

Keep Calm and Carry On: Why the Increasing Automation of Legal Services Should Deepen and Not Diminish Legal Education

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Introduction

The legal profession is not immune from the impact of rapid technological advances. Today, it is difficult to locate anyone who has not reached some level of acceptance of that truth. These advances are not limited to the way that information is stored, accessed and retrieved – though the speed at which vast amounts of material may be searched and sorted is radically transforming (most obviously) the laborious process of discovery. Certainly, technological developments have increased the pace and efficiency with which traditional legal services are provided. However, the more drastic changes are those that threaten to displace or rival the provision of those services themselves by the introduction of Artificial Intelligence and the development of platforms for cheap and easily obtainable automated legal advice.

Depending on your perspective all of this may be highly attractive and liberating or perhaps a little anxiety inducing. But it cannot be ignored. That is another truth which it is hard to find anyone deny. Legal educators are as attuned to the need to respond to these changes as those in legal practice – indeed possibly more so given that we work on the frontline of intergenerational change as students show us entirely new ways of ‘being’ in the world, of connecting and working with others.

So calls for changes in what and how we teach in law schools have long since passed the point of being cutting edge or revolutionary. The need to respond to so-called ‘digital disruption’ is unarguable. But there is a risk that legal educators will react in an alarmist and unmediated fashion to the future challenges of a changed legal services market – losing sight of what makes legal education distinctive and, we believe, will continue to be valued. We suggest in this article that we should appreciate the changes bearing down on us as creating opportunities. These are not only for an embrace of all that is new, but also for the enrichment of those traditional and defining features of legal education that may be expected to endure, if not actually increase in value, as legal practice continues its transformation.

New rivals to university legal education

This focus on the distinctiveness of a university law school education is, we submit, vital to how we go about responding to the rise of ‘disruptive innovators’, offering alternative forms of education and training. Recently, two American authors, Michele Piston and Michael Horn, presented that alternative in the following terms:

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Online technologies make it possible to modularize the learning process ... Modular flexibility enables online competency-based providers to create and scale a multitude of stackable credentials or programs for a wide variety of audiences. ... And teachers of these modules can come from a wide range of backgrounds, many outside the traditional legal academy. Lawyers, judges, administrative agencies, anthropologists, psychologists, sociologists, historians, business leaders, communications experts, among many others, can provide well-designed modules on topics relevant to lawyer-based competencies.¹

The authors go on to prescribe the ‘new paths’ that law schools must take to counter the rise of these ‘online competency-based providers’. In so doing, it appears, at least in the picture which they paint, that Ivy League American legal education is distinctly behind the more dynamic, diverse and experiential practices of Australian law schools. In that sense, the gulf between how things are done and how things will need to change in legal education appears to be far greater in the USA than it does here.

While that is welcome news, much of what Pistone and Horn prescribe has at least some degree of relevance to the traditional methods and formal structure of law school education. But their suggestion that traditional (or ‘incumbent’) legal educators should get on board with modular education allowing ‘stackable credentials’ by offering specialised undergraduate or JD degrees in law – so a student does an LLB (Commercial) or a JD (Criminal) – has two obvious problems. First, what such a model claims as flexibility and specialisation may be better described as fragmentation, ensuring a precocious insularity of the legal knowledge possessed by graduates. Second, there is a danger that this apparent prioritising of *areas* of knowledge will inhibit not only the formation of a broad, ethical legal culture amongst those receiving legal education (itself an important topic, but outside the particular focus of this article), but also the development of underlying methods of legal analysis and reasoning. These are the critical intellectual skills that legal education offers and which should not be overrun by the wave of innovation that is upon us, with its attendant need for the development of new professional skills of a technical nature.

Fifty years ago, Professor William Twining, the pre-eminent post-WWII voice on legal education in the common law world, gave his influential lecture ‘Pericles and the Plumber’.² This highlighted the tensions in legal education between law as a rarified intellectual field of study on one hand and essentially practical, vocational training on the other. He rejected both images as implausible and based on hopelessly reductionist models of ‘the lawyer’ that emerged from each. That piece had acute resonance for Australian law schools in the immediate aftermath of the 1987 Pearce Report, particularly in the choices made when creating the ‘third wave’ of law schools in the early 1990s. Fortunately, the emphasis on practical skills development that emerged as a significant priority at that time did not, overall, see law schools forsake attention to legal reasoning and jurisprudence. It may even be argued that a greater engagement with sociological legal research and inquiry by law schools over the same time went hand in hand with the transition of pure ‘skills acquisition’ to a more holistic emphasis on experiential learning.

¹ MR Pistone and MB Horn, *Disrupting Law School: How disruptive innovation will revolutionize the legal world* (Clayton Christensen Institute for Disruptive Innovation: 2016) 17-18.

² W Twining, ‘Pericles and the Plumber’ (1967) 83 *Law Quarterly Review* 396.

Over thirty years after that original lecture, in 1998, Twining showed remarkable prescience for our current challenges when, revisiting ‘Pericles and the Plumber’, he declared ‘legal professions in the modern world are so stratified, hierarchical, and fragmented that concepts like “the lawyer” or “the legal profession” are little more than fictions’.³ This challenged attempts to identify a core of required knowledge or ‘fundamental’ skills to be developed through legal education – an exercise about which he was enduringly skeptical, saying that the answers tend only to emphasise ‘matters that link rather than differentiate law from other occupations’.⁴ The language of ‘stackable credentials’ may not be one likely to be adopted by Twining, but that term bears a relationship to his view that law has no monopoly on ‘general intellectual skills of analysis, synthesis, oral and written communication, ... team work, and problem solving’. Similarly, although he accepts that such skills must be developed in the context of an individual’s chosen professional field, his view that ‘law is not one locality’ and ‘[d]ifferent lawyers need different local knowledges’ may be said to align with the call for much greater specialisation in legal education as a response to the diversification of legal services opening up with technological change.⁵

And yet, as Twining acknowledged, the question ‘what does it mean to be a lawyer?’ remains both relevant and legitimate as a lens for discussion about the reform of legal education. Richard Susskind’s description of ‘Tomorrow’s Lawyers’ has much in common with Twining’s rejection of monolithic models of a legal professional identity; he similarly highlights the variety of legal jobs for which law schools need to start preparing their students, including legal project management, knowledge manipulation, legal technologies and online dispute resolution.⁶ But he is emphatic that changes to legal education in response to technology-altered work practices should not see an abandonment of teaching students about ‘legal method – how to think like a lawyer, how to marshal and organize a complex set of facts ... how to reason with the law (deductively, inductively, analogically), how to interpret legislation and case law, and more’.⁷ These will remain relevant even to the ‘new’ legal jobs, reflecting the general acknowledgment that the debate about how changes to legal practice will drive change in legal education is really over what is to be added in terms of ensuring lawyers have *breadth* – that is, ‘the ability to collaborate across many disciplines’ – married to the *depth* of legal knowledge that law schools have traditionally fostered.⁸ That is undeniably a challenge in terms of redesigning legal education, but let’s be clear: the need for depth remains.⁹

The pressures on legal education caused by the emergence of ‘new’ legal jobs join pressures now familiar to all Australian law schools: today, university law schools are

³ W Twining, ‘Pericles regained?’ (1998) 1 *Legal Ethics* 131, 132.

⁴ Ibid 153.

⁵ Ibid 151.

⁶ R Susskind, *Tomorrow’s Lawyers* (OUP, 2013) 136.

⁷ Ibid 137.

⁸ R Amani Smathers, ‘The 21st-Century T-Shaped Lawyer’ (2014) 40(4) *Law Practice Magazine* <https://www.americanbar.org/publications/law_practice_magazine/2014/july-august/the-21st-century-t-shaped-lawyer.html>.

⁹ Bennett Moses points to the need to understand the limitations of automated systems even in the teaching of complex skills of communication and writing, let alone the analysis and problem-solving of legal issues: L Bennett Moses, ‘Artificial Intelligence in the Courts, Legal Academia and Legal Practice’ (2017) 91 *Australian Law Journal* 561, 569.

educating a large percentage of students for careers entirely outside of the law. With the increase in legal education providers, law student numbers and the reduction in law-related jobs (both as practising lawyers and in the 'new' legal job market), this is set to continue. Law schools are thus now confronted with a reality in which they are responsible for preparing students for legal practice, for new law jobs and for careers outside of the law. Undoubtedly, legal educators must provide students with the necessary attributes for admission to legal practice, but they must do so while also meeting the educational needs of this broader cohort.

The debates over technological change in the legal profession and its implications for legal education, as well as the more general diversification of law students reinforce rather than undermine some key commitments and observations made about legal education in recent times in Australia and the UK. Notably, these acknowledge the need for critical and analytical thinking as a fundamental core of legal education. In 2000, the Australian Law Reform Commission Report, *Managing Justice: A Review of the Federal Civil Justice System*, explained that 'professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility'.¹⁰

The 1996 report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC), in England, stated that the first goal of legal education in England should be:

Intellectual integrity and independence of mind. This requires a high degree of self-motivation, an ability to think critically for oneself beyond conventional attitudes and understanding and to undertake self-directed learning; to be 'reflective', in the sense of being self-aware and self critical; to be committed to truthfulness, to be open to other viewpoints, to be able to formulate and evaluate alternative possibilities and to give comprehensible reasons for what one is doing or saying. These abilities and other transferable intellectual skills are usually developed by degree level education.¹¹

In Australia we now see these abilities and skills reflected in regulatory requirements, such as the AQF Standards and the Threshold Learning Outcomes, which require graduates with both knowledge of legal principles and processes, as well as the foundation of informed and independent judgment.¹²

¹⁰ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Commonwealth of Australia, 2000), [2.77].

¹¹ Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (1996), 21.

¹² For instance, critical thinking is mentioned explicitly as a skill requirement in AQF level 7 (bachelor) and AQF level 9 (masters) degrees. Law degrees at the undergraduate and postgraduate level must reach the requisite AQF standards. It is instructive to compare the standard required for a JD (AQF Level 9) with that required for an LLB (AQF level 7). At Level 7, graduates of a bachelor degree will have: cognitive skills to review critically, analyse, consolidate and synthesise knowledge; cognitive and creative skills to exercise critical thinking and judgement in identifying and solving problems with intellectual independence. At Level 9, graduates will have: cognitive skills to demonstrate mastery of theoretical knowledge and to reflect critically on theory and professional practice or scholarship; cognitive, technical and creative skills to investigate, analyse

Professor Carolyn Evans, as Dean of the Melbourne Law School, declared that '[w]hile our future lawyers need to work in a digital world, it remains all the more important to recognise the value of some important elements of traditional legal education including research, critical thinking and analytical skills'.¹³ We take the point one step further: the unpredictable directions in which technology may take us, and the burgeoning diversity of the legal services market and opportunities for career mobility that will ensue, means that law schools must maintain a commitment in their curricula to affording students meaningful and disciplinary-based opportunities for deep learning and critical skills development.

The Genesis and Design of a Course in Contemporary Constitutional Law

It was with those commitments that we approached the design and implementation of a new elective course at UNSW Law in 2016: *Contemporary Constitutional Law*. Our focus was on offering, in our sub-discipline of constitutional law, a fresh opportunity for students to deepen their understanding of that area (and, not unimportantly, our own as teachers and researchers). We were aware that for at least some of these students a career in public law practice was in their sights. The acquisition of professional legal skills was on our radar in designing and teaching the course. But the skills development we particularly had in mind was closely allied to the form of deeper learning distinctive to a legal university education. In short, we wanted to develop students' capacity for analytical and critical thinking. This is an objective we see as complementary, not antithetical, to the needs of a practising lawyer, as well as being one that delivers important and ongoing learning outcomes for those planning more diverse future careers.

In brief, the course focused on recent cases argued before the High Court, requiring students to read the judgments in those cases, the submissions before the Court, or, in some instances, both. Our objective was to develop and deepen students' skills in case analysis and critical engagement with legal argument and judicial reasoning. We gave students a number of key preparatory tools to achieve that.

First: In the first two foundational weeks of the course, we set readings and guided discussions that gave students many of the tools that would be used to analyse the High Court's jurisprudence throughout the course. These weeks required students to consider the role of the High Court as a constitutional court in a more detailed manner, with readings set from current (or recently retired) judges on the role of the judge, judicial independence and the collective dynamics that affect High Court decision-making.

and synthesise complex information, problems, concepts and theories and to apply established theories to different bodies of knowledge or practice; cognitive, technical and creative skills to generate and evaluate complex ideas and concepts at an abstract level. See also TLO 2, which includes an ability to 'recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community'. TLO 3 includes the ability to identify and articulate legal issues and apply legal reasoning and research to generate appropriate responses to legal issues as well as: (c) engage in critical analysis and make a reasoned choice amongst alternatives, and (d) think creatively in approaching legal issues and generating appropriate responses.

¹³ C Evans, 'Digital Disruption and the Law', *Pursuit* <<https://pursuit.unimelb.edu.au/articles/digital-disruption-and-the-law>>.

Second: Once the course moved from its foundational phase to the analysis of contemporary cases, we provided an interim, ‘modelled’ class. We understood that simply expecting students to step up to a critical discussion of legal principle and reasoning might be daunting, and students may feel ill-equipped to do so. We therefore started by giving students an opportunity to watch us model a critical case discussion, and to understand how different academic reflections could emerge of the same case. Students could observe how we engaged with the detail of the case in this discussion, how we might interpret the reasoning differently, and how we might bring different critiques to the judgments.

Not only were students able to see over what issues we disagreed, but also how to express disagreement, and ask questions of others in a respectful but probing manner. These modeled dialogues also provided students with an opportunity to witness how a semi-formed view might be expressed, explored, and changed. Indeed, we would often change our own positions in the course of the dialogues, providing students with an opportunity to witness how the questioning of assumptions behind a position can bring about a change in that position.

We were able to undertake this modeling because we co-taught the course. By ‘co-taught’, we mean that we were in the same classroom. This was both a highly enjoyable and we believe highly useful decision. It allowed us to model critical discussion, it allowed us to learn from each other both in terms of teaching style and content, and it allowed different teachers to concentrate on different tasks in the classroom.

Third: As often the cases we set raised issues of law that students might not be familiar with – or students might need to revise – the suggested pre-reading for each week usually consisted of extracts from relevant texts to assist students in understanding the legal context in which the case was argued and either was or would be decided. Further, in the week preceding the case analysis, one teacher provided a ‘mini-lecture’ to give an overview of the topic and provide some background and context to the legal principles involved.

Fourth: Acknowledging that students often had little experience in reading full cases and may find this task overwhelming we introduced a tabular technique that we encouraged students to use to grasp, particularly in complex, multi-issue and multi-judgment cases, how the different judges decided the different issues and how this led to the ultimate result. We would often ask students to complete this table at the start of the class together, so that the whole class could understand the legal reasoning of each judge.

Fifth: To ensure students’ understanding of the case, as well as to assist them in analysing the relevant principles, judicial reasoning and consequences from internal and external perspectives, we provided them with a series of questions. These questions were:

- What was the procedural background to the case?
- Who was the plaintiff/applicant/appellant and *why* were they bringing the challenge?

- What is the political background behind the legislation under challenge?
- What are the key legal questions upon which the case was decided?
- Were there any interveners and/or amici curiae? What position did they take and why?
- Did the judges choose to set aside and not determine any issue that was argued by the parties? If so, was that a well-justified choice?
- Can you follow the logic of the reasoning of the judgments? To check the logic of the judgments, check (1) is the argument based on sound premises? (2) do the premises support the conclusion?
- Consider the different judgments – what are the major points of difference between them?
- To what extent is history used by the different judgments – do you consider this to be a legitimate use of historical material?
- How would you describe the interpretative methodology used in the different judgments? Why do you think particular judges adopted a particular methodology? Do they explicitly acknowledge or justify the method or approach taken? Was there an alternative approach? Why wasn't this adopted?
- Are the judgments informed by constitutional principles (such as federalism, responsible government, democracy)? What do the judgments reveal about the judges' conceptions about these principles? Where do these come from? Are there competing, alternative conceptions of these principles discernible in the other judicial opinions in the case or earlier decisions of the Court?
- To what extent is the majority approach consistent with the previous authority in the area? If it is not consistent, why do you think there has been a shift?
- Did the practical consequences of the outcome inform the judgment? If so, how?
- Do any of the judgments use international and foreign jurisprudence? If so, how? Is this a legitimate way of interpreting the Constitution?
- Does the judgment reveal anything about the judges' conceptions of the role of the Court? What about their values and politics?
- Does the case reflect tensions that exist in the broader community? How will the decision affect government and the community? Will there be groups who benefit from the decision, and groups who will be disadvantaged?

Sixth: To assist with students' preparation, every week, one group was allocated the task of providing a 'preliminary case analysis', that was reviewed by the teachers for accuracy and then shared among the students. Students preparing this maximum three-page analysis were required to set out the reasoning and then were encouraged to include what they thought the key issues in the case were, and consider different critical perspectives to bring to them. The group that prepared the case note was given the responsibility of initiating the discussion with the full class, not just ensuring sufficient understanding of the case but opening up opportunities for their classmates to participate.

Seventh: We invited practitioners and other experts to classes (where possible) to contribute to case discussions. This provided a further alternative view to discussions,

and allowed students to understand the wider context in which the decisions were made, and how contingent and path-dependent judicial decisions are. Practitioners and experts spoke to students about matters such as the availability of facts before the court and how this affected the High Court's decision, the extent to which particular arguments were put to the judges, and why.

Evaluating the course and the student experience

The course has been offered only once so far. Apart from inviting student feedback at any time through the semester, we devoted part of the final class to a discussion of the students' experience, specifically inviting comment on aspects such as the balance of cases as against more aerial or holistic perspectives, the use of video for practitioner perspectives and excerpts from High Court hearings, the requirement to analyse pre-hearing submissions, the seminar with public law practitioners and the significant element of student-initiated discussion through the team-based preliminary case analyses produced each week. We were also able to gather additional student feedback anonymously through the University's centrally managed online system for course and teaching evaluation.

We collected a range of useful observations, which will be used to inform future course planning. Overall the course was well received, as rich, interesting and enlightening. Students commented, often favourably (we are pleased to report), on the demands placed on them to deepen and broaden their comprehension of constitutional decision-making and litigation. Many students registered the unfamiliarity, but also the satisfying experience, of engaging so thoroughly with legal materials as part of their preparation for class. This was not just about reading more novel items such as pre-hearing submissions, but also simply the necessity to read High Court judgments in full. Legal education is necessarily dominated much of the time by an extract-based approach to cases that can interfere with a full appreciation of context. Our own perception about the group-based assessable task (the 'preliminary case analysis') was that students rose to a demanding new challenge. The responsibility to provide classroom peers with a written brief that accurately captured the legal dimensions and served as a catalyst for broader class discussion lifted the quality of technical and critical engagement we had previously seen from the same students in compulsory constitutional courses.

What we also saw dawn on students was the revelation of the contingency of legal outcomes. That is, the dependency of those outcomes on internal and external factors, including the resources to litigate and the opportunity to obtain necessary factual material. By hearing from practising lawyers, and by encountering the litigation process through pre-hearing submissions, they were often surprised to discover the creative complexity of developing legal arguments in such contingent and resource-dependent circumstances. These were simultaneously practically useful insights for lawyers of tomorrow *and*, intellectually, the deepening of students' knowledge, understanding and critical evaluation of Australian constitutional law.

It was the close technical and critical analysis of these contemporary cases that exposed to students the human and societal contingency of legal outcomes. It revealed to them how results in major litigation are 'path-dependent'. Any number of choices and decisions at key points in the policy-making and legal process could have altered

the situation of affected people or diverted litigation off onto a different course and potentially a different outcome: whether it be how the factual substratum of a case was established, who litigated a case and why, how the exercise of statutory interpretation should be carried out, and so on. If the humans are to manipulate the machines, rather than the other way around, then surely one thing society needs is lawyers in a position, ethically and intellectually, to appreciate the nature and importance of such potentially determinative choices. And, analogously perhaps, to comprehend the nature and importance of assumptions that pre-exist any algorithm that might purport to resolve legal questions.

Conclusion

Law schools must keep pace with the reality that technology is becoming embedded in, and to some extent reshaping, workplaces that focus on legal tasks and legal judgment. But part of the response to the challenge and opportunity created by rapid technological change should be to sharpen the quality and distinctiveness of university legal education. We can support our students in developing high-level skills in legal reasoning and critical analysis, as well as content knowledge of specific legal doctrines. Simultaneously, through exposure to and discussion of the realities of law as it is practised and as it impacts on members of the community and the political process, we can encourage them to develop discerning professional judgment and a well-grounded appreciation of the law in its broader societal context.

These are well understood to be durable educational objectives that will continue to prepare graduates well for a wide range of occupations in tomorrow's workplace. In particular, they offer the opportunity to develop critical thinking and analytical skills, as well as the capacity for mature and contextualised human judgment, qualities that will surely be needed more than ever as machine-operated processes increase.