriate data.

In Stranieri et al. (1999) we claim that at that time few automated legal reasoning systems have been developed in domains of law in which a judicial decision maker has extensive discretion in the exercise of his or her powers (and this is still the case).

We argued that judicial discretion adds to the characterisation of law as open textured in a way which has not been addressed by artificial intelligence and law researchers in depth. We demonstrated that systems for reasoning with this form of open texture can be built by integrating rule sets with neural networks trained with data collected from standard past cases. The obstacles to this approach include difficulties in generating explanations once conclusions have been inferred, difficulties associated with the collection of sufficient data from past cases and difficulties associated with integrating two vastly different paradigms. The resulting system, Split-Up, was the first computer software to use machine learning to provide legal advice in a discretionary domain.

The aim of the approach used in developing Split-Up was to identify, with domain experts, relevant factors in the distribution of property under Australian family law. We then wanted to assemble a dataset of values on these factors from past cases that can be fed to machine learning programs such as neural networks.

Twenty-five years later, computer hardware is much cheaper and hence computer software makes decisions much more quickly. In 1994, we needed to be very efficient with our use of data, for both the above-mentioned computing reasons and the fact that the Family Court of Australia would not allow us to take any data out of their registry.

Hence, we chose one hundred and three commonplace cases[16] from the Melbourne Registry of the Family Court of Australia. Three researchers carefully read these free-text cases and placed the relevant data in a carefully constructed database. The database was constructed following:

1. Discussions with our family law domain experts Richard Ingleby (University of Melbourne), Dorothy Kovacs (Monash University) and Renata Alexander (Victoria Legal Aid);
2. Reading judgements from the Melbourne Registry of the Family Court of Australia; and
3. Speaking with Family Court of Australia judges.

Ninety-four variables were identified as relevant for a determination in consultation with experts. The way the factors combine was not elicited from experts as rules or complex formulas. Rather, values on the 94 variables were to be extracted from cases previously decided, so that a neural network could learn to mimic the way in which judges had combined variables.

However, according to neural network rules of thumb, the number of cases needed to identify useful patterns given 94 relevant variables is in the many tens of thousands. Data from this number of cases is rarely available in any legal domain.

Furthermore, few cases involved all 94 variables. For example, childless marriages have no values for all variables associated with children so a training set would be replete with missing values. In addition to this, it became obvious that the 94 variables were in no way independent.

In the Split-Up system, the relevant variables were structured as separate arguments following the argument structure advanced by Toulmin (1958). Toulmin concluded that all arguments, regardless of the domain, have a structure that consists of six basic invariants: claim, data, modality, rebuttal, warrant and backing.

Every argument makes an assertion based on some data. The assertion of an argument stands as the claim of the argument. Knowing the data and the claim does not necessarily convince us that the claim follows from

[16] Most decisions in any jurisdiction are commonplace, and deal with relatively minor matters such as vehicle accidents, small civil actions, petty crime, divorce, and the like. These cases are rarely, if ever, reported upon by court reporting services, nor are they often made the subject of learned comment or analysis. More importantly, each case does not have the same consequences as the landmark cases. Landmark cases are therefore of a fundamentally different character to commonplace cases. Landmark cases will individually have a profound effect on the subsequent disposition of all cases in that domain, whereas commonplace cases will only have a cumulative effect, and that effect will only be apparent over time. Commonplace cases are those used in training sets for machine learning algorithms.

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the data. A mechanism is required to act as a justification for the claim. This justification is known as the warrant.

The backing supports the warrant and in a legal argument is typically a reference to a statute or a precedent case. The rebuttal component specifies an exception or condition that obviates the claim.

In twenty of the thirty-five arguments in Split Up, claim values were inferred from data items with the use of neural networks whereas heuristics were used to infer claim values in the remaining arguments. The neural networks were trained from data from only 103 commonplace cases. This was possible because each argument involved a small number of data items due to the argument-based decomposition.

The Split-Up system produces an inference by the invocation of inference mechanisms stored in each argument. However, an explanation for an inference is generated after the event, in legal realist traditions by first invoking the data items that led to the claim. Additional explanatory text is supplied by reasons for relevance and backings. If the user questions either data item value, he/she is taken to the argument that generated that value as its claim.

The Split-Up system performed favourably on evaluation, despite the small number of samples.

Because the law is constantly changing, it is important to update legal decision support systems. The original hybrid rule-based/neural network version of Split-Up was constructed in 1996. In 2003, the tree of arguments was modified in conjunction with domain experts from Victoria Legal Aid to accommodate changes in legislation including:

1. The then tendency by Family Court judges to view domestic abuse[17] as a negative financial contribution to a marriage.
2. The re-introduction of spousal maintenance as a benefit to one of the partners. Under the *clean-break philosophy*, Family Court judges were reluctant to award spousal maintenance, since it would mean one partner would continue to be financially dependent on his/her ex-partner. However, the increasing number of short, asset-poor, income-rich marriages led to a re-consideration of the issue of spousal maintenance.
3. The need to consider superannuation and pensions separately from other marital property.

The argument-based representation facilitated the localization of changes and made maintenance feasible. The use of the argument-based representation of knowledge enabled machine learning techniques to be applied to model a field of law widely regarded as discretionary. The legal realist jurisprudence provided a justification for the separation of explanation from inference.

With the provision of domain expertise and financial support from VLA, we developed a web-based version of Split-Up using the web-based shell ArgShell and the knowledge management tool JustReason. As a web-based system Split-Up informed divorcee of their rights and supported them to commence negotiations pertaining to their divorce.

The shell and the knowledge management tool were further developed by the JUSTSYS company[18]. The company was formed by Andrew Stranieri in 2002. It was based at the Global Innovations Centre at the University of Ballarat (Zeleznikow 2003). Systems were built in

1. Refugee Law—Embrace;
2. Eligibility for Legal Aid—GetAid;
3. Copyright entitlements—RightCopy;
4. Plea bargaining—Sentencing Information System; and
5. Eye Witness Identification—ADVOKATE.

The Split-Up system was the focus of much publicity. Late in the evening of Wednesday 3 July 1996, I received a telephone call from the London Daily Telegraph. The newspaper had received a press release from La Trobe University about our Split-Up system. It wanted to use our software on the then forthcoming divorce of Prince Charles and Lady Dianna. I was initially reluctant to meet their request because:

[17] There are six types of domestic abuse: physical abuse, sexual abuse, psychological abuse, social abuse, economic abuse and spiritual abuse. See http://www.aic.gov.au/publications/current%20series/rip/1-10/07.html last accessed 19/1/2016; See also the definition of family violence in section 5 of the Family Violence Protection Act 2008 (Vic).

[18] See https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=36277668 accessed 2/7/2019.

1. Split-Up operated in the domain of Australian Family Law, and Charles and Diana were not Australian residents;
2. The goal of Split-Up was to provide advice about commonplace cases. The marriage of Charles and Dianna was anything but commonplace; and
3. No-one had any idea of the common pool of marital assets held by Charles and Dianna.

I informed the Daily Telegraph I could not use the Split-Up system to provide an accurate solution. The Daily Telegraph journalists told me that they were not concerned about the validity of the result – all they wanted was an interesting article.

After thinking about the issue, I decided that the project would receive much valuable publicity by providing the Daily Telegraph with a solution. The journalists gave me an estimate of the common pool property and the contributions and needs of the couple. The system ended up classifying Lady Dianna as a single mother who had lost her job. It thus suggested awarding her 70% of the common pool. The heading of one article was "*SOFTWARE TAKES A HARD LINE ON THE PRINCE*". A second article had as its heading "*Computer to help divorce couple's assets*". Of course, in 1996, the idea of using machine learning and artificial intelligence to make legal decisions was very futuristic!

The Daily Telegraph article led to much media coverage, primarily in Australia, but also globally.[19] On Monday 26 August 1996, we had a ten minute simulation on the GTV9 network news show *A Current Affair*. The take away message from the session was that negotiation rather than litigation should be the logical first step in trying to resolve family disputes.

HOW INFORMATION TECHNOLOGY CAN ASSIST DISPUTE RESOLUTION

Marc Galanter, in his work on the Vanishing American trial, indicated that whilst litigation in USA might be increasing, the number of cases decided after fully contested trials is rapidly decreasing (Galanter 2004). Alternative Dispute Resolution has become the appropriate form of dispute resolution.

Fisher and Ury (1981) introduced the concept of Principled Negotiation—principled negotiation promotes deciding issues on their merits rather than through a haggling process focussed on what each side says it will and will not do. Central to the idea of principled negotiation is that of a BATNA (Best Alternative to a Negotiated Agreement). The reason you negotiate with someone is to produce better results than would otherwise occur. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you run the risk of entering into an agreement that you would be better off rejecting; or rejecting an agreement you would be better off entering into.

We soon realised that Split-Up provided useful advice about BATNAs in Australian Family Law Property distribution. But given a BATNA, how can Information Technology provide useful support to disputants?

Our focus upon BATNAs, negotiation and evaluation led us to apply for and receive four Australian Research Council Linkage Grants.

1. An Australian Postdoctoral Award (Industry) to Andrew Stranieri to build intelligent web based legal decision support systems. In conjunction with Software Engineering Australia, we built a number of web-based systems, including a generic shell Webshell. A spin-off company JUSTSYS was formed.
2. An Australian Postgraduate Award (Industry) to Jean Hall to work on the Evaluation of Legal Decision Support Systems.
3. An International Research Exchange Award with Uri Schild at Bar Ilan University in Israel to work on computational models of discretion (Kannai et al. 2007).
4. An Australian Postgraduate Award (Industry) with Victoria Legal Aid to Andrew Vincent to work Plea Bargaining Decision Support (Hall et al. 2005).

Walton and Mckersie (1965) propose that negotiation processes can be classified as distributive or integrative. In distributive approaches, the problems are seen as *zero sum* and resources are imagined as fixed: *divide*

[19] In particular on the BBC and Canadian newspapers.

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the pie. In integrative approaches, problems are seen as having more potential solutions than are immediately obvious and the goal is to *expand the pie* before dividing it. Traditional negotiation decision support has focused upon providing users with decision support on how they might best obtain their goals. Such advice is often based on Nash's principles of optimal negotiation or bargaining (Nash 1953). Game theory, as opposed to behavioural and descriptive studies, provides formal and normative approaches to model bargaining. One of the distinctive key features of game theory is the consideration of zero-sum and non-zero-sum games. These concepts were adopted to distinguish between distributive and integrative processes. Game theory has been used as the basis for the Adjusted Winner algorithm (Brams and Taylor 1996) and the negotiation support systems: Smartsettle (Thiessen and McMahon 2000).

We decided to adapt the Adjusted Winner algorithm to negotiation in Australian Family Law. Family Winner (Bellucci and Zeleznikow 2006) takes a common pool of items and distributes them between two parties based on the value of associated ratings. Each item is listed with two ratings (a rating is posted by each party), which signify the item's importance to the party. The algorithm to determine which items are allocated to whom works on the premise that each parties' ratings sum to 100; thereby forcing parties to set priorities. The basic premise of the system is that it allocates items based on whoever values them more.

Originally, the system was developed to meet clients' interests, with no concern for legal obligations. In Zeleznikow (2014), we incorporated principles of justice into the new Asset-Divider system. The ideas behind the Family Winner system have also been used to build systems providing advice upon plea bargaining (Hall et al. 2005) and the Israel-Palestinian dispute (Zeleznikow 2014).

In 2005, there was further media interest in our work on artificial intelligence and Law. In February we had an article in the MIT Technology Review on *logging on to your lawyer.*[20] In March, the Information Technology supplement of The Economist had a focus upon our research with title *AI and the Law.*[21]

In September 2005, the Boston Globe contacted me re the choice of a new US Supreme Court Chief Justice. Chief Justice William Rehnquist had recently died and President George Walker Bush needed to choose a replacement. Ever since the choice of Chief Justice Earl Warren by President Dwight Eisenhower in 1953, presidents had been worried about the predictability of Supreme Court Justices. The Boston Globe postulated if only a computer system could predict how a Justice would act. On 11 September 2005, the Boston Globe published an article about our work: *Do we have the technology to do a better legal system.*[22]

There was much ensuing publicity including the Sydney Morning Herald[23] (shorter version in the Age) *Divorce? Let the computer be the judge*. BBC Radio 5, the BBC World Service and the Times of London which discussed our work on using game theory for negotiation support.[24]

On Wednesday November 16 our software was displayed on the Australian Broadcasting Commission's science show The New Inventors.[25] We won our heat and received invaluable publicity. This included *March of the robolawyers* (9 March 2006), from The Economist print edition (p. 9-10)[26] and *Desktop Divorce* by Ben Tinker on the CNN Money Program (12 October 2007).[27]

As a result of such publicity Relationships Australia Queensland and Victoria Body Corporate Services contacted me wishing to conduct collaborative research. The end result was two Australian Research Council Linkage Grants—a postdoctoral fellowship for Brooke Abrahams (Abrahams et al. 2012) and a PhD fellowship for Peter Condliffe (Condliffe and Zeleznikow 2014).

[20] http://www.technologyreview.com/articles/05/02/issue/forward_lawyer.asp, last viewed 10/7/2019.

[21] https://www.economist.com/technology-quarterly/2005/03/12/ai-am-the-law last viewed 10/7/2019.

[22] http://www.boston.com/news/globe/ideas/articles/2005/09/11/robo_justice/ last accessed 10/7/2019.

[23] https://www.smh.com.au/national/divorce-let-the-computer-be-the-judge-20050921-gdm3t8.html, last accessed 10/7/2019.

[24] http://www.timesonline.co.uk/article/0,,8163-1806165,00.html, accessed 10/7/2019.

[25] See http://www.youtube.com/watch?v=YOZczuvrou4, accessed 10/7/2019 for an edited version,

[26] http://economist.com/displaystory.cfm?story_id=E1_VVSTQRG, accessed 10/7/2019,

[27] http://money.cnn.com/video/news/2007/10/12/tinker.desktop.divorce.cnnmoney/, accessed 10/7/2019.

FROM LEGAL POSITIVISM AND RULE-BASED REASONING TO LEGAL REALISM AND ONLINE DISPUTE RESOLUTION

The granting of two SPIRT Grants (now called Linkage Grants) by the Australian Research Council extended our collaboration with Victoria Legal Aid (VLA). At that time a major issue for VLA was to determine when potential clients should receive legal aid assistance. At that time the task chewed up 60% of VLA's operating budget, yet provided no services to its clients. After passing a financial test, applicants for legal aid needed to pass a merit test. An ensuing system, GetAid was developed in conjunction with web-based lodgement of applications for legal aid (Hall et al. 2002). It was expected that commencing the middle of 2003, VLA clients would use the GetAid system. This never occurred. The system was used in house for five years before being discarded.

The work with VLA had us thinking of how to help self-represented litigants and what were appropriate techniques for building web-based legal decision support systems. At the opening session of the Third International Symposium on Judicial Support Systems held at Chicago Kent College of Law, in May 2001, the theme was *What can judicial decision support systems do to improve access to justice*? I presented an article at the symposium with the title *Legal Aid and Unrepresented Litigants: Building Legal Decision Support Systems for Victoria Legal Aid*. In Zeleznikow (2002) I discussed the demands that the rise of *pro se* litigation poses for the judicial system and how community legal services can help meet these challenges through the development of web-based decision support systems. This commenced our interest in Online Dispute Resolution (ODR). In particular we wished to develop a process for developing Intelligent ODR systems.

In Lodder and Zeleznikow (2005) we advocated a three-step process in the development of ODR systems. Their proposed three-step conforms to the following sequencing.

1. First, the negotiation support tool should provide feedback on the likely outcome(s) of the dispute if the negotiation were to fail—i.e., the BATNA.[28]
2. The tool should attempt to resolve any existing conflicts using argumentation or dialogue techniques.[29]
3. For those issues not resolved in step two, the tool should employ decision analysis techniques and compensation/trade-off strategies in order to facilitate resolution of the dispute.[30]

Finally, if the result from step three is not acceptable to the parties, the tool should allow the parties to return to step two and repeat the process recursively until either the dispute is resolved, or a stalemate occurs. A stalemate occurs when no progress is made when moving from step two to step three or vice versa. Even if a stalemate occurs, suitable forms of ADR (such as blind bidding or arbitration) can be used on a smaller set of issues.

By narrowing the issues, time and money can be saved. Further, the disputants may feel it is no longer worth the pain of trying to achieve their initially desired goals.

A truly helpful ODR system should provide the following facilities:

1. *Case management*: the system should allow users to enter information, ask them for appropriate data and provide for templates to initiate the dispute;
2. *Triaging*: the system should make decisions on how important it is to act in a timely manner and where to send the dispute;
3. *Advisory tools*: the system should provide tools for reality testing: these could include, books, articles, reports of cases, copies of legislation and videos; there would also be calculators (such as to advise upon child support) and BATNA advisory; systems (to inform disputants of the likely outcome if the dispute were to be decided by decision-maker, e.g. judge, arbitrator or ombudsman);

[28] As we did with the Split-Up system.

[29] As in Lodder (1999).

[30] As we did with the Family Winner System.

[31] See https://weightagnostic.github.io/papers/turing1948.pdf, last accessed 12/7/2019.

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4. *Communication tools*—for negotiation, mediation, conciliation or facilitation. This could involve shuttle mediation if required;
5. *Decision Support Tools*—if the disputants cannot resolve their conflict, software using game theory or artificial intelligence can be used to facilitate trade-offs;
6. *Drafting software*: if and once a negotiation is reached, software can be used to draft suitable agreements.

Of course, no single dispute is likely to require all six processes. However, the development of such a hybrid ODR system would be very significant, but costly. Such a platform would be an excellent starting point for expanding into a world where artificial intelligence is gainfully used.

Having spent twenty-five years (1990-2015) developing intelligent legal decision support systems, I came to the realisation that the major problem in the domain was not building such systems but designing and regulating their use. Artificial intelligence software arose from the pioneering work of Turing[31] and Nash (1951) in the 1950s. Even Machine Learning has a thirty-year-old history (Quinlan 1986). The reason that artificial intelligence and Machine Learning are finally being used in the legal professional is because that recent developments in computer hardware enable such systems to be much faster and easier to use.

With the general availability of such systems we need to become cognisant of more user centric issues:

1. *Ethics*—what should be the remit of such systems, who should use them, to what extent should they be relied upon (Ebner and Zeleznikow 2015);
2. *Fairness*—how can we ensure the negotiation advice offered is based on issues of justice rather than merely the interests of the disputants (Zeleznikow and Bellucci 2012);
3. *Governance*—currently ODR can be seen as the "wild west"—anyone can develop any system without regulation. In Ebner and Zeleznikow (2016) we propose four models of how to govern Online Dispute Resolution: No Governance, Self-Governance, Internal Governance and External Governance
4. *Security*—in Abedi and Zeleznikow (2019) we identify three elements of information security, privacy and authentication as standards for an appropriate ODR legal framework;
5. *Trust*—in Abedi et al. (2019) we identify three elements as standards to measure trust in ODR systems: knowledge, expectations of fairness, and the existence of a code of ethics.

Having commenced research in artificial intelligence and Law, thirty years ago, my emphasis was upon using rule-based and case-based reasoning to develop legal decision support systems based upon a legal positivist approach.

Over time I realised that there are often "undetermined reasons" why legal decisions are made and that blindly adhering to legal positivism has its negatives. I gradually became aware that law was more than a mere robotic application of rules. Law is used as a social device to reflect society's changing attitudes. No more is this so than the case of family law. Until recently children were seen as the property of their parents—especially their mothers. But fortunately, society has gradually transitioned to the notion that parents have obligations to children and that family law decision making should reflect the paramount interests of the children. But if judges are encouraged to exercise discretion in their decision-making, how can we model this exercise of discretion.

I then realised that machine learning could be used to try and understand the reasons why legal decisions are made. This more closely aligns to notions of legal realism. I also became aware that the major impediment to the use of technology in law was not the lack of adequate software. Rather it has been the failure of the community to address user centric issues.

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A Brief History of the Changing Roles of Case Prediction in AI and Law

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ABSTRACT

Predicting case outcomes has long played a role in research on Artificial Intelligence and Law. Actually, it has played several roles, from identifying borderline cases worthy of legal academic commentary, to providing some evidence of the reasonableness of computational models of case-based legal reasoning, to providing the raison d'être of such models, to accounting for statistically telling features beyond such models, to circumventing features altogether in favor of predicting outcomes directly from analyzing case texts. The use cases to which case prediction has been put have also evolved. This article briefly surveys this historical evolution of roles and uses from a mere research possibility to a fundamental tool in AI and Law's kit bag of techniques.

Keywords – artificial intelligence and law, prediction, machine-learning, case-based reasoning

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Summary

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INTRODUCTION

Predicting case outcomes has long played a role in Artificial Intelligence and Law (AI and Law), a branch of computer science which involves research and development of computer systems that can intelligently solve problems in the legal domain or assist humans in solving them. Machine learning (ML) has been frequently applied to predict case outcomes. ML refers to computer programs that use statistical means to induce or "learn" models from data with which to classify a document or predict an outcome for a new case. Other techniques have also been applied, however, notably computational models of case-based legal argument.

Through much of the history of AI and Law, the dominant approach to computationally modeling legal reasoning for prediction and other tasks has been top down. Researchers have employed legal expertise to decompose legal statutes and case decisions into rules or other components that could be applied to analyze problems and, where appropriate, to predict outcomes. Legal expert systems, for example, are a top down approach: "computer applications that contain representations of knowledge and expertise which they can apply—much as human beings do—in solving problems, offering advice, and undertaking a variety of other tasks," (Susskind 2010, p. 120 f.). The legal knowledge is assembled at the beginning, that is, top down, in manually creating the system's rules for solving problems. Expert systems apply the rules to analyze problems and make predictions, and they can explain the predictions in terms of the rules they applied, a kind of logical proof that attorneys will recognize and understand. It is, however, labor intensive and expensive to create, modify, or update the rules as the law changes, a phenomenon known as the knowledge acquisition bottleneck, which has limited the development of legal expert systems.

It has long been hoped that a bottom-up approach could sidestep the knowledge acquisition bottleneck. In theory, machine learning could extract legal knowledge by automatically inducing rules or generating statistical models from data such as decided cases. The learned rules or models could then be applied to predict outcomes of new problems. As discussed below, this is already happening to some extent. The learned models and features, however, may not correspond to legal knowledge human experts would recognize. As a result, the programs often cannot explain their predictions in terms that attorneys would credit.

In this article, we provide a short history of AI and Law research on predicting case outcomes. We then focus on recent developments in legal text analytics, which employs natural language processing (NLP), machine learning and other computational techniques automatically to extract meanings (or semantics) from archives of legal case decisions, contracts, or statutes. These developments present new opportunities for predicting case outcomes and for circumventing traditional approaches to modeling legal expertise although often at the expense of an inability to explain predictions.

MODELING LEGAL EXPERTISE

Throughout most of the history of AI and Law, building computational models that reason with legal rules, argue with legal cases and precedents, predict legal outcomes, and explain those predictions required addressing the following core questions: what legal domain to model and for what use case, how to represent the requisite legal knowledge, which inference methods to implement, how to acquire the legal knowledge, and whether the program will learn.

The first questions involve determining which areas of the law and problems of interest are to be modeled and what is the use case to which the model will be applied. Due to the difficulties of representing legal knowledge, models generally cover relatively narrow domains such as trade secret law or landlord tenant law. Since every model is a simplification, it is important to settle on a use case, that is, an application to which the model will be put, for which the model is sufficiently detailed and accurate. Use cases that involve classifying the relevance of documents for information retrieval and ranking, such as case decisions, contract or statutory provisions, keep human users in the loop and may impose less restrictive requirements than those that purport to replace human decision makers.

A second key question is how to represent the knowledge in the legal domain. Knowledge representation techniques may take many forms: formal representations of legal rules, representations of generalized case facts such as factors, stereotypical fact patterns that strengthen or weaken a side's claim, or representations of legal document texts as term vectors. A term vector represents a document in terms of its words, citations, indexing concepts, or other features; it is an arrow from the origin to the point representing the document in a large dimensional space with one dimension corresponding to each feature in the corpus. All such representations are simplifications; choices must be made as to which simplifying assumptions to make, for instance, discretizing concepts and values or adopting a closed-world assumption that what is not known to be true is false.

Since the computational model is usually meant to perform legal reasoning, there are questions about what inference methods to implement and whether to employ generic methods, such as logical inference with rules or statistical inference based on frequencies, or more specialized techniques, for example, drawing analogies to cases. These questions include not only how to perform the inferences but also how computationally expensive the methods. One must also consider how to explain the inferences. For instance, statistical inferences may make accurate predictions but not be able to explain those predictions in terms that legal professionals would recognize. Evaluation is a further consideration; it includes how to evaluate both the predictions and the explanations.

Finally, one must determine how to acquire information with which to populate the knowledge representations for the domain and use case. What technical and domain expertise is needed to create and fill domain representations? As noted, for expert systems this required enlisting humans with legal expertise to compile rules with which the system can analyze problem scenarios. For models of case-based legal reasoning, it has required humans to read the cases and index them by concepts such as factors.

The extent to which this knowledge acquisition can be automated has long been a tantalizing question. This is where machine learning comes into play. Models can learn from legal data. We will mostly consider supervised machine learning, which involves a training step and a prediction step. In the training step, the ML algorithm takes training instances as inputs. In legal text analytics, these will likely be chunks of text such as sentences from legal cases, represented as a vector of features and a target label (e.g., a binary decision whether a classification applies.) Feature vectors are like term vectors but use additional features beside terms and term frequencies; the value for each feature is the magnitude along some dimension of the feature in a text. The model statistically "learns" the correspondence between certain language features in the sentence feature vectors and the target label. In the prediction step, given the texts of new chunks from the test set, also represented as feature vectors, the model predicts the classification to assign to the sentence, if any. The model can be evaluated objectively by comparing the learned classifications to manually assigned ones for some gold standard test set.

Today, models can learn predictive rules from classified cases, boundaries between positive and negative instances of legal concepts, weights representing the predictive power of features, and likelihoods that a text chunk answers a legal question, expresses a factor, or is a particular type of contractual provision.

As discussed below, with neural networks, machine learning tackles even the knowledge representation step, automatically identifying the kinds of features that matter. Neural networks comprise input and output nodes connected to multiple layers of intermediary nodes via weighted edges. Propagating an input to an output involves a linear combination of the weights. The goal of the network is to learn weights that minimize the deviation of the computed output with the target output. Different architectures of networks, layers and depths are suitable for different tasks. Neural networks with multiple layers can perform feature learning via their hidden layers.

In short, machine learning is turning the top-down process of modeling legal knowledge on its head, enabling bottom-up approaches to acquire the knowledge to predict outcomes, if not to offer legally intelligible explanations of those predictions. Recently, computational models are learning to select sentences with which to effectively summarize legal cases. Some researchers today

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are suggesting that, given enough data, machine learning based summarization techniques can learn to generate effective summaries without the need to represent and acquire legal knowledge at all. Others ask whether there can ever be sufficient data in the legal domain for this to be realistic.

In the next section, we briefly review the history of prediction in AI and Law and the events that have led to this current juncture in the field's history.

BRIEF HISTORY OF PREDICTION IN AI AND LAW

In the last 45 years, AI and Law approaches to predicting case outcomes have evolved in a number of directions. It all began with predicting case outcomes using a nearest neighbor algorithm or inducing rules via decision trees from substantive features of legal cases and outcomes. Gradually, more complex models of arguing from legal cases were applied to the prediction task, models that considered increasingly more legal knowledge of substantive factual strengths and weaknesses, rule-based issues, and underlying legal values, and which could explain their predictions in terms of these arguments.

Most recently, as discussed below, the predictive features have involved less information about substantive features and more about generic issues, historical trends and the identities of litigation participants, that is, courts, judges, parties, and their representatives. Machine learning text analytic programs using neural networks are predicting outcomes from case texts and automatically identifying predictive features without recourse to traditional legal knowledge representation. Researchers are attempting to tease out from these neural networks the constituents of legal explanations. For example, Hierarchical Attention Networks yield attention weights focusing on the most predictive parts of texts with which, it is hoped, meaningful explanations can be fashioned.

While one tends to think of use cases for predicting outcomes that guide settlement decisions or strategic decision making in litigation, sentence predictiveness can play other roles. For example, as discussed below, recent efforts have employed the predictiveness of sentences, that is, their correlation with case outcomes, to help generate extractive case summaries.

3.1 NEAREST NEIGHBOR

As early as the 1970's, researchers MacKaay and Robillard (1974) created a program to predict outcomes of Canadian tax cases in which courts determined whether real estate transactions generate ordinary income or capital gains and more favorable tax rates. They represented each of 60 Canadian tax cases in terms of 46 binary fact descriptors identified by previous courts as relevant. These included characteristics of the private party that sold the real estate, circumstances surrounding the purchase and sale of the property, use of the property during ownership by the private party, the private party's intention and whether the tax appeal board had upheld the taxpayer's claim. (MacKaay and Robillard 1974, p. 327-331).

The researchers applied a k-nearest neighbor (or k-NN) algorithm, which calculates "a measure of similarity or dissimilarity between the fact patterns of cases and [predicts] the decision in a new case to be the same as that of its [k] closest neighbor[s] in terms of the ... dissimilarity measure." (MacKaay and Robillard 1974, p. 307). The metric, Hamming distance, simply sums the number of variables, that is, descriptors, for which the two cases have different values.

The authors also generated two-dimensional displays such as Figure 1 using multidimensional scaling methods based on the same distance metric (MacKaay and Robillard

FIGURE 1. *Two dimensional representation of sixty capital gains tax cases*

1974, p. 317). One observes a fairly clear boundary between the cases decided pro and con the taxpayer. The authors examined commentaries in the *Canadian Tax Journal* for the period covered by the sample cases and discovered "that decisions which appeared new or extreme at the time of deciding in the view of an expert, turn out to lie on the frontier in the diagram." (MacKaay and Robillard 1974, p. 322).

Even in this early work, a central "question was raised as to what the 'prediction methods' try to achieve: minimization of prediction errors or elucidation of human understanding." (MacKaay and Robillard 1974, p. 322). This dichotomy has dogged legal prediction ever since, and it relates to another question that is especially relevant today: how descriptors are found. The authors discussed the alternatives: one can simply list all of the low-level factual circumstances that the cases have mentioned or one can seek to identify more general concepts that cover the instances and suggest how to recognize similar features in future cases. (MacKaay and Robillard 1974, p. 322). The authors call the latter alternative "the human process" of feature identification.

At a time when machine learning programs can predict outcomes from the raw text of cases and hierarchical neural networks can identify predictive features automatically, it is still a question if and how to "follow the human process", one that draws upon legal knowledge of a regulatory domain and the underlying values it protects to identify "general concepts" that can both guide recognition of relevant similarities but also explain the resulting predictions in terms that attorneys would recognize.

TABLE 1. *Should defendant be released on bail?*

Case	Injury	Drugs	Weapon	Prior record	Result
1	none	no	no	yes	yes
2	bad	yes	yes	serious	no
3	none	no	yes	no	yes
4	bad	yes	no	yes	no
5	slight	yes	yes	yes	no
6	none	yes	yes	serious	no
7	none	no	yes	yes	no

3.2. RULE INDUCTION AND DECISION TREES

Since Carole Hafner and Don Berman first presented them in the late 80s and early 90s, introductory tutorials on AI and Law have focused on an example of automatically inducing predictive rules, contrasting it with the human knowledge engineering process of creating rule-based expert systems. The latter involves collecting examples of legal decision-making, manually developing a rule to explain them in terms of legal concepts, and testing and refining the rule on more examples.

Compare that to the induction approach: collect a large set of examples and let the computer create rules using an induction algorithm like ID3 as illustrated in Table 1 and Figure 2. The first shows a small data set of seven cases involving the question of whether a defendant should be released on bail.

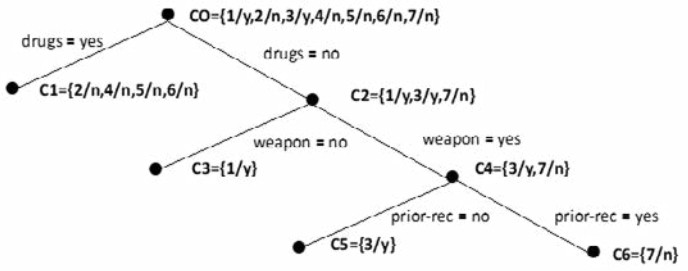

FIGURE 2. *Decision tree for bail decisions*

A decision tree algorithm learns a tree-like set of questions for determining if a previously unseen instance is a positive or negative example of a classification. Each question is a test: for example, if a particular feature has a value of "yes" branch one way or if "no" branch the other way. The test may also be if the weight of a particular feature is less than some threshold; if it is, branch one way, otherwise branch the other way.

An induction algorithm like ID3 generates decision trees like the one in Figure 2. It chooses one attribute to "split" the data. When each of the Ci nodes at the leaves all have instances with same result, the algorithm stops.

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An expert system shell may then create rules based on the decision tree. Each rule records a path from the root node to a leaf, for instance, IF drugs = yes THEN bail = no, IF drugs = no AND weapon = no THEN bail = yes.

The advantage of the inductive approach is that it is automatic. Based on information theoretic criteria, ID3 minimizes the number of questions to ask. As an automatic process, it sidesteps knowledge engineering effort and avoids the need for human interpretation of results in fashioning rules. On the other hand, contradictory data, or the need to invent new conceptual terms in order to split the data cleanly, present challenges for an induction algorithm. Without more, decision trees also tend to overfit the data, that is, they learn rules from training data that do not generalize to previously unseen data. Moreover, beyond the induced rules, the approach does not generate legally cognizable reasons for a prediction.

Decision trees and related methods for learning treatment rules for judicial bail decisions (See, e.g., Figure 3, which employs Markov decision processes and a tree-pruning strategy (Lakkaraju and Rudin 2016)) are now addressing new problems. Algorithmic decision-making

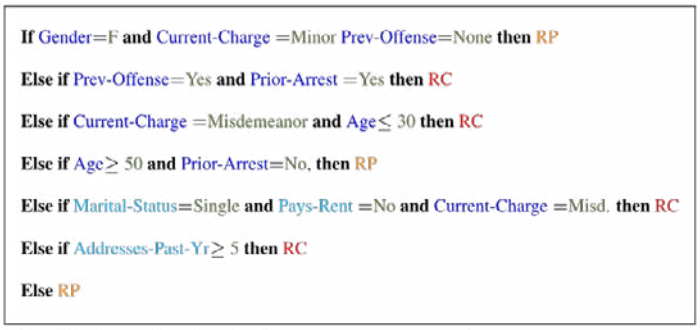

FIGURE 3. *Learning Cost-Effective, Interpretable Treatment Regimes for Judicial Bail Decisions using Markov Decision Processes (Lakkaraju and Rudin 2016)*

is correcting for the fact that the data only includes outcomes for released defendants, not for defendants that judges detained (Kleinberg et al. 2017). The new machine learning models consider predictions of counterfactuals, costs of gathering information, and costs of treatments. The models also need to address issues of fairness and bias (Hutchinson and Mitchell 2018) and be interpretable by a human decision maker.

3.3. PREDICTIONS VIA CASE-BASED ARGUMENT MODELS

Legal decision makers do more with case precedents than induce rules or compare features with neighboring cases; they cite them as authoritative examples, make arguments analogizing them to and distinguishing them from the case to be decided, and cite or distinguish counterexamples. A line of researchers in AI and Law has developed computational models of case-based legal argument and applied them to the task of predicting case outcomes in terms of the strengths of the competing arguments.

A prime example is the Value Judgment-based Argumentative Prediction (VJAP) program (Grabmair 2016). The author assumed that a judge makes a legal decision because the effect of the decision on applicable values is preferable over the effects of alternative decisions. That is, the judge makes a value judgement in determining that a decision's positive effects outweigh the negative effects.

Significantly, these value orderings are not preferences in the abstract; there is no single abstract hierarchy of values. Instead, judges assess the effects on values relative to the specific facts of the case to be decided. VJAP performs this kind of legal reasoning, applying value judgments across cases, mapping them from one factual scenario to another, constructing arguments that a target set of facts relates to the source factual context in a manner that justifies a particular conclusion in light of the applicable values.

In trade secret law, the domain of VJAP, parties can protect confidential product-related information from disclosure and use by competitors. The program employs a logical model of trade secret law, a set of rules derived from legal sources such as the Uniform Trade Secrets Act and the Restatement of Torts Section 757 which many courts have adopted.

This model provides a logical structure of trade secrets law as a set of rules (in the upper half of Figure 4), and for each leaf issue, such as "maintain secrecy" or "confidential relationship", a list of 26 factors that relate to that issue and whose presence strengthens or weakens the argument

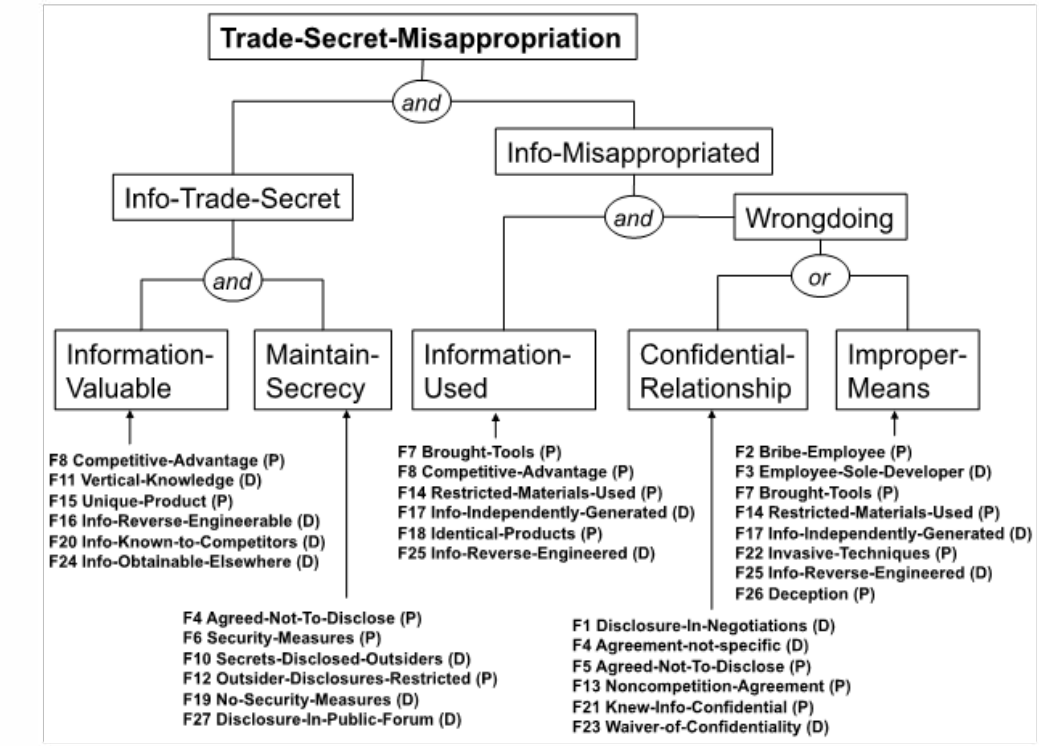

FIGURE 4. *VJAP Domain Model*

on that issue of a side (plaintiff "P" or defendant "D"). For example, Table 2 describes three pro-plaintiff and one pro-defendant factor and the related issues. These issue-related factors, in turn, index cases in a database of 121 trade secret misappropriation cases, of which plaintiffs won 74 and defendants won 47.

Grabmair identified four value interests protected by trade secret law. It protects plaintiffs' property interests in competitively valuable information and in maintaining confidentiality. On the other hand, it also protects the general public's interests in the usability of publicly available information and in fair competition. This list of

TABLE 2. *Sample Trade Secret Misappropriation Factors*

Factor no.: Name	Side favoring	Meaning	Issue	Significance
F6: Security-Measures	pro-plaintiff	Pltf. adopted security measures.	Maintain secrecy	It helps to show that Pltf. took reasonable steps to protect his property.
F15: Unique-Product	pro-plaintiff	Pltf. was the only manufacturer making the product.	Information valuable	It helps to show that Pltf.'s trade secret is valuable property.
F16: Info-Reverse-Engineerable	pro-defendant	Pltf.'s product information could be learned by reverse-engineering.	Information valuable	It helps to show that Pltf.'s property interest is limited in time.
F21: Knew-Info-Confidential	pro-plaintiff	Def. knew that Pltf.'s information was confidential.	Confidential relationship	It helps to show that Def. knew Pltf. claimed a property interest.

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protected interests is an interpretation of trade secret law, but one based in scholarly treatments.

In a key contribution, Grabmair also identified four ways in which various factors affect a value making it more protected, indicating that it has been waived, making it less legitimate, or interfering with it. For example, consider the value associated with plaintiff's interest in confidentiality. Plaintiff's confidentiality interest is more protected given the confidentiality of outside disclosures (Factor F12), the known confidentiality of the information (F21), the security measures plaintiff took (F6), and the noncompetition (F13) or nondisclosure agreements (F4) the plaintiff entered. The confidentiality interest is less legitimate because of the public availability of the information (F24), the nondisclosure agreement's lack of specificity (F5) or the information being known to competitors (F20). Plaintiff's value interest in confidentiality is waived because of a waiver of confidentiality (F23), the absence of security measures (F19), a public disclosure (F27), its disclosure during negotiations (F1) or its disclosure to outsiders (F10). Finally, the interest in confidentiality is interfered with or violated because of the defendant's use of restricted materials (F14) or its payment to an employee of plaintiff to switch employment (F2). Similar relations between factors and value effects are represented for the other three values underlying trade secret protection.

One inputs a new problem to VJAP represented as set of factors. As suggested in Figure 5, the program then generates all possible arguments about who should win the case by applying argument schemes, templates for making arguments by analogizing the current case to, and distinguishing it from, the cases in its database. These arguments by analogy and distinguishing consider the value tradeoffs in the previous cases as well as in the current case, that is, they consider the effects of factors on underlying values in terms of protection, legitimacy, waiver, and interference.

The argument graph of Figure 6 illustrates these arguments, in oval-shaped nodes, related to propositions in rectangular nodes, via diamond-shaped confidence propagation nodes. This argument structure is a variation of the Carneades argument framework (Gordon et al. 2009): the edges connecting the nodes represent consequence and premise relations (Grabmair 2016, p. 48-51). The upper part of the argument graph corresponds to arguments in the domain model while the lower part contains in depth "arguments about leaf issues, tradeoffs, precedents, and analogy/ distinction arguments between precedent and the case at bar.... " (Grabmair 2016, p. 50).

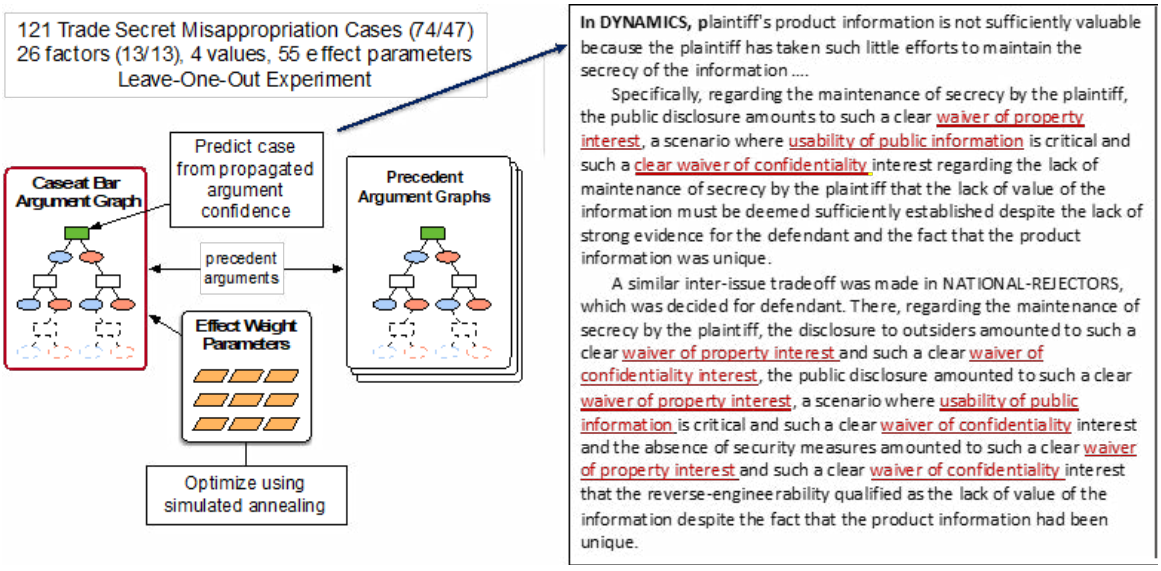

FIGURE 5. *VJAP's process makes predictions and explains them with arguments*

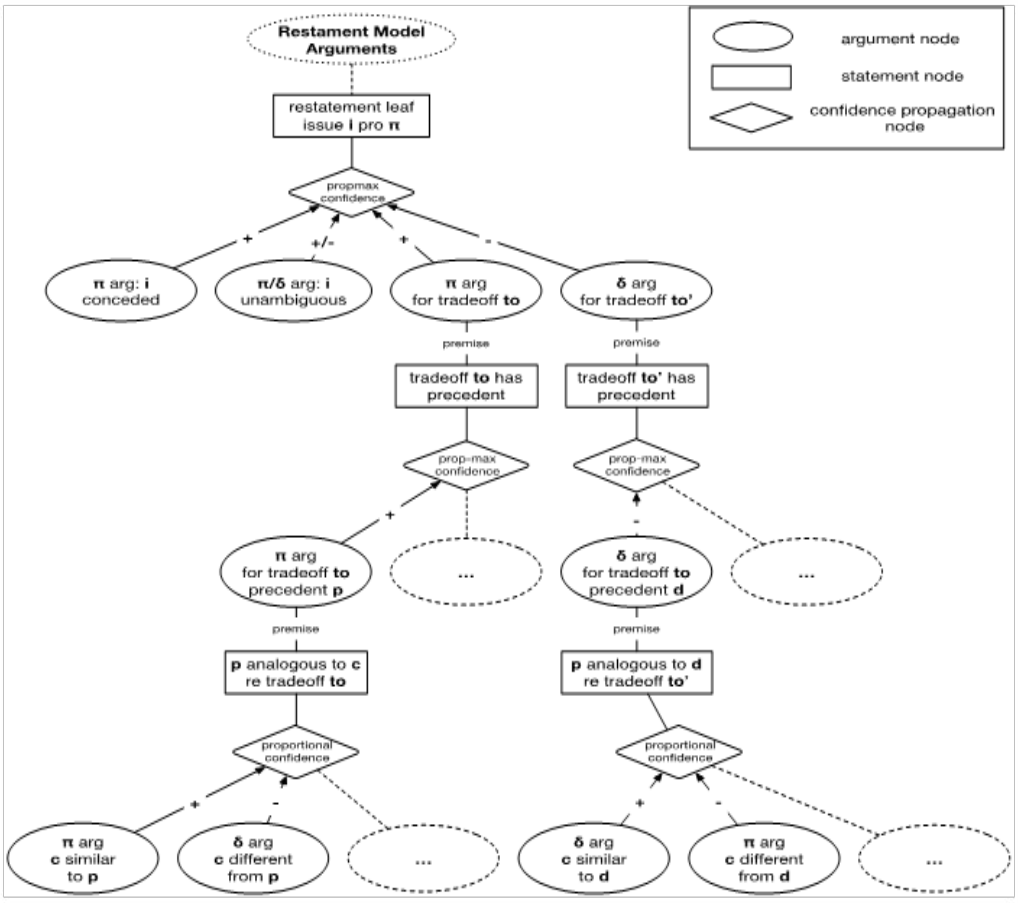

FIGURE 6. *VJAP's process makes predictions and explains them with arguments*

Basically, the program attempts to fit the new case into the existing database, using the arguments as a kind of mapping from one fact situation to another. The program propagates quantitative weights across a graphical model representing its confidence in a prediction based on the magnitude of promotion or demotion of the value in past case contexts. In short, using the quantitative graphical model in Figure 6, it scores the competing arguments and predicts an outcome based on the best fit.

VJAP optimizes the weights iteratively in a process of simulated annealing, adjusting the weights to reflect the degree of confidence that argument premises can be established, which depends on the strength of arguments pro and con the premises. VJAP considers local value tradeoffs involving only one issue as well as inter-issue tradeoffs; the confidence measure is increased in relation to the strength of the analogy between a precedent and the case and decreased to the extent they can be distinguished. (Grabmair 2016, p. 71). The simulated annealing takes place in an argument construction-propagation-prediction loop during which the system iteratively searches for the optimal weight map.

As shown in Figure 5, VJAP then outputs both its predicted outcome and a textual argument justifying the prediction. The underlined phrases indicate where VJAP refers to the relevant values and value effects in analogizing the current case to and distinguishing it from past cases such as the *National Rejectors* case.

The VJAP domain model in Figure 4 and the specification of possible value effects, of course, are examples of explicit, top-down representation of legal knowledge. The question is, however, whether a program can explain

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its predictions without such legal knowledge. One can demonstrate empirically the contribution of the values to predictive accuracy. A virtue of creating a knowledge-based AI system is that one can turn on and off (that is, ablate) the various sources of knowledge in experiments to assess their effects on predictive accuracy. In cross validation experiments, Grabmair evaluated various versions of the VJAP program. Cross validation is a standard procedure for evaluating an ML program. The data is divided into k subsets or "folds." In each of k rounds, a different one of the k subsets is reserved as the test set. The ML model is trained using the k - 1 subsets as the training set. Grabmair computed the versions' predictive accuracy, including a version that employs: only local value tradeoffs (.69), local plus inter-issue value tradeoffs (.79), no arguments based on precedents (.71), and arguments based on precedents that occur chronologically prior to the problem case (.84).

The last is particularly interesting. Basing legal arguments on chronologically preceding cases is a practical constraint of real-world legal argumentation. Mackaay and Robillard (1974, p.323) had raised the issue of "the development over time of the case …, a feature which is not found in work reported by earlier researchers in this area." That was 1974. Grabmair (2016) is the first to have evaluated a computational model of case-based legal reasoning imposing such a chronological constraint.

VJAP is only the latest computational model for predicting case outcomes based on arguments. As far as I know, the first work to employ case-based argument strengths as a basis for predicting outcomes involved the CATO (Aleven 2003) and IBP (Ashley and Brüninghaus 2006) programs.

Aleven argued persuasively that predictive accuracy was one measure of the reasonableness of a computational model of argument.

> *A useful supplementary approach is to look at how well a program predicts the outcome of cases, based on its arguments or judgments of case relevance. Good predictive performance would inspire confidence that the arguments made by the program … have some relation to the reality of legal reasoning. (Aleven 2003, p. 212)*

Brüninghaus developed a prediction technique in the Issue-based Prediction (IBP) program that involved hypothesis testing. Using a model like that shown in Figure 4, one counted the pro and con cases involving issue-related factors for each issue in the case to be decided, posed a hypothesis that the case should be decided with the majority on that issue, and then tested the hypothesis by attempting to explain away the counterexamples, that is, the cases decided for the other side. If it could distinguish all of the counterexamples, it would confirm the prediction for the majority side on that issue, otherwise it would abstain. It then used the logical model like that of Figure 4 to combine the issue-based predictions. In comparative evaluations, IBP's predictive accuracy was greater than that of CATO, k-nearest neighbor, decision trees, and a baseline that always predicted the majority class. (Ashley and Brüninghaus 2006).

Unlike CATO or IBP, the AGATHA program represented values associated with factors but differently from VJAP. In a kind of theory construction, AGATHA induced a set of preference rules from the outcomes of past cases. The rules captured preferences between sets of factors in those cases and between sets of the associated values. The theory could then be applied to determine and explain the outcome of new cases. AGATHA's search algorithm constructed a theory in the form of a tree-like set of argument moves, including citing an analogous case, distinguishing it, and countering it with a contrary case. Since it can construct more than one theory, AGATHA selects the best theory (that is, tree) according to theory evaluation criteria operationalized quantitatively, including simplicity (the number of preference rules), explanatory power (the number of cases predicted correctly), tree depth, and completeness (whether additional theory construction moves could be performed). For each theory, these measures are combined into an evaluation number, "a value with which to compare the theories based on how well they explain the background, [and] their structure …. They can be used to… guide a heuristic search." (Chorley and Bench-Capon 2005, p. 48).

As is apparent, each of these approaches, VJAP, CATO, IBP, and AGATHA, not only predicts case outcomes, but explains those predictions in terms of substantive legal knowledge concerning the merits of a case to be decided and precedents. The explanations are in the form of legal arguments or reports of hypothesis testing or theory construction, explanations that employ explicit legal

knowledge about legal rules, issues, factual strengths and weaknesses of particular cases, or underlying values.

3.4. PREDICTION VIA MACHINE LEARNING

It is interesting to compare with the above prediction approaches, two relatively new legal applications that do not consider information about the merits of a case. Katz et al. (2014) have developed and evaluated the first one, a supervised machine learning program to predict if a US Supreme Court Justice or the whole will affirm or reverse a lower court's judgment (referred to here as the KBB program). It employs an advanced form of decision trees, an extremely randomized forest of decision trees, to evaluate a case, input as a set of feature values, and to predict its outcome, based on all previous decisions for that Justice, the Court, and all previous cases. An extremely randomized forest of decision trees is a technique to transform a set of relatively weaker learners into a collectively strong one. It generates a large number of diverse trees and averages across the entire forest. As a result,

> *In total, over the period from 1816-2015, our model exhibits accuracy of 71.9% at the Justice vote level.... Starting in 1816 and carrying through the conclusion of the October 2014 term, our model correctly predicts 70.2% of the Court's decisions. (Katz et al. 2017, p. 8)*

The cases are represented in terms of 95 features from the Supreme Court Database [S], Segal-Cover Scores [SC], and feature engineering [FE] by the authors. As illustrated in Figure 7, the first two sources, prepared by academics,[1] provide case information and background information about the Justices and the Court.

As close as any of the features comes to representing the substantive merits of a case are the Issue Area [S] and Issue [S]. Issue Area values comprise 14 broad categories of legal issues before the Court such as Criminal Procedure, Civil Rights, or First Amendment. Criminal Procedure, in turn, comprises 60 issues, including involuntary confession, habeas corpus, plea bargaining, retroactivity, search and seizure, and others. Thus, features of a case that capture particular facts, strengths, or weaknesses are not represented.

With respect to background information about the Justices and the Court, the political party of the president who appointed the Justice is represented as a stand-in for the Justice's views, conservative or liberal. The Segal Cover Scores measure the "perceived qualifications and ideology" of a Supreme Court nominee. The trend features are engineered by the authors to record decision directions over time periods such as recent, prior, or cumulative terms with respect to legal issue areas.

The authors reported that, "collectively, individual case features account for approximately 23% of predictive power.... Justice and Court level background information account for just 4.4%." Most of the model's predictive power (72%) is driven by tracking the behavioral trends, including the ideological direction of overall voting and voting of various Justices, general and issue-specific differences

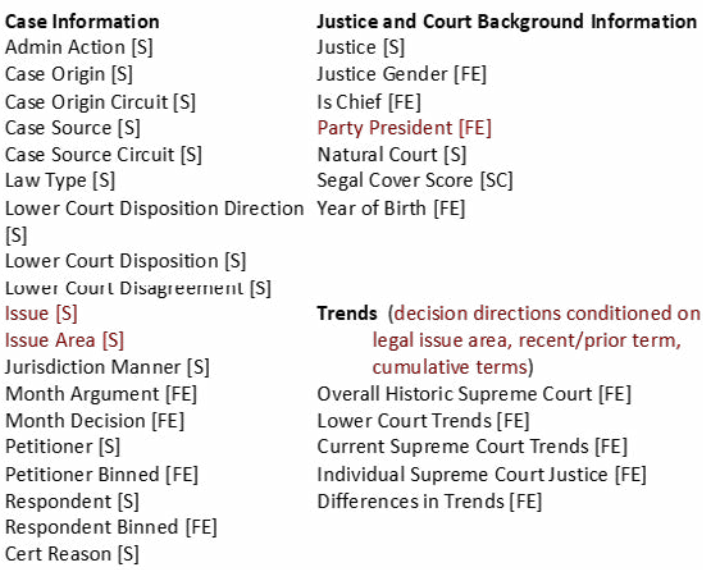

FIGURE 7. *Overview of Case Features in KBB Program*

between individual Justices and the balance of the Court, and ideological differences between the Supreme Court and lower courts (Katz et al. 2014, p. 17-18).

Like the KBB program, Lex Machina, another supervised machine learning approach to prediction, did not consider the substantive merits of cases, but focused on very different case features: the litigation participants and their behavior, namely the lawsuit parties, their attorneys

[1] http://scdb.wustl.edu/ ; https://gist.github.com/jeremyjbowers/f36efe6db30056b1a587

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and law firms, the judges assigned to a case, the districts where the complaints were filed, judicial and district "bias" (computed as the ratio of cases won by the plaintiff from the set of past cases assigned to the corresponding judge or district) and the case outcomes. Developed at Stanford University by law professor Mark Lemley and colleagues in the Computer Science Department, Lex Machina employed logistic regression, a statistical machine learning model, to predict the outcomes of intellectual property claims based on all IP lawsuits in a 10+ year period with an accuracy of 64% (Surdeanu et al. 2011).[2] The most significant contributions to accuracy were the judge's identity,[3] followed by the plaintiff's law firm, the defendant's identify, the district where the claim was filed, the defendant's law firm, and the defendant's attorney.

Remarkably, Lex Machina's participant-and-behavior features can be extracted automatically from the texts of cases. For most features, it required identification of named entities (firms, courts, people) and checking names against directories or lists of names. Extracting the outcomes of cases was more difficult. Three IP experts annotated sentences stating the outcomes for cases in a training set, and a machine learning model was able to learn to extract the outcomes automatically.

The authors emphasized that the model is "agnostic to the merits of the case". Given enough data, participant-and-behavior features alone were a substitute for information about a case's merits. Lacking substantive information about the case, however, Lex Machina was unable to explain its predictions in terms that legal professionals would recognize as legal explanation or argumentation. One wonders if the program could predict better with such substantive information and, given the AI and Law prediction work described thus far, how that could be accomplished. It is a problem of representation: factors and other substantively relevant features work well where the cases are all of a type, but here the IP-related cases presumably ranged across many types of legal claims. Even if only one type of legal claim, an appropriate representation needs to be available; factors are appropriate for trade secret law and some issues in trademark, but have not been applied in other IP-related areas.

3.5. PREDICTION WITH SUBSTANTIVE INFORMATION EXTRACTED FROM CASE TEXTS

Assuming an appropriate representation for the substantive merits of a case is available, can such information be extracted automatically through legal text analytics and used to predict case outcomes? That approach was first tried in the SMILE+IBP project and continues to be a focus of current research in AI and Law. Alternatively, can one dispense with representing substantive legal features altogether and make predictions directly from the text of cases? That approach has been applied in recent work predicting outcomes of cases before the European Court of Human Rights. We will examine both approaches here in turn.

The SMILE+IBP program learned how to identify trade secret misappropriation factors in summaries of case texts. It employed supervised ML. Some examples of the kinds of sentences it learned to classify (from the *Mason* case, a trade secret dispute concerning the recipe for a cocktail, Lynchburg Lemonade) for the factors described in Table 2 include:

> F6: Security-Measures (pro-plaintiff): He testified that he told only a few of his employees--the bartenders--the recipe. He stated that each one was specifically instructed not to tell anyone the recipe. To prevent customers from learning the recipe, the beverage was mixed in the "back" of the restaurant and lounge.
>
> F15: Unique-Product (pro-plaintiff): It appears that one could not order a Lynchburg Lemonade in any establishment other than that of the plaintiff.
>
> F16: Info-Reverse-Engineerable (pro-defendant): At least one witness testified that he could duplicate the recipe after tasting a Lynchburg Lemonade.

[2] LexisNexis acquired Lex Machina in 2015.

[3] It appears that the use of Lex Machina with French judicial data would be illegal in France. The French Parliament has adopted a law prohibiting the use of judicial data for purposes of prediction: "No personally identifiable data concerning judges or court clerks may be subject to any reuse with the purpose or result of evaluating, analyzing or predicting their actual or supposed professional practices." Article 33 of the Justice Reform Act. Violation of this law could result in a prison term of five years. http://www.abajournal.com/news/article/france-bans-and-creates-criminal-penalty-for-judicial-analytics (accessed 23/7/2019).

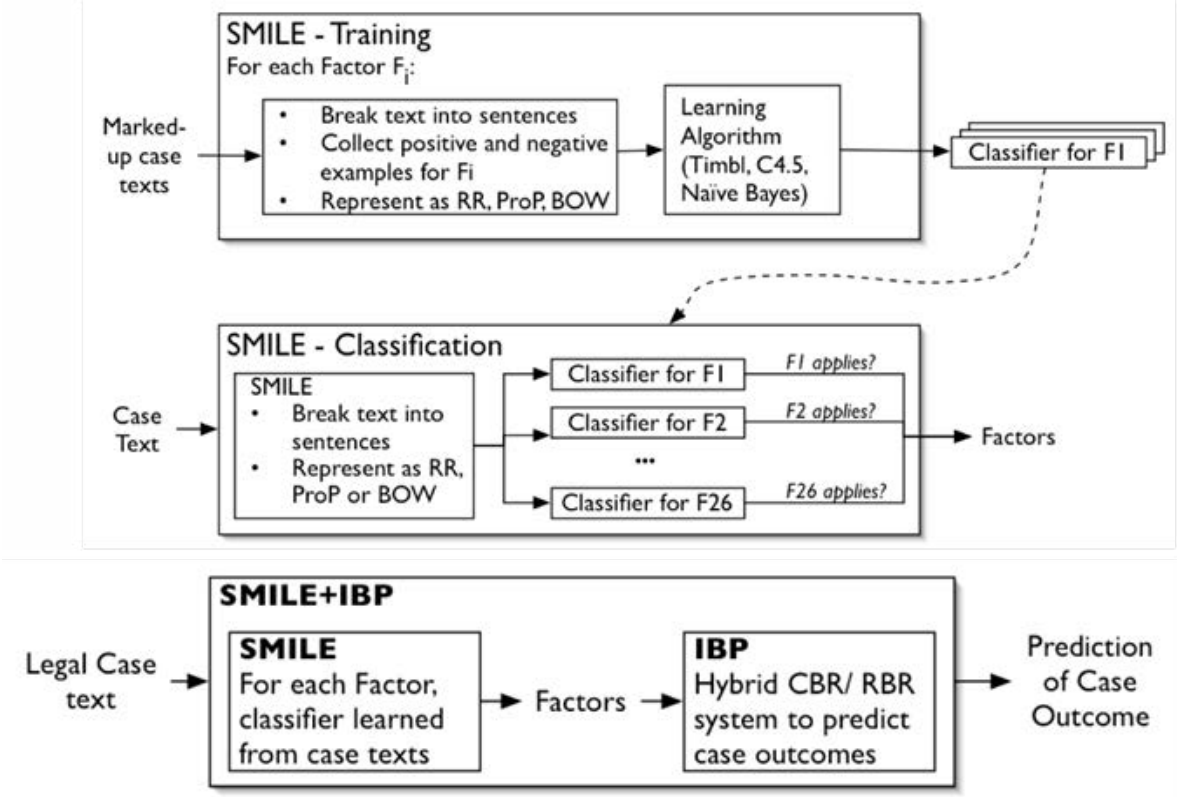

FIGURE 8. *SMILE+IBP learned to identify factors*

F21: Knew-Info-Confidential (pro-plaintiff): On cross-examination Randle agreed that he had been under the impression that Mason's recipe for Lynchburg Lemonade was a secret formula.

As indicated in Figure 8 at the top, in a training step, a classifier was learned for each factor from the texts of positive and negative instances of factor-related sentences from trade secret cases represented in three ways (as bags of words, that is, as term vectors, with roles represented (for example, substituting "plaintiff" or "defendant" for party names), or in terms of propositional patterns capturing subject-verb, verb-object, verb – prepositional phrase, and verb – adjective relationships). In a prediction or classification step, the full text of a new trade secret case was input, broken into sentences represented in the three ways, and all of the factor classifiers were applied. SMILE's output, the resulting list of factors representing the case, were then input to the IBP program, which used the hypothesis-testing approach described above to predict an outcome. In an evaluation, we compared the predictive accuracy and F1 metric of SMILE+IBP, IBP using human-determined case factors as inputs, and a biased-coin-toss baseline (F1 is the arithmetic mean of accuracy and coverage). While scoring lower than IBP's accuracy and F1 measures (.92, .96), SMILE+IBP scored higher (.63, .70) than the baseline (.49, .66) indicating that it was processing some factor-related signal in the case texts (Ashley and Bruninghaus 2009). One must recall that this was long before the rise of legal text analytics. As Samuel Johnson observed of a dog walking on its hind legs, "It is not done well; but you are surprised to find it done at all."

In more recent efforts, Falakmasir and Ashley (2017) assembled 1600 trade secret cases from CourtListener,[4] employed a word-embedding text representation technique, Doc2Vec, to capture contextual semantic information in the texts, focused on 179 cases in the IBP corpus, trained a machine learning model for each factor, and predicted the factors that apply in each case document. In an evaluation applying the model to 30% of the documents as a

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hold-out test set, the result was an F1 measure (arithmetic mean of precision and recall) of .69/.65 (micro/macro) (Falakmasir and Ashley 2017).

Why is this important? If legal text analysis programs can learn how to automatically identify factors in case texts, then computational models of legal argument (e.g., VJAP, AGATHA, IBP) can accept case texts as inputs and output predictions and explanations or arguments. Thus, machine learning (ML) from manually annotated (or marked-up) texts is likely to be essential for scaling up AI and Law programs. (Ashley 2017).

Annotating case texts, for example, marking-up which sentences are positive instances of a given factor, is time-consuming and expensive in terms of expert labor. Any techniques for minimizing the amount of annotation required are worth exploring. In a recent paper, Branting et al. (2019) present the SCALE approach as an alternative, a semi-supervised machine learning method for achieving explainable legal prediction. SCALE employs a small set of annotated data and maps it onto a larger set of candidate documents. The approach may be useful wherever courts describe legal concepts in stereotypical terms across domains of legal cases. They need not use identical language; SCALE applies word-embedding representations and clustering algorithms that can identify semantically similar descriptive text segments across the case texts. The technique could be used to predict outcomes based on the relevant resulting clusters and explain the predictions in terms of cluster-related concepts. Alternatively, it could be applied as a pre-processing technique to make detailed annotation more efficient.

Branting presents a useful table of paradigms for explainable decision prediction. See Table 3. Items five through seven are approaches whose inputs are not case texts but features such as factors or rule predicates and include VJAP, IBP, and AGATHA. Items three and four do take case texts as inputs and include SMILE+IBP and SCALE, which then identify members of the feature set of factors or rule predicates in the texts and use them to predict and explain outcomes.

Items one and two move toward a radical alternative. They avoid the need for engineering sets of features altogether, using unsupervised machine learning to identify features such as topics (Aletras et al. 2016) or making predictions directly from the texts represented only as feature vectors (Medvedeva et al. 2019). Unsupervised ML employs techniques such as clustering algorithms that infer groupings of unlabeled instances based on their content.

The goal of Aletras et al. (2016) was to predict violations of particular articles of the European Convention on Human Rights (ECHR) from the texts of cases tried by the European Court of Human Rights (ECtHR). They hypothesized that the case texts and the parts of the text dealing with the facts, the law, and arguments are "important factors" influencing the case outcome. The work focused on three articles of the ECHR: Article 3: Prohibition of Torture, Article 6: Right to a Fair Trial, and Article 8: Right to Respect for Private and Family Life. The corpus comprised the published decisions of cases that had survived the first stage of admissibility, including 250 cases for Article 3, 80 for Article 6, and 254 for Article 8, all balanced in terms of the numbers of decisions granting or denying relief. Each case was represented in terms of its outcome and as bags of terms, that is, feature vectors, with n-grams from one to four contiguous terms for its sections on procedure, facts (circumstances, relevant law), law (which includes the parties' arguments and the court's reasons) and for the full case as a whole.

Case texts were also represented in terms of "abstract semantic topics" comprising word clusters associated

TABLE 3. *Paradigms of explainable decision prediction (Branting, et al. 2019, p. 23) with additions*

Paradigm	K-E artifacts	Execution-time representation	Output	Example
1. text → output			prediction, relevance weights	(Medvedeva, et al. 2019
2. text → predicates → output	predicate set, rule set		prediction, per-predicate relevance weights	(Aletras, et al. 2016
3. text → features → output	feature set		case-based argumentation	SMILE+IBP
4. text → features→ predicates → output	feature set, predicate set, rule set		hybrid case/rule-based argumentation	SCALE
5. features → output	feature set	featural case representation	case-based argumentation	IBP, AGATHA, VJAP
6. features → output	rule set	featural case representation	rule-base argumentation	
7. features→ predicates → output	feature set, predicate set, rule set	featural case representation	hybrid case/rule-based argumentation	NIHL (Angelic methodology)

[4] https://www.courtlistener.com/

with the ECHR articles. For each article, the word clusters were trained using an automated, unsupervised technique (spectral clustering on an n-gram similarity matrix). The presence of a cluster in a case text was treated as an additional feature representing that text. Thus, although their approach employed a kind of semantic legal features, human experts were not involved in compiling the features, which was done automatically.

The researchers applied a machine learning model (a linear support vector machine) and evaluated the trained model (using 10-fold stratified cross validation). Their model achieved an accuracy of 79% accuracy at the case outcome level. The circumstances and topics n-grams were the best predictors, the law n-grams predicted badly, a correlation was observed between facts and outcomes, and the topics revealed groups of non-violation and violation cases.

Subsequent researchers criticized the results in (Aletras et al. 2016), pointing out a confound in that the language of the circumstances sections of ECtHR cases was not neutral but prefigured the outcomes (Medvedeva et al. 2019). In that later work, the researchers assembled a database of more ECtHR cases for nine ECHR articles, balanced between Violation and Non-violation cases, applied a supervised machine learning algorithm (support vector machine), and achieved the predictive accuracies on a held-out test set shown in Table 4, with an average accuracy of 0.74.

Interestingly, in another experiment, they enforced a chronology constraint for Articles 3, 6, and 8 such that the cases used to predict a case's outcome had to have occurred prior in time to the case. When using training cases up to 2013 to test 2016-17 cases, the accuracies decreased to 0.70, 0.63, and 0.64, respectively. Compare this with the VJAP results, where enforcing the chronology constraint increased the accuracy of prediction. Could knowledge be the difference?

Finally, Medvedeva et al. also assessed prediction based simply on the surnames of the judges, achieving an average accuracy of 0.66! Prediction is always full of surprises!

PROSPECTS FOR EXPLAINING PREDICTIONS FROM TEXT

In this respect, one sees the influence that features like judges' names can have on prediction. Some programs like Lex Machina exploit such features, but they do not support explaining predictions in substantive terms. As discussed below, in some use cases considering such features is a virtue. In others, researchers must take steps to mask the predictive contributions of features like judges' names or certain citations.

In Aletras et al. (2016) the SVM algorithm weights the topic-related clusters in terms of how strongly they support an outcome of Violation or No Violation. Some of these clusters make some intuitive sense. For instance, the third highest ranked cluster for a finding of Violation of Article 3, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment," labeled by the authors as "Treatment by state officials," contained terms such as "police, officer, treatment, police officer, July, ill, force, evidence, ill treatment, arrest, allegation, police station, subjected, arrested, brought, subsequently, allegedly, ten, treated, beaten." Although it is not obvious why some of these terms are included, others seem as though

TABLE 4. *Dataset and results per ECHR article in (Medvedeva, et al. 2019)*

Article	'Violation'	Drugs	Weapon	Prior record	Result
2	57	57	114	398	0.82
3	284	284	568	851	0.81
5	150	150	300	1118	0.75
6	458	458	916	4092	0.75
8	229	229	458	496	0.65
10	106	106	212	252	0.52
11	32	32	64	89	0.66
13	106	106	212	1060	0.82
14	144	144	288	44	0.84

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they could be relevant to a conclusion of Violation. While perusal of the clusters for other topics shows that some are intuitively relevant, others are equivocal, and none conveys much confidence that these clusters could form the basis of an explanation (Aletras et al. 2016, Table 3).

Branting et al. (2017) have employed Hierarchical Attention Networks (HANs) to induce models from previous case decision texts that can predict case outcomes. HANs employ stacked recurrent neural networks, that is, neural networks that can process temporal sequences of inputs. One such network operates at the word level and has an

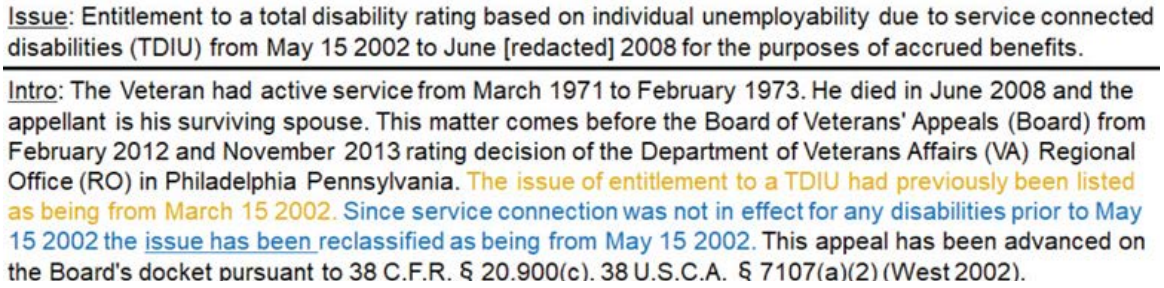

FIGURE 9. *A portion of a BVA case. The sentence with the highest proportion of attention weight, 74%, is shown in blue, and the sentence with the next highest weight, 9%, is shown in yellow. (Branting, et al. 2017 Figure 3)*

attention model to extract into a sentence vector those words important to the meaning of the sentence. A similar procedure is applied to the derived sentence vectors which then generates a document vector representing aspects of the meaning of a given document.[5]

For present purposes, the attention model is the important point. It assigns higher weights to the text portions that have greater influence on the model's outcome prediction. The hope is that the attention model can be used to highlight those salient portions of the text and that these highlighted portions would amount to an explanation of the prediction.

Branting applied the HAN approach to predict outcomes from the full texts of cases in a corpus of decisions of the Board of Veterans Appeals (BVA) and of WIPO domain name disputes. The results were good: F1 metric: BVA 0.74; WIPO 0.94. He found that decision outcomes could be predicted using various models from the texts of motion, contention, and factual background sections alone. Then, he used the network attention weights from the predictive models to identify salient phrases in decisions and presented the information in an interface specially designed to improve decision making. Figure 9 illustrates the output of the interface for a portion of a BVA decision in which two highly weighted sentences are highlighted.

In an experiment, Branting, et al. (2019) engaged 61 experts and non-experts on a task involving analyzing WIPO decisions in which attention-weight-based highlighting was employed in the user interface. "Each participant was asked to decide the issue of 'No Rights or Legitimate Interests' (NRLI) in two separate cases and to provide a justification for each prediction" as well as to comment on the experience. There were four conditions, two of which involved highlighting portions of case texts based on attention weights. The results showed that the "[h]ighlighting had no effect on correctness" of the predictions.

> *Perhaps the most illuminating comments by participants were that they had difficulty understanding the connection between the highlighted text and the issue that they were supposed to decide. These comments, and the overall results of study, indicate that useful decision support should help the user understand the connection between relevant portions of the case record and the issues and reasoning of the case (Branting et al. 2019, pp. 24f).*

[5] https://medium.com/analytics-vidhya/hierarchical-attention-networks-d220318cf87e

Although one experiment is not determinative, this finding is a blow to hopes that HAN attention weights can explain legal predictions.

USES OF AUTOMATED PREDICTION

We know that using legal predictions for some purposes requires explanations and that some ML models © feature weights do not yield accessible explanations. The use of hierarchical attention networks to predict case outcomes yielding network attention weights offered the hope of using the attention weights to highlight relevant portions of the document. Branting's careful evaluation, however, suggests that attention weights are *not* a basis for intelligible explanations.

This may not deter commercial applications of text-based case prediction. One provider's website touts a recent experiment pitting legal experts versus the company's ML prediction algorithm to see which could better predict whether complaints for payment protection insurance (PPI) mis-selling will be granted or rejected. CaseCruncher Alpha predicted outcomes of complaints submitted to it as texts based on target data from historical decisions using a multilayer (convolutional) neural network classifier. They compared the system's accuracy of prediction, 86.6%, with that of 100+ UK lawyers, (62.3%). Although details of the evaluation/dataset were not published, the promoters suggested that the

> *... main reason for the large winning margin seems to be that the network had a better grasp of the importance of non-legal factors than lawyers .... The experiment also suggests that there may be factors other than legal factors contributing to the outcome of cases. Further research is necessary ...*[6]

Presumably, given its use of a neural network, CaseCruncher Alpha does not explain its predictions. If its predictions are more accurate, however, because they

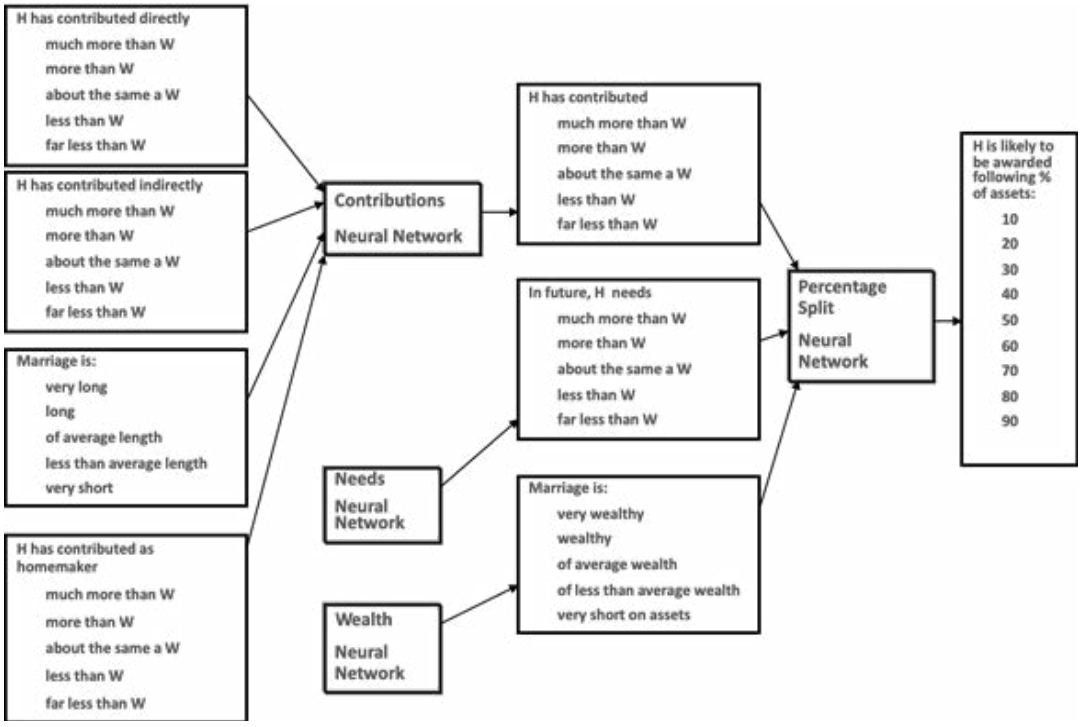

FIGURE 10. *Split-Up, a divide and conquer approach to explanation*

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account for apparently "non-legal factors", that may better fit certain use cases such as valuing a dispute for purposes of betting or settlement, or strategic planning and resource allocation. Lex Machina also considered non-legal factors; one could imagine using it to inform big firm's lateral hiring decisions since it provides readily available statistics about litigators' performance.

For those use cases requiring explanations, a divide and conquer approach may be more appropriate.

In a program that predicted judicial allocations of marital assets in divorce proceedings, Zeleznikow and Stranieri (1995) implemented neural networks but addressed their inability to explain decisions by using a divide-and-conquer approach. As suggested, in Figure 10, they employed a structural framework of multiple neural networks, one for each issue such as needs, direct and indirect contributions, wealth, etc., and generated explanations based on the overall structure of the outputs, not just on the individual outputs.

In a sense, divide-and-conquer is also the approach in items three and four of Table 3. Programs like SMILE+IBP and SCALE divide predictions into a framework of legally relevant issues, the sets of factors and rule predicates. The programs employ multiple ML models to predict the presence of the sets' features in an individual case, and employ the framework, such as a domain model illustrated in Figure 4, to predict and explain an overall outcome.

Finally, there are other kinds of use cases in AI and Law in which prediction plays more of a supportive role. For example, in automatically summarizing legal cases Zhong et al. (2019) employed as a criterion for including a sentence in the summary, a sentence's outcome-predictiveness, that is, its correlation with the outcome of a case.

The work focused on 35,000 Board of Veterans' Appeals (BVA) cases involving a single issue, Post-Traumatic Stress Disorder (PTSD). The outcome distribution was 3:2:1 with respect to the three possible outcomes: remanded, denied and granted cases. The researchers employed a template for generating summaries comprising one sentence each stating: the source of the appeal (e.g., "This is an appeal from the Department of Veterans Affairs Regional Office in Seattle, Washington."), the issue on appeal (e.g., "The issue is entitlement to service connection for posttraumatic stress disorder (PTSD)."), the military service history (e.g., "The veteran had active military service from November 1967 to December 1970."), and the conclusion (e.g., "Service connection for PTSD is granted.") Each of these were identified with regular expressions (i.e., regex rules) (Zhong et al. 2019).

The summaries also contained, however, up to three sentences stating the court's reasoning and evidential support e.g., "The evidence of record establishes that the Veteran has been diagnosed with PTSD related to in-service stressors that have been corroborated by credible supporting evidence."). These were generated by an iterative process of ranking the sentences by predictiveness, selecting the most predictive sentence for possible inclusion in the summary, masking that sentence, and repeating the process until the sentences' predictiveness dipped below a threshold.

Interestingly, not all of the most predictive sentences contain useful information such as facts and evidence worth incorporating into a summary. Some sentences were statistically correlated with outcomes but comprised only citations, names of judges, or statements of high-level legal rules. For example, an excerpt like "STEVEN L. KELLER, BVA", may be highly correlated with outcomes and thus predictive because the model learned that Steven L. Keller remanded 78 percent of the cases. Thus, the researchers implemented measures to filter out citations, high-level legal rules, and judges' names, non-legal features like those on which Lex Machina based its predictions (Zhong et al. 2019).

In addition, only sentences of a particular type, Reasoning & Evidential Support, would be appropriate for the summary template. A random forest decision tree classifier, trained on an annotated training set, identified reasoning and evidential support sentences from the set of most predictive sentences. Finally, since it was important that the summary minimize duplication, an algorithm was applied (Maximal Marginal Relevance) to select the most diversified of the remaining most predictive sentences,

[6] https://www.case-crunch.com/index.html#progress-bars3-o

and the selected sentences were fit into the summary template (Zhong et al. 2019).

The results were somewhat equivocal. The researchers had enlisted two law students to write 20 summaries for comparison. The researchers determined that the frequently applied quantitative measures of summary quality (i.e., ROUGE-1 (unigram overlap) and ROUGE-2 (bigram overlap) (Lin 2004)) were inadequate in that they could not distinguish the human-prepared summaries of presumably higher quality from machine-generated ones. A human expert determined that while 10% of the human-generated summaries did not adequately identify issues and resolutions for the 20 cases, 50% of the machine generated summaries did not do so. Nevertheless, the predictiveness of sentences appeared to be a useful, if not sufficient, criterion for inclusion in meaningful summaries. (Zhong et al. 2019).

CONCLUSIONS

We have seen the different roles that predicting case outcomes has played in the history of Artificial Intelligence and Law research, from identifying borderline cases worthy of legal academic commentary, to providing some evidence of the reasonableness of computational models of case-based legal reasoning, to providing the raison d'être of such models, to accounting for statistically telling features beyond such models, to circumventing features altogether in favor of predicting outcomes directly from analyzing case texts.

We have also seen a variety of use cases to which predicting case outcomes has been put. Some of these require explanations to help humans assess whether to believe the prediction. For these uses, some combination of model-based and text analytic approaches could be best at predicting legal outcomes, providing explanations, and enabling arguments in terms attorneys can understand. Other uses involving valuing a dispute for purposes of betting or settlement, strategic planning and resource allocation, or lateral hiring may benefit from taking into account features instead of or beyond substantive legal merits. Still other uses, the most recent ones, employ prediction in support of some other intelligent task such as summarizing legal cases, tasks for which some legal knowledge is required but that do not necessarily require explanations of predictions.

Throughout this evolution, the question recurs that Mackaay and Robillard first posed. What do the prediction methods try to achieve: "minimization of prediction errors or elucidation of human understanding?" Both are important, but the use case determines the balance of their importance for particular tasks.

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