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REFLECTIONS ON LEGAL EDUCATION AND PHILOSOPHY: THE CRITICAL ROLE OF THEORY IN PRACTICE

JOHN ZERILLI*

I INTRODUCTION

An application-focused, commercial-utility-driven approach to legal education can seriously undermine the law's potential and produce students insensitive to the significance of questions they are called upon to ask in legal practice. A mature curriculum will not eschew a survey of the great debates of philosophy in the history of ideas nor insulate students from considering the influence of other subjects bearing an impact upon the law. The law's necessarily interdisciplinary nature requires its practitioners to possess at least an appreciation of extra-legal learning from areas such as philosophy, logic, history and economics.

John Maynard Keynes once wrote tellingly of theory:

The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.¹

Keynes was an economist. His words, however, reach far beyond economics.

A The Origins of Legal Academy

English common lawyers have practised their science for over 800 years. The academic teaching of the common law, by contrast, is a comparatively recent development. The first semblance of the modern law school is to be found in England in 1828 through the efforts of Andrew Amos, a practising barrister who accepted the first chair of English Law in the newly-created University of London.² We must wait until 1850 for Oxford to introduce a BA course in law and history, and 1858 for the Cambridge law tripos, under which

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¹ Quoted in Daniel Fusfeld, *The Age of the Economist* (7th ed, 1994) 4.

² John H Baker, *An Introduction to English Legal History* (3rd ed, 1990) 195.

students commenced law by reading another subject.³ The academic students were always outnumbered by the professional students who, like David Copperfield, acquired their legal skills as articulated clerks. Historically, the study of law was not recognised as a liberal education and the legal historian, John Baker, notes that it is a sad reflection on the status of legal education in those days that the most distinguished English lawyers between about 1850 and 1950 were either not university graduates or had read subjects other than law.⁴ This — probably unfortunate — situation is, however, no longer the case. But the fact that scholars could come to law with vast knowledge of a field outside of it demonstrates remarkably how amenable the law is to an inter-disciplinary approach. Formal legal education is a good thing, but its effect can be to erect a fence around the subject. The true nature of law is apt to be obscured by its presentation as an independent, self-sufficient, self-referential body of knowledge. That predilection was marked — even approved — in late Victorian times as the result of a movement which emphasised the scientific study of the humanities.⁵ If law, too, is a science, so it was said, then it is a discipline which must be characterised by objectivity, neutrality and the dispassionate ascertainment of verifiable facts; and if law is a science, there should be no need to look beyond the lawyer's laboratory for answers — legislation, case reports and digests. Lord Radcliffe would wisely state years later:

[Law] takes its substance from ... history, custom, economic theory, philosophic notions, ideas of psychology, morals and religion. These are the things of which the lawyer has to have some knowledge if he is to understand the law itself ... [H]e must be ready to maintain as part of his professional equipment a lively, if amateur, interest in such subjects.⁶

This raises the question of the epistemic status of the law's privileged position, which is considered in the next section.

B *Knowledge for Knowledge's Sake*

Against the backdrop of legal education, changes in the broader world of education must be grasped. Once decidedly liberal, it is now, perhaps more than it has ever been, vocational. A blurring of the function between university and polytechnic is cognisable; some institutions of higher education have come to embody the fusion.⁷

³ Ibid 196.

⁴ Ibid.

⁵ See generally Margaret Davis, *Asking the Law Question* (2nd ed, 2002) ch 4.

⁶ Lord Radcliffe, 'The lawyer and his times' (1967), address on the occasion of the 150th anniversary of the Harvard Law School, reproduced in Radcliffe, *Not in Feather Beds* (1968) 265, 275.

⁷ See, eg, the development of institutes of technology into universities, such as the New South Wales Institute of Technology into the University of Technology, Sydney.

Commercial utility, no doubt, is an indispensable consideration informing a student's choice of study: *primum vivere, deinde philosophari*, so the saying goes.⁸ But should this all-important, bread-winning principle hijack all the others? The question assumes greater importance in legal education, for the production of law is not a consumer industry, but a social service.⁹ Should education be allowed to surrender its transformative potential to its merely informative capacity? In earlier times the cultivation of knowledge was seen as a necessary preliminary to the liberation of the mind. There had not occurred as yet the great debunking of theory in the hierarchy of knowledge. It was reasonably more common to find students of pure mathematics than applied mathematics, history than international relations, philosophy than sociology. The wealthiest men — John P Morgan, Andrew Carnegie, for example — were among the most cultured; one has only to visit the eponymous Morgan Library in New York to witness the calibre of the man. The Cambridge genius quoted above, Keynes himself, 'possessed the rare, if not unique, distinction of having a mind that was fully developed intellectually, artistically and commercially'¹⁰ — a speculator in the equity and commodity markets, arts administrator, logician, aesthete, economist, international statesman, bibliophile, writer and philosopher. The British philosopher, Bertrand Russell, stated the plangent reality evident to him by 1930: 'It is one of the defects of modern higher education that it has become too much a training in the acquisition of certain kinds of skill and too little an enlargement of the mind and heart by any impartial survey of the world'.¹¹

The application of knowledge has, under the spectre of economic rationalism, become the foremost concern of education. The arts degree, perhaps partly to blame for a general resignation of spirit and standards, has lost much of its former prestige. Students who saddle themselves by reading literature, Latin, or philosophy are of uncertain value. We cannot afford to entertain the classical fancies of an erudite few; there is now a temperamental preference for hard knowledge over woolly speculation.¹² So we study 'communication' and have forgotten the tender art of consolation or the restorative capacity of conversation. Even the study of economics is suffering from the perception, held among some, that a highly theoretical subject must be less useful than its 'practical' equivalents. Banish

⁸ 'Men should live before they philosophize'.

⁹ Radcliffe, above n 7, 266.

¹⁰ Ian Macfarlane, *The Search for Stability* (2006) Australian Broadcasting Corporation (ABC) Boyer Lectures.

¹¹ Bertrand Russell, *The Conquest of Happiness* (1930, 2004) 40–42, 172–74.

¹² John Campbell, *Margaret Thatcher Volume 2: The Iron Lady* (2003) 395–400, 396: Mrs Thatcher's personal distaste for the intellectual was clear to most who worked with her: 'Ideas for their own sake did not interest her at all', 396.

the thought — if it may be contained at all in such a small outlook of mind — that much of what we know of the natural world began with hypothesis, that is, with theory.

Probably some of this decline in standards, at least in countries which came under the spell of economic rationalism, can be traced to the palpable reforms effected under the Thatcher administration. The 1985 Green Paper issued under Sir Keith Joseph spelt out the government's unprecedentedly utilitarian view of university education: universities were to be more commercial and more vocational, so to serve the needs of the national economy 'more effectively'.¹³ After Kenneth Baker's 1988 Education Reform Act, the Government funded university education on a contract basis. John Griffith, Professor of Public Law at the London School of Economics, compared the destruction of the university system to the dissolution of the monasteries.¹⁴ Although she proved her mettle, Mrs Thatcher remarked that 'it was certainly no part of my kind of Thatcherism', to effect a 'philistine subordination of scholarship to the immediate requirements of vocational training'.¹⁵

The 'ascent of philistinism' might be too histrionic a description of the market-orientation of education. But as recently as 2004, two Australian scholars perceptively observed that any reforms in legal education must commence with frank recognition of the phenomenon, stating that '[t]he first challenge is for Australian law schools to rethink their relationship with the legal profession ... so that legal education aims for more than preparing students for work in private legal practice'.¹⁶ This is a uniquely difficult challenge for legal education since it is almost a part of its tradition to think of the profession as the aim and apogee of the academy.¹⁷ The major criticisms of legal education pointed out the need for 'practical' and 'clinical' instruction¹⁸ which resulted in the integrated practical legal training module within, for some universities, the law degree itself.¹⁹ That, for better or worse, has made the intimacy in the union of profession and academy all the greater. It is not suggested that the union should be anything other than a happy one, just as no one should suggest severing the vital connection between hospitals and faculties of medicine.

But where does this leave legal education? What prevents reversion to a 17th century-style clerkship? If the call is for more practical law graduates, why persist with the academy at all? Is it the

¹³ Ibid 397.

¹⁴ Ibid 399.

¹⁵ Ibid 400.

¹⁶ Mary Keyes and Richard Johnston, 'Changing Legal Education: Rhetoric, Reality and Prospects for the Future' (2004) 26 *Sydney Law Review* 537, 538.

¹⁷ Ibid 542.

¹⁸ Ibid 541.

¹⁹ See Australian Law Reform Commission (ALRC), *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [2.9]–[2.10].

efficiency of so many in the one class at one time? Is it the increasing complexity of the law which requires it to be taught as systematically as theology?²⁰

For whatever reason, the legal academy's presence is undeniably stronger and the past 30 years have seen more law schools planted than at any other time.²¹ So highly liberalised is the law degree that it has been expressed, with some justification, to have replaced the arts degree as the foundation degree for further study in the common law world, and dubbed, somewhat derisively, the 'glorified arts degree'.

The reason we persist with the academy is because law has a peculiar and amorphous nature requiring at once instruction in the deep and penetrating matters with which it deals and the application of that learning to lively conflicts and questions which arise in the material world, often in commercial contexts.

These developments have thus placed legal education in a contentious position. For some it is to provide a liberal education, particularly for the majority who have no wish to pursue a traditional career in law. For others it is to train professionals who care little for the larger questions of law — its relation to other branches of learning, its method, its effect on society, the source of its power, why it commands obedience, whether and how it may be changed — and are content to know *what it is*, and how to apply it, aside from *what it ought to be*. The ALRC report on *Managing Justice* stated that 'Australian law schools have accepted that their dual mission [is] to provide (or contribute to, in the case of combined degrees) a broad liberal education, as well as to provide a basic grounding for those entering the profession'.²² If there is a line of demarcation between these approaches, it is not clear where it falls. The question is constantly asked by educationists, teachers and curriculum designers. The answer is of some significance, both to the teaching and practice of law. The answer depends upon the line drawn between 'formalism' and 'realism'.

Australian policy is now less ambivalently focused on promoting an education which

[i]n a changing environment ... is one which promotes intellectual breadth, agility and curiosity; strong analytical and communication

²⁰ It may surprise some to know that the Australian jurist (formerly Justice) Michael McHugh is not a university graduate. And as far as the quality of Diploma education goes, opinions differ, but Meagher JA, on his appointment to the Court of Appeal of New South Wales, as reported in *Blackacre* (1990) 31, said, 'I think that for the first time ever we have reached the situation where the Solicitors and Barristers Admissions Board is providing a much better legal education than any of the universities'.

²¹ Certainly from an Antipodean perspective. For example, the ALRC report, above n 19, [2.14], records that between 1987 to 1997, the number of law schools in Australia more than doubled from 12 to 28. They had already doubled in 1987 from six to 12 since 1960. At that rate, their increase is geometric.

²² ALRC report, above n 19, [2.17].

skills; and a (moral/ethical) sense of the role and purpose of lawyers in society.²³

II THE LEGAL CURRICULUM

A *What is Taught in Law School?*

A legal education, broadly speaking, has three objectives: faculty, location and cognition.

1 *Faculty*

Practicing lawyers must comprehend legal principles and processes. The curriculum rightly would include a survey of the substantive corpus of law, for example, the law of obligations, public law and crime as well as the adjectival law, such as the law of evidence and procedure. It would also cover legal method, rules of precedent and formal legal reasoning. A lawyer is not a lawyer until he or she has these arrows in his or her quiver. The lawyer may possess nothing besides and still be a lawyer. But without these, even possessing other admirable qualities, he or she is no lawyer.

2 *Location*

Locating the law involves the skill of legal research. It is indeed artificial to stress too much the difference between finding, as distinct from understanding, the law; but the Hanoverian adage is still timely; King George III is reputed to have said that a lawyer is not a person who knows the law, but one who knows where to find it.²⁴

3 *Cognition*

Cognition is the aptitude to synthesise and evaluate the law. It is said that science breaks apart (analysis) but philosophy pieces together (synthesis).²⁵ The traditional, formal approach to law is here described as a 'facultative' one because it demands 'facility' with the law as it is. The law is assumed, operating as a constraint upon free action and positing the boundaries within which action is permissible. It may roughly be aligned with science in that it analyses and breaks apart what *is*, not venturing to piece back together so as to find added meaning. It may criticise the operation of the law, but falls short of a comprehensive criticism, as it never calls the entity of law itself into question.

Jurisprudence, as a branch of philosophy, does, on the contrary, attempt synthesis by piecing together: by refusing to take anything

²³ David Weisbrot, 'From the Dean's desk' (1994) 3 *Sydney Law School Reports* 1.

²⁴ See the 'Introduction' to Rob Watt, *Concise Legal Research* (4th ed, 2001).

²⁵ The celebrated humanist philosopher, Dr Will Durant, was an exponent of this idea. See Will Durant, *The Story of Philosophy* (1926).

for granted rather it interrogates the law to its foundations. Its criticism is thus radical, often devastating, always iconoclastic, potentially destructive but stimulatingly renewing. Jurisprudence, one may assume, offers a fertile soil for the inquiring mind more worthy than formal, 'black letter' analysis. But brilliance of another kind is required of the lawyer engaged, not in cognitive criticism, but in formal legal argument. The lawyer's task is made perhaps more difficult, and not simpler, by having to take as far as possible the law as it is, not as it should be. The line between these activities is not always easy to draw in practice.

The essence of a critical approach to law, as the nomenclature adopted here suggests, is 'cognition', quite the way Descartes meant when he said, '*Cogito, ergo sum*'.²⁶ The formal black letter of the law, at its extremity, tends to look inside-out. There comes a point where, like Descartes, the law is made to look outside-in and in doing so becomes self-conscious. Self-consciousness is the point at which personality can be acknowledged and either reinforced or repressed. It may lead to self-actualisation as equally as to an unhealthy and disabling introspection. Of course, one must avoid the latter: the challenge of legal education is just that. Legal education must, if its objectives are to be kept sensible, aim to strike the right balance between cognition and faculty, or, in terms of jurisprudence, realism and formalism; in education science terms, between pure and applied knowledge; in other words, between theory and practice.

III PHILOSOPHY IN LEGAL EDUCATION

The value of normative philosophy to legal studies is immense. Despite my own approach to the law being formalistic, I cannot deny the importance of any discipline which encourages reflection or which stimulates deep thinking. To reason about 'ought' as well as 'is' is vital in the broadest sense, not just in the law. There would be no 'is' if there were not first an 'ought' which spurred corrective action and adjustment. The 'is' in democratic systems usually turns out to be a response to what is perceived as the 'ought', but even then it is very rare for the 'is' and the 'ought' to align. Overwhelmingly they do not. There are those who say that the lawyer should not concern himself with 'ought' questions.²⁷ To remove normative considerations entirely from the practice of law would be impossible, for it would lead to means without ends, process without purpose. Indeed, one must question whether norm-free laws exist, at least for very long; even a road rule is designed to preserve life, and a

²⁶ 'I think, therefore I am'.

²⁷ Samuel Johnson, as cited in James Boswell, *Life of Johnson* (1791, 1992 ed) 11–13: 'A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge'.

tax is the cost of civilisation. But I have another reason why I must admit moral philosophy into the teaching of law; if I do not, I must deny that theory influences practice and so deny the power of ideas. This I am loath to do. Without the idea, there would have been no Reformation, no Enlightenment, no American independence, no Gettysburg Address — in short, no progress. And this is to say nothing of the importance of ideas to science where, perforce, the hypothesis precedes the experiment.

A Law as Philosophy

Law, like theology, is simply a brand of philosophy. All systematic ways of thinking about or seeing the world amount ultimately to philosophy. Some philosophies are convincing enough to compel people to modify their behaviour; others are fit only for the textual footnote. When the law, in the realm of contract, describes the world in terms of offer and acceptance, it is, in truth, developing labels which it hopes useful to apply to all conduct fitting a particular description or fulfilling a particular role in the relations of humanity. The more ambitious a philosophy, the more encompassing of human conduct it becomes. The law, indeed, is a most ambitious philosophy, requiring for its regulation of human affairs an understanding of all human conduct. It must assign a place for all action, a label for all deeds. Only when it so ascribes significance to conduct can it interpret facts. Ascription is legal theory at work, philosophy in action.

It is, therefore, puerile to conceive of law as existing in its own domain. On the green lawn of wisdom it occupies a certain corner, but the same grass grows over all.

B Parallels in Philosophical Thought

Lawyers, unlike most professionals, routinely ask abstract questions and must, at the proper time, deal in fragile generalities only too prone to break like delicate porcelainware. What makes a thing essentially what it is, for example, a ‘fact’, an ‘employee’, a ‘contractor’, a ‘term’, a ‘representation’, a ‘condition’, a ‘warranty’, a ‘licence’, a ‘lease’, an ‘order’, a ‘matter’? When is the taking of life to be permitted, commissioned or excused? Can one experience non-existence? A comparison of existence with defects on the one hand and non-existence on the other led an Australian judge to quote Ludwig Wittgenstein — ‘Death is not an event of life, death is not lived through’ — in search of an answer.²⁸ Can malice live with negligence?²⁹

²⁸ This was necessary to ask in the context of quantifying the damages suffered by a child born after a failed sterilisation procedure performed negligently. See *Harriton v Stephens* (2006) 226 CLR 52, especially Kirby J and his quotation of Wittgenstein, [78].

²⁹ *The Queen v Lavender* (2005) 222 CLR 67.

An area of obvious overlap is causation which has posed perennial problems for lawyers and philosophers. Did Event A cause Event B, or did the cause of Event A cause Event B? Can an effect become a cause, reinforcing the original cause and producing the same effect in an intensified form, and so on indefinitely?³⁰ These are sometimes very difficult matters in fact-specific cases. Generally, the law is less interested in the true causes of things than the philosopher. Acknowledging the presence at times of a multiplicity of contributing and sufficient factors, the law is more interested in which of the factors is to be attributed with causal status for the purpose of allocating responsibility. The problem of causation thus becomes, in law, the problem of attribution. For example, losses resulting from a breach of contract are typically attributed to the breach, not to the independent decision of the innocent party to terminate the contract even when the breaching party is willing to perform and rectify the breach.³¹

Another instance of overlap is the legal fiction. Where it survives, it still represents an attempt to use scholastic logic, the kind inherited through Thomas Aquinas, from Aristotle. Fictions are appealing because, where a lie stands between a problem and a solution, it permits the solution whilst disguising the lie in an otherwise valid sequence of thought. A fiction, as it were, plays the role of an incorrect major premise which, provided the integrity of the syllogism is maintained, does not invalidate the logical sequence yielding the conclusion. Syllogism itself, quite apart from fiction, is commonplace in legal writing.³² Glanville Williams went so far as to describe the notion of a non-delegable duty as a 'logical fraud'.³³ One may enquire as to whether there is any difference between a logical fraud and a fraudulent logic.

When two concepts or events are described as mutually exclusive, we apply set theory. One often reads legislative provisions of the form, 'A means not *not A*', or similar variants importing Boolean logic.³⁴

The problem of subject and object riddles the law. In the law, one is said to be 'objective' (although Fowler's *Modern English*

³⁰ See George Orwell's essay, *Politics and the English Language*, first published in 1946. In this masterly account of the decadence of the English language, Orwell demonstrates how the decline of thought produces bad English, itself producing greater vagueness and imprecision in thought: 'But if thought corrupts language, language can also corrupt thought'.

³¹ *Castle Constructions Pty Ltd v Fekala Pty Ltd* (2006) 65 NSWLR 648.

³² Note the reference to syllogistic logic by Hayne J in *Harriton v Stephens* (2006) 226 CLR 52, [162] and the use of it in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 183 [51]–[54], dealing with the incorporation of terms into contract by signature.

³³ Glanville Williams, 'Liability for Independent Contractors' [1956] *Cambridge Law Journal* 180.

³⁴ Cf s 18(2) *Crimes Act* 1900 (NSW).

*Usage*³⁵ would advise ‘unbiased’, ‘disinterested’, ‘impartial’ and ‘unprejudiced’) by abandoning so much of a *personal* criteria of what is ‘reasonable’ as is not *ubiquitous* and then adopting so much of the criteria as *is*. For ‘ubiquitous’, the Apostle Paul might have used the phrase, ‘common to man’,³⁶ though we could justly employ ‘prevalent’ or ‘universal’. This elusive set of criteria is external to the perceiver-subject and is embodied in an alternative personality in which the criteria obtain as characteristics. This is the hypothetical ‘reasonable person’ who houses that right combination of thoughts, attitudes and idiosyncrasies. One is said to apply an objective test by ignoring *personal* biases — and the biases of the subject when assessing the reasonableness of its actions — and resorting to the biases of the hypothetical, reasonable person. The reasonable person is not necessarily as ‘objective’ as we are in our resort to him or her and indeed may, depending on the degree of objectivity required for a particular legal test, be reckoned to possess some of the biases, interests, partialities and prejudices of the subject person whose views are being replaced. The test is nonetheless objective. It is only when the biases of the subject have been permitted to feature prominently in the reasonable person’s thinking and doing that the test has become subjective.³⁷

In the law, a philosophical approach is both necessary and inescapable. All good lawyers are philosophers, whether they care to admit so or not. A great philosopher’s contribution to a jurisprudential dispute would be very instructive. The appellate Judge, Harold Glass was the medallist in philosophy at the University of Sydney, a prize he shared, not commonly appreciated, with John Leslie Mackie, the highly eminent twentieth century philosopher and author of one of the major works on causation in that century, *The Cement of the Universe*. Who could doubt that when it came time for Mr Justice Glass to decide any of these questions, he was not at some advantage by his acquaintance with abstract discourse?

C *History and Law*

History is too often considered a peripheral subject.³⁸ Rarely at the higher levels of schooling is it made compulsory. Strictly speaking, it is unnecessary for people to possess vast historical knowledge and there may be other ways of training the mind to think clearly and critically about evidence or motive. Students of English property law

³⁵ Sir Ernest Gowers (2nd ed, 1965).

³⁶ I Corinthians 10:13, ‘There hath no temptation taken you but such as is *common to man*’.

³⁷ The test for provocation under the *Crimes Act* 1900 (NSW), s 23, is an example where the reasonable person is reckoned to have characteristics of the subject-offender.

³⁸ See Stuart Macintyre, *The History Wars* (2003).

cannot afford to adopt this attitude. The basis, for example, of tenure in the English tradition, and of modern conveyancing practice,³⁹ is neither ownership, nor possession, but *seisin*, a sufficiently distinct juridical concept incomprehensible without some knowledge of medieval history. Even outside property law, the lawyer concerns himself very much with history. As Professor Steve Hedley stated, ‘All legal argument is historical up to a point. I am not sure what it would mean for a lawyer not to be a slave of history’.⁴⁰

Might history, in another vein, be the enemy of logic? The insinuation comes through Holmes who once said that the heart of the law is not logic, but history, and that, ‘[A] page of history is worth a volume of logic’,⁴¹ pitting logic against history. By exalting *both* history *and* philosophy in the legal curriculum, have I confused two distinct and opposing sources of reason? Does the emphasis on a logical discipline such as philosophy, mean that, in my practice, a strict rationality would wrongly prevail over ancient lore? Or, conversely, will a high regard for history compel me to suspend an otherwise intellectually satisfying conclusion?

What, Holmes himself would have averred, history brings to rude, raw logic is the benefit of human experience. Our knowledge of the past reactions of humanity to its environment can serve to temper a rough and rigorous logic. My preferred subjects at school were always mathematics and history. It is by no accident that I would decide upon a career in law, being, at least from my perspective, a near perfect blend of the two. No other discipline in the same way allows for the suffusion of logic with tradition. It could explain why James Joseph Sylvester and Arthur Cayley, the well-known algebraists of the 19th century were, when not reading mathematics, practising barristers. Charles Percy Sanger, whom Alfred North Whitehead⁴² described as a ‘brilliant mathematician’,⁴³ joined the Chancery Bar and was well-known among legal circles for his excellent edition of *Jarman on Wills*.

³⁹ See how even under Torrens legislation, the fact that the medieval tenant did not own his land, but did own the estate in the land, is well illustrated by the form of a Torrens Title Certificate, where the tenant in fee is described as ‘the proprietor of an estate in fee simple’.

⁴⁰ Steve Hedley, ‘Rival Taxonomies Within Obligations: Is There a Problem?’ (2005) in Simone Degeling, James Edelman (eds) *Equity in Commercial Law* (2005) 77, 84.

⁴¹ Oliver Wendell Holmes, quoted in the preface to the first edition of Windeyer’s *Lectures on Legal History* (1936).

⁴² Co-author of the seminal work of formal logic and mathematical philosophy, *Principia Mathematica*, 1910–13.

⁴³ Alfred North Whitehead in Bertrand Russell, *Autobiography* (1968). To get an idea of how able a mathematician Sanger was, consider that he was second wrangler in the Cambridge mathematics tripos; Russell was seventh wrangler in his year; Keynes, some years later, was 12th wrangler.

IV A CASE STUDY

A The Ancestry of a 'Modern' Debate: A very real philosophical problem paraded in legal garb

Many modern jurisprudential debates, particularly those surrounding method, originate in the parched pages of the ancients. It is often disputed whether a judge comes to an instinctive sense of the correct approach to a legal problem, or whether the judge consults the cases first. Put another way, does the judge reason *a priori*, or *a posteriori*,⁴⁴ deductively or inductively, apply 'top-down' or 'bottom up' reasoning?⁴⁵ *Semble*, is law an art or a science? How many law students today know that this dispute is at the heart of the conflict between Plato's *nous* concept of pure knowledge in the soul, not dependent on sense-perception, and Aristotle's emphasis on perception and experience whereby one deals first with the concrete, perceivable facts from which knowledge may be induced? In metaphysics, it is closely related to the pompously known 'problem of universals'. *Nous* is why Plato looked forward to death, the complete emancipation of the soul from the inhibitive body; and why in Britain it denotes practical intelligence. Philosophers would tell us that *nous* is why Christians are able to conceive of Christ as the Word of God,⁴⁶ or why the Duke of Wellington remarked that Napoleon was not a person, but a principle.⁴⁷ That knowledge and perception debates continue with alacrity is not surprising. What is surprising is that the mental landscape in which the debates were first conducted has been forgotten, as almost have the original disputants and their thankfully salvaged and recorded wisdom.

The historic quarrel resurfaced in *Markarian v The Queen*⁴⁸ where the two schools, Platonic and Aristotelian, were starkly embodied in McHugh J and Kirby J respectively. Neither judge quoted either philosopher. I suspect that a Sir Owen Dixon, a Sir Victor Windeyer or a Sir Frank Kitto would have. McHugh J favoured sentencing by 'instinctive synthesis' whereby a judge comes to a result after private assessment of the relevant considerations. This he variously styled 'judicial instinct' and 'judicial wisdom'. He spurned the 'two-tiered' approach which Kirby J preferred, labelling it a 'pseudoscience' since 'sociological variables do not easily lend themselves to mathematisation'.⁴⁹ Furthermore,

⁴⁴ Terminology believed first employed by the German philosopher, Immanuel Kant, 1724–1804.

⁴⁵ See Justice Keith Mason, 'What is wrong with top-down legal reasoning?' (2004) 78 ALJ 574.

⁴⁶ Russell, in his *History of Western Philosophy* (1946), says the author of John's gospel and the Johannine epistles was influenced by the Platonic discourse.

⁴⁷ See generally Elizabeth Longford, *Wellington — The Years of the Sword* (1969).

⁴⁸ (2005) 215 ALR 213.

⁴⁹ *Ibid* [52].

[T]he two-tier sentencer mistakes an illusion of exactitude for the reality of sentencing because there is no method of the sequential arithmetical reasoning [in the two-tier approach] that produces the correct sentence for any case. A sentence can only be the product of human judgment.⁵⁰

Kirby J, in defence of the ‘two-tiered’ approach to sentencing, honoured the method which most clearly allowed articulation of the reasons behind the sentence imposed:

Judicial officers engaged in sentencing should be encouraged to reveal their processes of reasoning ... The generalised assertion by the sentencer that he or she has acted on ‘instinct’, ‘intuition’ or personal experience ... is not now enough, in my opinion, to meet the standards of reasoning in sentencing that we have come to expect in Australia.⁵¹

It is curious that the origin of the controversy was traced back ‘over twenty years’ by Kirby J⁵² and not the 2 500 years which would have been the more precise estimate of its long life and a surer guide to its provenance.⁵³ Either side could have made use of the learning of minds more exercised in this field of thought. Russell, in his *Mysticism and Logic*, had this to say about the conflict between instinct and reason:

Are there two ways of knowing, which may be called respectively reason and intuition? And if so, is either to be preferred to the other? ... Of the reality or unreality of the mystic’s world I know nothing. I have no wish to deny it, nor even to declare that the insight which reveals it is not a genuine insight. What I do wish to maintain ... is that insight, untested and unsupported, is an insufficient guarantee of truth, in spite of the fact that much of the most important truth is first suggested by its means. It is common to speak of an opposition between instinct and reason ... But in fact the opposition of instinct and reason is mainly illusory. Instinct, intuition, or insight is what first leads to the belief which subsequent reason confirms or confutes ... Even in the most purely logical realm, it is insight that first arrives at what is new.

Where instinct and reason do sometimes conflict is in regard to single beliefs, held instinctively, and held with such determination that no degree of inconsistency with other beliefs leads to their abandonment. Instinct, like all human faculties, is liable to error. Those in whom reason is weak are often unwilling to admit this as regards themselves, though all admit it in regard to others. Where instinct is least liable to error is in practical matters as to which right judgment is a help to survival: friendship and hostility in others, for instance, are often felt with extraordinary discrimination through very careful disguises. But even in such matters a wrong impression may be given ... It is such considerations that necessitate the harmonising mediation of reason ... In this there is no opposition to instinct as a whole, but only to blind reliance upon some one interesting aspect of instinct to the exclusion of other more commonplace but no

⁵⁰ Ibid.

⁵¹ Ibid [135].

⁵² Ibid [110], [139].

⁵³ (2005) 215 ALR 213, [139].

less trustworthy aspects. It is such one-sidedness, not instinct itself, that reason aims at correcting.⁵⁴

Anyone familiar with law reports can imagine this sort of passage being reproduced without moment. The whole passage reads as if it were the utterance of a Lord Radcliffe or Viscount Haldane.

Contrast the approach of Windeyer J in his portentous analysis of causation in *National Insurance Co of New Zealand Ltd v Espagne*⁵⁵ where, unlike our two modern judges, he roamed outside the law into philosophy and discussed JS Mill, Bradley, Bosanquet, Cicero, Francis Bacon and St Thomas Aquinas. Of his style, Heydon J commented extra-judicially:⁵⁶

He did not only refer to English institutional writers like Bracton, Fleta, Littleton, Fortescue, Coke and Blackstone and English cases ... He analysed Roman law, canon law and the laws of Ancient Greece. He looked at the laws of Modern Europe, Latin America and Quebec. He considered Scots law, Roman-Dutch law and United States law. He referred to the Institutes of Justinian, to the legal works of Puffendorf, Grotius and Pothier, and to Voltaire. He referred to English legislation over four centuries — statutes enacted in 1540, 1552, 1576, 1660, 1661, 1753, 1823, 1835, 1836, 1856, 1857, and 1884 — and to Australian legislation. This result could not have been the result merely of parasitic ‘research’.

Later, Heydon J was able confidently — ‘dogmatically and deliberately’ — to say that:

Those grappling with a legal problem to which one of Windeyer J’s long single judgments is relevant will usually not find a better starting point — or finishing point — than that judgment ... not only technically learned, but rich in its wise and calm understanding of human nature and human conflict.

Philosophy is not without consequences in the law. It teaches one how to write argumentatively and systematically. It makes one attentive to and careful about method. It forces one to be explicit about premises and to demonstrate how conclusions flow from them. It may demand elaborately reasoned answers to the most basic questions.

To revert to the President of the Court of Appeal of New South Wales, ‘[R]efreshing and occasionally useful insights may come through religious studies, history, the philosophy of the mind or probability theory’.⁵⁷ This, he asserts, is better than a ‘closed circle of self-referential ideas’, referring later to Lord Atkin who ‘had the

⁵⁴ Russell, *Selected Papers* (1927) 28–31.

⁵⁵ (1961) 105 CLR 569, 583–601.

⁵⁶ JD Heydon, ‘Outstanding Australian Judges’ (2005) 7 *The Judicial Review* 255, 267; remarking particularly upon Windeyer J’s judgment in *Attorney General (Vic) v Commonwealth* (1962) 107 CLR 529, 576–600.

⁵⁷ Mason, above n 45, 584.

parable of the Good Samaritan as much as the existing case-law in mind when he enunciated the morality-based neighbour principle'.⁵⁸

V CONCLUSION

It may be that the circumstances in which a lawyer is called upon to create the law arise infrequently. Yet the most formalistic practitioner is often forced to think about the best way to solve a legal problem absent judicial assistance from decided cases. For at least a century now, law across the common law world has been pursued as an academic discipline as much as a professional one and academic instruction has become the gateway to practice. Despite this, an emphasis on the applied over the pure stifles overt acceptance of the importance of theory to practice.⁵⁹ We have not moved on from Francis Bacon, who said of theory and practice in his *Novum Organum*, '[O]ne without the other is useless and perilous; knowledge that does not generate achievement is a pale and bloodless thing, unworthy of mankind'.⁶⁰ May we not run an equally perilous risk by attempting to achieve without knowledge, without wisdom? In Holmes' words, 'we have too little theory in the law rather than too much'.⁶¹

⁵⁸ Ibid.

⁵⁹ This is a trend in vocation-based education today, not unique to law.

⁶⁰ Durant, above n 25, 133.

⁶¹ Oliver Wendell Holmes, Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 476.