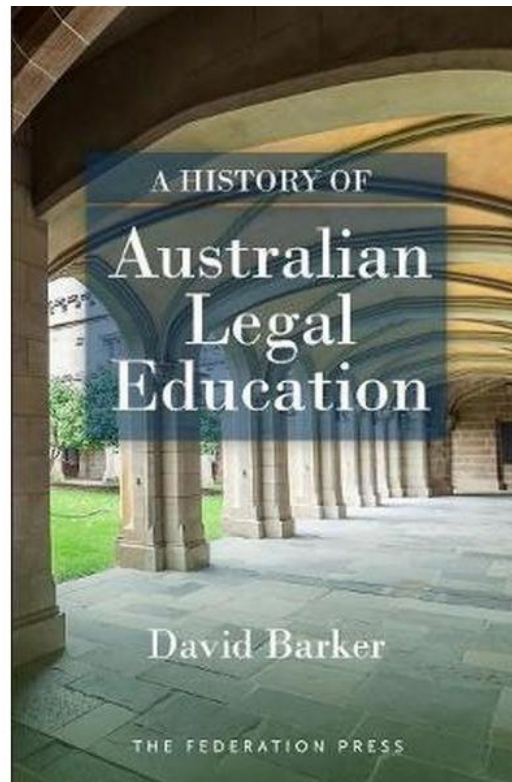


David Barker, *A History of Australian Legal Education*, 2017, Federation Press, 275pp.

Review by David Ash



*In ten years we're gonna have one million lawyers,
One million lawyers, one million lawyers.
In ten years we're gonna have one million lawyers.
How much can a poor nation stand?!*

On 21 August 2017, the US president and millions of his fellow citizens celebrated a total solar eclipse. On 21 August 1770, a year or so after a transit of Venus,

Captain James Cook laid claim to the eastern coast of Australia. Since then, Australia's national development has included identity struggles both internal and external. A theme of the latter has been the eclipse of British hegemony and the emergence of a US one.

Whether the 2017 eclipse indicates the emergence of Chinese hegemony remains to be seen. What we can say is that the shift from the UK to the US has been dogged by the rise of the lawyer. A meagre ten of Britain's 54 prime ministers read at Inns of Court, 11 if you include Disraeli who didn't complete his studies. Contrast this with the US, where over half of presidents have been lawyers. Is Australia's difficulty in working out where it stands with these two English-language powers reflected in our electoral diffidence, as just on one-half of our prime ministers have been qualified lawyers? Struth Ruth, whither thou goest or not?

Everything has its good bits and its bad, and the getting of a formal education in the law is no exception. Law is both a science and anything but. A science, in the sense that its essence is the asking of questions. Anything but, in the sense that its practitioners and their clients require finality.

The question for legal education, as David Barker observes in this elegant history, is whether it "can satisfactorily meet the twin objectives of training individuals as legal practitioners and providing a liberal education that facilitates the acquisition of knowledge and transferable skills".

John and John Quincy Adams both went to Harvard and both became eminent lawyers. Neither, however, went to Harvard Law School; it didn't exist until 1817. Christopher Columbus Langdell was its dean for much of the second half of the 19th century and introduced the case method. The law school itself described the method in these terms; it:ⁱⁱ

- *Uses a court decision to exemplify principles of law*

- *Employs “hub-and-spoke” discussion between professor and student, otherwise known as the Socratic method*
- *Analyzes the dilemma after it has been resolved*

Sounds like a plot outline for *The Paper Chase*.



John Houseman discovers legal education.

[Source media.salon.com/2013/04/housman_paperchase2.jpg]

England – and therefore Australia – did not follow this development. Rather, the prevailing method was and for some institutions continues to be, lectures. Barker quotes the description of another commentator: “the imparting of information in the form of legal principles, rules and propositions... to be committed to memory for examination purposes.” It puts in perspective the casebooks which have often

been issued as supplements to Australian texts; I suspect that they were intended to stimulate an adoption of the case method, and I suspect most students used them to read only what they had to, for the passing of exams.

Which method creates more positivists is a matter for debate. One major influence of both methods is a focus on the common law in contrast to the statute. It has been said of Sir Frederick Pollock – who with Sir Frederic Maitland dominated Oxbridge legal education during roughly the same period – that he:

... helped to establish law as an academic discipline and to arrange matters so that the common law was studied as the core of that discipline with statute only as a relatively unimportant appendage...

The idea of the statute as an appendage continues to have a profound effect in Australia. Bill Priestley QC has been an outstanding appellate judge. In 1992 he chaired a Law Admissions Consultative Committee which delivered a core of eleven subjects now known as the Priestley 11. This year, the editor of the *Australian Law Journal* the Hon Francois Kunc observed:ⁱⁱⁱ

Readers who have followed the debate about the adequacy of the “Priestley 11” will be aware that perhaps the most frequently suggested “new subject” is statutory interpretation. The volume and scope of statute law has grown well beyond what lawyers of past generations would have ever imagined. That expansionary trend continues.

As well as introducing the case method, Dean Langdell, who came from a modest background, also introduced the system of blind grading. Given that Columbus is the capital of Ohio, he would have been delighted to see the system footnoted by the US Supreme Court when it ruled in *McIntyre v Ohio Elections Commission*. Mrs McIntyre of Westerville, a northeastern suburb of Ohio, handed out unsigned and therefore illegal leaflets opposing a school levy.

Ohio has not shown that its interest in preventing the misuse of anonymous election related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be

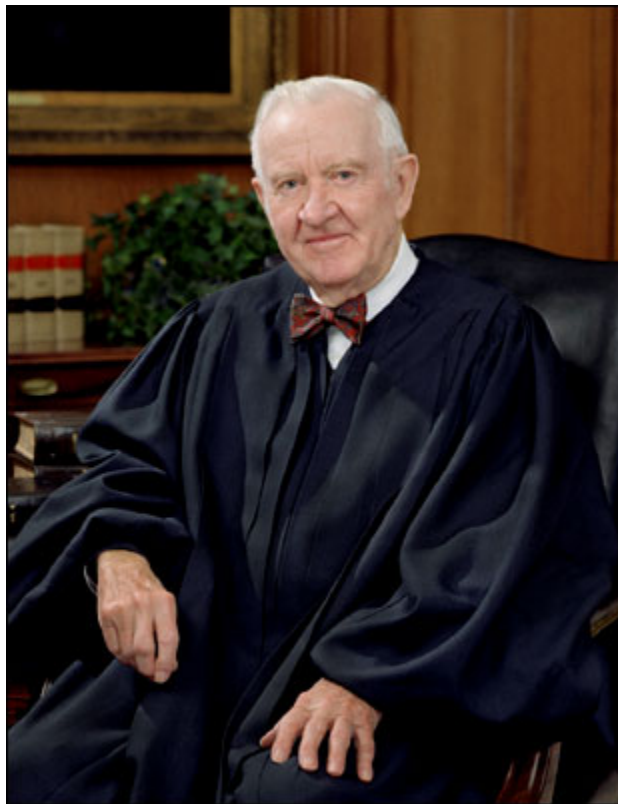
hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.

In the course of his reasons, Stephens J for the Court said:

Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.

In a footnote furthering that proposition, the judge observed:

Though such a requirement might provide assistance to critics in evaluating the quality and significance of the writing, it is not indispensable. To draw an analogy from a nonliterary context, the now pervasive practice of grading law school examination papers "blindly" (i.e., under a system in which the professor does not know whose paper she is grading) indicates that such evaluations are possible – indeed, perhaps more reliable – when any bias associated with the author's identity is prescinded.



Do all US legal scholars wear bow ties?

[Sourced from the public domain]

A significant shift in the law's understanding of its own sovereignty has been occasioned by the growth of democracy, in particular the spread of the electoral franchise. A common law which allows commoners to become practitioners is A Great Thing; a common law of practitioners which excludes persons who are neither Anglican nor white nor male is quite another.

This change has percolated into and from our law schools. The most marked – not the only, but the most marked – growth in recent generations has been a huge influx of women students. There are many reasons for this, but the author rightly does not pass up mention of pioneers.

William Pitt Cobbett was Sydney University's pre-eminent legal academic at the end of the 19th but another who opposed the admission of women. It was rumoured that his sabbatical had to occur before the remaining powers-that-were could summon up the wherewithal to admit Ada Evans as a student. Pitt Cobbett's attempt to persuade her to move to medicine did not succeed and she graduated in 1902. Incidentally, Pitt Cobbett left a huge estate which created a number of problems, one reaching the High Court. As his biographer (FC Hutley, the distinguished jurist and law lecturer) later noted:

In his death he joined the large band of distinguished lawyers whose unsatisfactory testamentary dispositions benefited his profession.

On the other side of the nation, Edith Haynes had been permitted to register as a student (and was articled to her father) but in 1904 was refused admission to the intermediate examination by the Western Australian Barristers Board. A writ of mandamus directed to the Board failed^{iv} and things only changed with the 1923 Women's Legal Status Act. Unsurprisingly and while my Google search for "Women's Legal Status Act" has thrown up 916 hits, "Men's Legal Status Act" has thrown up precisely zero.

TELEGRAPHIC.

A WOULD-BE LADY LAWYER.

CASE OF MISS HAYNES.

APPLICATION REFUSED.

PERTH, Aug. 10.

An application was heard before the Full Court to-day on behalf of Miss Edith Haynes for an order compelling the Legal Practitioners' Board to allow her to present herself for examination with a view to admission to the profession.

An affidavit was filed in the case, stating that the applicant had been duly articled in a solicitor's office and that she now wished to present herself for her first examination.

Mr. Haynes, K.C., appeared for the applicant, who is his niece.

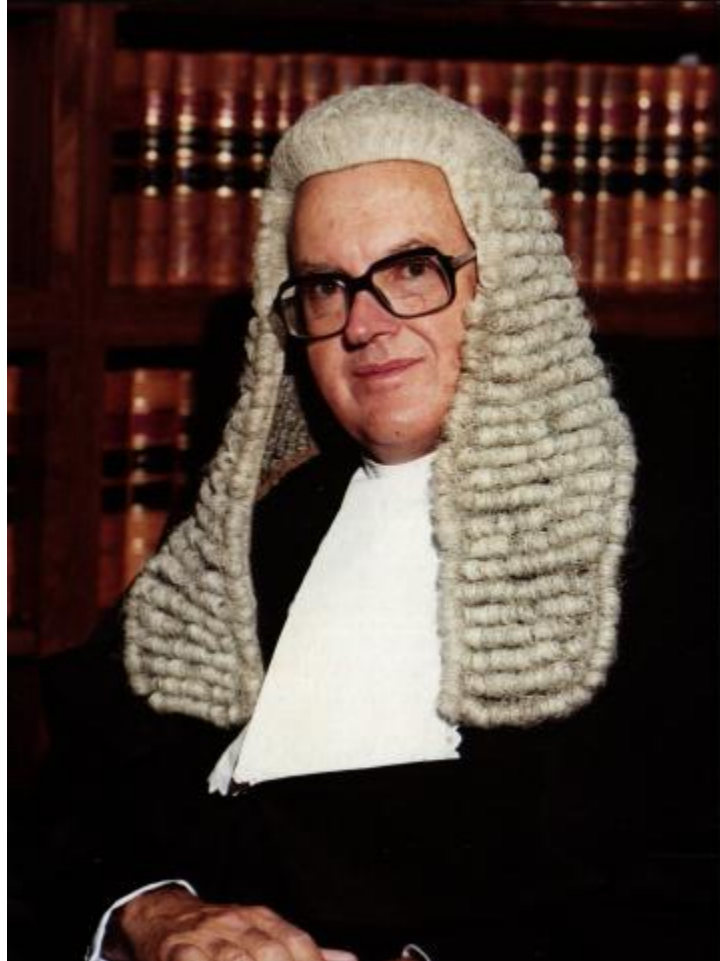
The court decided against the application.

The Chief Justice said that the court would follow the decision given by the Lord Chancellor in England in the case of Miss Cave, who wished to be called to the Bar, and in whose case the Chancellor decided that as there was no precedent for such a course he would not create one.

The great cave of the common law, or shades of Plato.

[Sourced Kalgoorlie Miner, p 5, Thursday 11 August 1904]

Litigation, of course, is not the sole domain of female legal students. Harry Gibbs, later Australia's chief justice, sued the Queensland Barristers Board for failing to exempt him as a first class honours students from fees. He and his friend Tom Matthews won.^v



Student litigant to chief justice of Australia.

[Sourced from legalheritage.sclqld.org.au/exhibitions/sir-harry-talbot-gibbs-pc-ac-gcmg-kbe-qc]

The author characterizes the evolution of legal education in Australia as the pre-war formal, the post-war innovative, and the creative. Very few of us remain to recall the first, but the innovative was a colorful period for tertiary education everywhere: the writers of the Judean Peoples' Front sketch were at Cambridge in the 60s, after all. I well recall Sydney University's splits; the economics faculty; the philosophy department; battles in English (probably conducted in old English); and of course jurisprudential jousting in Phillip Street. The author gives particular space to the highly publicized battles at Macquarie University, catching the mordant observation of Bruce Kercher on this distraction from his development as a doyen of Australian legal history:

There was a lot of exaggeration in the press too. Eventually it broke into two factions and in the middle sat the majority of staff who watched the bombs fly overhead. Most of us ducked and tried to avoid the flak and got on with teaching and research.

It is the last evolutionary phase, the creative, which is the most important for legal education's current participants, for it draws together two developments which inform and plague modern tertiary education, commercialization and internationalization.

The apparent starting point for the last phase is 1989, the commencement of what the author dubs "An Avalanche of Law Schools". I say "apparent" because two important events had occurred two years before, the delivery of the Pearce Report and the commencement of the Dawkins reforms. Much of the value of this book is its effective overview of the ensuing years. Colourful comments from senior academics is included, for example David Weisbrot on the Report and Margaret Thornton on reform, respectively:

The Dawkins reforms, which brought an end to the binary system in Australia in 1988, signalled the beginning of the end of the idea of the university as envisaged by Newman, and its replacement with the idea of the university as a business.

and

The central message of the Pearce Report on Australian Law Schools was that legal education in Australia is being run on the cheap, and this is a Bad Thing. The moral for Vice Chancellors, University Councils, and Governments, however, is that legal education in Australia can be run on the cheap, and this is an Absolutely Splendid Thing.

The author covers significant areas beyond the academy, such as alternative entry points for students and access to free legal information. However, it is the marriage of legal training and the academy – a relatively recent affair in the common law – that is the great value of the author's work. Recently a well-regarded journalist in the Fairfax stable reported under the heading "Universities have been turned into aimless, money-grubbing student exploiters". Perhaps, but many say Fairfax might

soon be out of business. Where do we strike the balance? David Barker provides no business plan. He suggests merely that the law schools stick to what they have done well, striking a balance of training practitioners and providing a liberal education. There will always be a place for the academic purists and the high priests of finance to have their battles, but I rather like Barker's implication that common sense is a learning in itself. As Newman said, Men will die upon dogma but will not fall victim to a conclusion.



And don't mind the use of "men": he also observed that "Ability is sexless".

[Sourced from johnhenrycardinalnewman.org/]

ⁱ Tom Paxton, chorus to "One Million Lawyers". It was released in 1985. There are now 1,315,561: [ABA Lawyer Demographics, Year 2016](#).

ⁱⁱ <http://casestudies.law.harvard.edu/the-case-study-teaching-method/>.

ⁱⁱⁱ Kunc, "Current Issues" (2017) 91 ALJ 343, 345.

^{iv} *In Re Edith Haynes* [1904] 6 WALR 209.

^v [1939] Case 32 QWN 52.