Online Access to Legal Information and the Challenge to the Legal Concept of Authority

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MA Thesis submitted to the Faculty of Arts and Social Sciences, University of Technology Sydney, 2014

CERTIFICATE OF ORIGINAL AUTHORSHIP

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

I further acknowledge the assistance of my supervisor Dr Theresa Anderson in the development of this thesis.

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Abstract

Law is an authoritative practice. Hard copy texts have been until relatively recently the key repository of rules and commentary relied upon in the practice of law. Every law student quickly learns that any statement of law must be supported by reference to corresponding authority: that is the relevant judicial decision or section of an act. The reference will be by a unique citation identifying the specific materials. Without reference to primary authority, a statement of law has limited weight or credibility. It is because of the profession's traditional reliance on textual authority the law library has been described as the lawyer's equivalent of a scientist's laboratory.

The traditional hard copy law library comprised not only statements of law and commentary but materials which enable the holdings to be navigated, such as indexes, citators and encyclopaedias. These reference materials helped guide a researcher to the most relevant and significant sources.

The hard copy medium of the content also required a particular physical arrangement in a library. The distinctive binding of the respective reports and reference materials, the classification and chronology of materials as well as the placement on shelves reflect and maintain the hierarchy. A legal researcher was trained to be familiar with the topography of a law library.

But what happens when law resources become available online and the topography of the library and the visible and tangible hierarchy of texts becomes hidden? In the nineties there were scholarly predictions that online access to legal materials would impact on the stability of law. This thesis looked back over twenty years to see if these predictions had been borne out. On discovering there had not been a dramatic change the thesis uses the opportunity to examine law from the discipline of information science to clarify how knowledge is shared amongst the legal profession.

1 Introduction

The library as laboratory

Hard copy texts have been until relatively recently the key repository of rules and commentary relied upon in the practice of law. Over time a symbiotic relationship between the legislators, courts and publishers has established a hierarchy in law resources which has been enshrined in practice and procedural rules. This hierarchy underpins what is described as *authority*[1] in legal writing. Every law student quickly learns that any statement of law must be supported by reference to corresponding authority: that is the relevant judicial decision or section of an act. The reference will be by a unique citation identifying the specific materials, typically held in a law library, where anyone who wants to check on the statement can verify its origins. Without reference to primary authority, a statement of law has limited weight or credibility. It is because of the profession's traditional reliance on textual authority the law library has been described as the lawyer's equivalent of a scientist's laboratory.[2]

Furthermore, the library content comprises not only statements of law and commentary but materials which enable the holdings to be navigated, such as indexes, citators and encyclopaedias. These reference materials will guide a researcher to the most relevant and significant sources. These reference materials then, also act as an overall filtering mechanism, supporting the hierarchy established by the publishing process.

The medium of the content also requires a particular physical arrangement in a library. The distinctive binding of the respective reports and reference materials, the classification and chronology of materials as well as the placement on shelves reflect and maintain the hierarchy. A legal researcher is trained to be familiar with the topography of a law library.

[1] The term *authority* is used in a variety of contexts within this dissertation. The definition depends on the context. There is a legal concept of authority as well as notions of authority which arise in other disciplines which are referred to in this paper to describe hierarchies in the dissemination of knowledge. The difficulty of the use of the term in the legal context is discussed in detail in Chapter 2 What is Law?. For discussion of authority in the broader knowledge context of establishing credibility or validity see Chapter 4 Law as a Community of Practice: Indexing, classification and authority.

[2] Christopher Columbus Langdell *Harvard Celebration Speeches* 3 Law Q Rev 124 (1887) p 124.

The assumed centrality of the library in law established a truism that the structure of law is determined by the way it is published. So in effect it is the apparent contribution of formally published legal resources in libraries which has provided stability and predictability in the law.

The research question

What happens then, when the introduction of online access to legal resources removes the need to rely on hard copy texts in law libraries?

There is an area of scholarship which developed since the mid-eighties which argued that online access to law would undermine the structure established by the hard copy information regime. The hierarchy present in the published works would become elusive because the physical terrain of the library will disappear; the editorial or filtering process of hard copy publishing will be bypassed; and the navigation tools will become unnecessary. So without a clear identification of authority, law itself would become less stable, predictable or certain. The literature made assumptions about the role of the library in law as a repository of authority, and then speculated about what might happen when the medium changes: *thus the challenge to the legal concept of authority*.

However these assumptions and the subsequent speculation in literature on the topic have generally been unsupported by empirical research.

This thesis initially set out to develop and apply a methodology to empirically determine the impact of online access to legal resources particularly in the context of the impact on the notion of authority. It was assumed that almost thirty years after information science professionals' access to online materials, and almost fifteen years of practitioner desktop access to legal information through the World Wide Web, any impact would be readily discernible. However my initial research revealed that not much had changed in regard to the the way established legal authority has been relied upon to support legal research,[3] and concurrent US research had also indicated the same result.[4] So the original premise of my thesis had been gainsaid before I had attempted the first draft.

So then the questions became:

[3] See Chapter 5 Discovering Legal Information in Context.

[4] See Judith Lihosit 'Research in the Wild: CALR and the Role of Informal Apprenticeship in Attorney Training' *Law Library Journal* Vol. 101:2 [2009-10]; see also Chapter 5 *Discovering Legal Information in Context*.

- if there has been no change in the way authority has been used by the legal profession to support explications about what the law is, why there has been no change; and
- if there has been no change, why is it that this area of scholarship has gone unchallenged for almost 20 years?

There is the possibility there have been gradual rather than dramatic changes to the law which are yet to be revealed. Or it is possible law may be subject to structures which constrain change in response to rapid developments in information technology.[5] The latter might suggest that the format and organisation of hard copy legal texts do not determine the nature of the profession in the ways assumed.

While it can be conceded that the predictions made in regard to online access to law resources may not have been borne out, the result does not obviate the importance of this enquiry. The process of assessing the impact of the technology leads to a better understanding of the law. Addressing the above questions can be seen as an opportunity to look at law through the *defamiliarising lens* of the new technology.[6] Disruptive technologies, apart from achieving the objective of the innovation, enable us to view the status quo in a different way. The intrusion of online access to the established management of legal resources enables aspects of what law *is* to be thrown into relief.[7]

This thesis, while focusing on the supposed challenge to authority represented by online access to law will also examine how descriptions of how the legal profession in general operates have not acknowledged developments in information science over the same period, that is, since the early nineties. If legal scholars concerned by the impact of information technology on law had an awareness of developments in the area of information science the nature of their research would have been different. An initial observation is the literature

[5] See Ithiel de Sola Pool *Technologies of Freedom* Harvard University Press (1983) p 6 'Change occurs, but the established institutions are a constraint on its direction and pace'. See also, Christine L Borgman *Scholarship in the digital age: information, infrastructure, and the Internet* Cambridge, MA : MIT Press, 2007: 'However to borrow the title of Bruno Latour's (1993) "We Have Never Been Modern", rarely is anything a complete break with the past. Old ideas and new, old cultures and new, old artifacts and new, all co-exist. It is necessary to recognize the relationships and artefacts around us, while at the same time being able to critique them' p 31.

[6] The reference is from a text on reproductive technologies: Sarah Franklin *Embodied Progress: a Cultural Account of Assisted Conception* Routledge (1997) p 21.

[7] See Chapter 2 What is Law?

demonstrates a lack of clarity or precision in articulating how legal professionals interact with legal information. It does not differentiate between the varieties of research objectives. For example a librarian or information professional may be seeking a specific reference guided by citation; a practitioner may need to learn about different facets of a legal issue; an academic may be identifying ambiguity or uncertainty in the application of a principle or more significantly any one of the former may be sharing what they discover with their colleagues.

Understanding the variety of legal information users' objectives determines how the information may be used and the impact of the medium used. The discipline of law does not engage with these aspects of information use. Legal resources are classified as either primary or secondary sources and placed in a hierarchy determined by their relative persuasiveness. In order to effectively understand the circumstances of the user it is necessary to look beyond law and consider disciplines which explicate the impact of information technologies on professions.

One example of a discipline which explores the interaction between technology and institutional use of information is *social informatics*.

> ICTs [Information and Communications Technologies] do not exist in social or technological isolation. Their "cultural and institutional contexts" influence the ways in which they are developed, the kinds of workable configurations that are proposed, how they are implemented and used, and the range of consequences that occur for organizations and other social groupings.[8]

Technology develops according to the needs of a specific community, the range of applications are determined or limited by the existing structure of the community, which may also attenuate the impact of any developments. It is superficial to look at one aspect of the information exchange in the legal profession, that is the impact of technology on the traditional library, and extrapolate from it developments for the profession as a whole.

Elements which should be considered can include:

[8] Rob Kling, Holly Crawford, Howard Rosenbaum, Steve Sawyer, Suzanne Weisband *Learning from Social Informatics: Information and Communication Technologies in Human Contexts* Report: Center for Social Informatics, Indiana University, August 14, 2000 (v 4.6) < http://www.social-informatics.org/uploadi/editor/SI_report.pdf> 16 Sept 11 p 15.

- Examining law as a socio-technical practice: information is not sought by an individual for a unique self-contained purpose but in the context of broader collaborative objectives;[9]
- Determining the context of the researcher: legal research is written about from a purely functional perspective without taking into account the process which addresses the objectives and information needs of the researcher and how the meaning of information found depends on the purpose of the research;[10]
- Assessing the centrality of text in law: legal interactions are not merely communicated by text, and meaning may be derived from other aspects of legal knowledge transactions.[11]

This thesis will canvass a range of information sciences and communications theories to better come to terms with the relationship between law and information technology.[12] It is important to note the above listed approaches to analysing information transactions developed during the eighties and nineties. What will be considered in this thesis is the juxtaposition of research into the interpretation and use of online information and the assumptions regarding the impact of online access to law. The scholarship regarding the latter was seemingly oblivious to the research which might have assisted in understanding how legal researchers deal with information. A contribution this thesis will make is as an illustration of the value of the contemporary developments in information science theory and how it may have usefully expanded the initial discussion of the impact of online research on law.

My background

An aspect of the development of the research question is my study and career background. The experience is unique and contributes to my interest, but also facilitates my ability to traverse the issues.

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[9] See for example Kimmo Tuominen, Reijo Svolainen, Sanna Talja 'Information Literacy as a Sociotechnical Practice' *Library Quarterly* vol 75 no 3 329-345 (2005).

[10] See for example *Sense-Making Methodology Reader: Selected Writings of Brenda Dervin* Brenda Dervin, Lois Foreman-Wernet with Eric Lauterbach [ed] Hampton Press Inc 2003

[11] See for example Gary Burnett, Michele Besant, Elfreda Chatman Small Worlds: Normative Behavior in Virtual Communities and Feminist Bookselling *Journal of the American Society for Information Science and Technology* 52(7):536 (2001).

[12] See Chapter 4 Law as a Community of Practice.

I studied at the University of Sydney in the late eighties and at the time it had the reputation of providing a strict *black letter law*[13] legal education. While there were jurisprudence electives and some subjects with a theoretical perspective the emphasis was doctrinal.

In the early nineties I went on to work in legal publishing. The rapid development during this time in the digital media by which legal information could be distributed encouraged an interest in the impact this may have on law. This was the decade that legal content migrated from hard copy to CDs to online.

Another aspect of these developments was the change from proprietary online platforms to the World Wide Web. The accessibility and useability of Internet browsers removed online research from a solely information specialist domain. In law this created the *end user* researcher—the non-information literacy trained legal professional who could suddenly access vast databases of legal resources without library or editorial guidance.

During these years I was involved in training both sales staff and customers in the new technology which was a useful introduction to an aspect of legal practice. I was also a customer service research assistant. In the latter role I would respond to customer queries regarding particular legal problems and help them devise the best strategy to find what they were looking for. This often necessitated me doing the research and finding the results myself and then talking the client through the process. So not only did I become familiar with the technology, I experienced firsthand the difficulties faced by newcomers to the research.

What also became an issue was the customer's perception of value. It was evident to customers that printing and distribution costs were reduced or eliminated. Also the expectation of ownership of texts in perpetuity in a physical library was replaced by software and content licences which left a library nothing on expiry. This recalibration of the customer/publisher relationship in the pricing of subscriptions should be noted. It was clear that this was a fundamental change in the established legal publishing business model as well as the customer's interaction with the information.

Difficulties with comprehending the enormity of the change included conceptualising how it operated. The publishing company I worked for assumed that the best commercial model was the *portal*: that is, the creation of a web site which integrated all the services a legal professional would need. So as well as conventional research materials other services such as

[13] A focus on law as the application of rules.

title searches, precedent software and payment systems would all be available from the one site. The portal was analogous to a shopping mall with an anchor store, in this case key research materials, and related specialty shops. No one leading this initiative at the time understood that the World Wide Web as a whole was a portal and that the physical limitations of territory or space did not apply in this way. An example of this limited approach is that in the late nineties the creation of portals and the commercial potential of e-mail was considered more important than web searching by consumers.[14]

The perception of value and the misapprehension of borderless navigation goes hand in hand with the end user legal practitioner who initiated the research but was now also in the position to do the research themselves in the absence of the structure or discipline imposed by library knowledge. Perhaps the best term which encapsulated the disruptive impact of the World Wide Web is *disintermediation*. While it originally applied to the ability of a consumer to negotiate directly with a distributor rather than a retailer, the ability of a researcher to access a complete range of materials from the desktop without needing the familiar terrain of a physical library or the assistance of an information professional is as dramatic as the challenge to bricks and mortar retailers.

Both LexisNexis and Westlaw had provided access to US, UK and Australian resources to Australian libraries in the 1980s. Australia had its own online access to law in SCALE, CLIRS, and Info-One.[15] These services were very expensive and difficult to use with dial up access using either dedicated terminals or proprietary software loaded on a PC. Searches would generally be done by a librarian, because of the skills required and costs which could be incurred.

It was not until the mid to late nineties that there was common end user access to online materials. So for the legal researcher until comparatively recently law resources were only available in hard copy and generally in dedicated law libraries.

Legal research

It might also be helpful in establishing the context of this research to relate two roles which informed my interest.

[14] See David A Wise *The Google Story* Pan (2006) p 86.

[15] A brief history here: www.austlii.edu.au/cgi-bin/sinodisp/au/other/CompLRes/1997/2/4.html

Noting up

While at law school I worked for two senior barristers doing clerical work. One task was *noting up* incoming volumes of case reports. This involved reading the first few pages of each recent case in the latest volumes of reported decisions, and then identifying older cases which had been referred to in the recent decision. Once I had determined that there was a recent reference I would then find the report of the previous decision in the chambers library and make an annotation identifying where that decision has been recently referred to, and the nature of that subsequent citation.

When the barrister was briefed in regard to a particular matter the older leading cases would be referred to first, because this was the authority he was familiar with, and it would be clear from the number and nature of annotations whether it was still an important case and if the case was still good law.

The process was valuable because a legal rule which could be extracted from a leading case may be qualified, extended or further elucidated in subsequent decisions. The meaning of a rule may change over time and the annotations helped a barrister establish the most recent arguable iteration of a rule.

The noting up of cases was a labour intensive role and prior to online publishing added enormous value to the chambers library. When I first commenced law in the late eighties there were advertisements on the law school noticeboard for the sale of fully noted up report series for ten and twenty thousand dollars. By the time I had completed my degree the prices had halved. Within ten years these report series were almost valueless. I knew at the time I was in the role that I would be one of the last of the *noter uppers*, but I do not think the then middle aged barristers who I worked for had any suspicion of the impending revolution.

Legal editing

As mentioned above, after graduating I worked for Butterworths[16] legal publishers as an editor on the legal encyclopaedia *Halsbury's Laws of Australia*. This encyclopaedia was written in so-called propositional style. This meant each statement of law expressed in the work had to be supported by primary authority. There was no room for authorial opinion or history or social context. The expression of the law was solely restricted to statements of legal principal. I remember early on that at least one author declined to contribute to the encyclopaedia on the

[16] Now *Butterworths LexisNexis*.

basis that law does not operate in this way which, at the time, was puzzling for me. This was a dubious outcome of a positivist legal education.

Nevertheless the *Halsbury* experience represented a further immersion in black letter law. The editor's role was to read through the manuscript and verify that every principle of law expressed in the work was indeed supported by primary authority. The verification process included holding the relevant legislation or case report in one's hand and sighting the wording of the reference. The pursuit of this editorial rigour extended to visiting major law libraries to check the more obscure sources first hand. As with noting up, it was also labour intensive and consequently extraordinarily expensive. The editing of this encyclopaedia is emblematic of the enduring reverence for legal authority which now seems anachronistic.

The publisher's justification for the vast investment in the work was it would become the central tool for all legal research. Lawyers would first consult *Halsbury's* and then be guided to other Butterworths published legal materials. It would be a reference tool, a legal taxonomy, an index for legal resources as well as a marketing tool. Each of these elements of the publication are important for the genesis of this thesis. The *Halsbury*'s experience demonstrated that further to a traditional doctrinally focused legal education my work experience cemented the centrality of authority in law. The perspective of law's operation was bibliographically focused. I can see this now as a one dimensional view of legal information. Having studied and worked in a context which relied on the published legal hierarchy, it was a logical assumption that if online access to law allowed the circumvention of not only the hierarchy, but also the indexing tools, it will have an impact on the way the profession comprehends the law. My view of the way rules operate in law, and how they are derived from the sources, corresponded with the views of the scholars who speculated about the impact of the change. I had already noticed the plummeting value of law report series. It was not far-fetched that the impact on law would be no less dramatic.

Situating the research

Information behaviours

This study is necessarily cross-disciplinary. It is situated in law as well as information sciences. The analysis of the impact of online access to law will focus on information behaviours within a profession. This acknowledges that legal research is carried out with a range of objectives and within a range of contexts. Any empirical research will be informed by knowledge of the literature of theories of communication and information behaviours.

When considering the impact of information technology on law the argument is, it would be superficial to examine the profession's use of online research without taking into account the various ways the technology is relied upon; the uses of the information sought; and the context of the research within legal communities where computer research is merely one aspect of information exchanges within legal communities.

Authority and positivism

It is important to acknowledge for the purposes of this thesis that in law, the notion of authority is elusive.[17] The difficulty is authority is referred to as if there is a single shared meaning. However the concept of authority is used in such a range of contexts that it is difficult to define apart from the use of the term indicating a hierarchy in the way legal rules are recorded and explicated.

For the purposes of this thesis *law* might be defined as the creation and enforcement of rules for maintaining a society. In order for the law to be applied effectively these rules need to be identifiable, recorded and discoverable. This is a simple and unsophisticated view and subject to criticism but in the context of this discussion represents an assumption of the key literature which considers the impact of online legal research. Further, it should be expected that the process of finding or identifying legal rules would be absent any controversy especially as justice is meant to be blind—a rule is a rule. Law, in the context of this narrow definition, can be seen as a positivist discipline or an authoritative practice. And as discussed above, the identification of the rules which make up the law was mainly done, until recently, by the interrogation of hard copy texts which were organised in a way which acknowledged an established hierarchy.

When the literature is examined it is possible to argue that it fails to engage with the complexity of the notion of authority in law. Positivism and authority are conflated and treated simply as the identification of definitive rules in text. However it is essential to treat the concepts with precision. If law is not a strictly positivist profession and authority means more than simply the recognition of rules as represented literally in texts then the impact of technology on law may not be as dramatic as predicted. It means the centrality of the library may be overstated. Contrary to the assumptions in the literature, positivism is more than

[17] See Chapter 2 What is Law?: Law and Authority; and Chapter 3 Collapse of the Legal Universe.

simply the acknowledgement that binding rules can be objectively identified in texts; and authority means more than those rules being recognised by the profession and enforceable.

The process of finding exactly what the law is and then applying it is not necessarily straightforward. Identifying a rule, has, we will discover, always had its difficulties. Some of these difficulties are connected with the medium in which law has been recorded whether it is oral, written, printed or digital. Other difficulties arise in regard to the processes by which the rules are identified.

A rule is not simply stated in a text and then able to be applied in a range of situations. In law a rule may need to be distilled from the circumstances or facts which gave rise to the respective judicial decision being relied upon. The subsequent application of the rule may then be subject to arguments regarding how similar the circumstances are in which the rule is going to be applied to the decision from which the rule was derived. For example a case might decide a breach of a duty of a manufacturer to take reasonable care may be found where a rotten snail is discovered in an opaque bottle of ginger beer.[18] But is there also a similar breach where underwear is sold with an excess of sulphides which causes serious dermatitis?[19]

Further there is an aspect of treatment of rules beyond meaning and relevance. There is also the notion of legitimacy or enforceability. Identification, distillation, meaning, relevance and legitimacy are all different facets of positivism and authority. The literature tends to focus on the assumed existence of concrete rules whereas law deals with more elusive principles.

It is necessary that any discussion of the impact of information technology on law must acknowledge the competing approaches to legal exegesis, for example:

- *Legal formalism*: law is literal and positivist;
- *Legal realism*: law is pragmatic, contextual;
- *Critical legal studies*: law perpetuates political or financial interests—it is essentially ideological.[20]

[18] See *Donoghue v Stevenson* [1932] AC 562.

[19] See *Grant v Australian Knitting Mills* [1936] AC 562.

[20] See for an overview of competing legal theories: Gerald B Wetlaufer 'Systems of Belief in Modern American Law: A View from Century's End' (1999) 49 *American University Law Review* 1. The single phrase characterisations I've used are simply as a way of differentiating between the respective approaches. They are not meant to attempt to encompass what these theories represent. See further Chapter 2 What is Law?.

That there are a variety of ways to explain the law, illustrates that bibliographic positivist assumptions about the law is a limited perspective from which to analyse the impact of technology.

Contrasting approaches to legal education

A helpful illustration of the issues introduced above is contained within published celebration speeches marking a landmark of Harvard Law School. On the 5th of November 1887 both Oliver Wendell Holmes and Christopher Columbus Langdell spoke at the quarter-millennial celebration of Harvard Law School.[21] Note that at the time it was still unusual for law to be taught at a university. The divergent approaches to legal education expressed reveal contrasting understandings of law.

Langdell was at the time a Harvard Law School professor. Holmes both studied and lectured at Harvard and at the time of the celebration was a justice of the Massachusetts Supreme Judicial Court. He was soon to sit on the United States Supreme Court as an Associate Justice. While both were Harvard alumni and teachers they had differing perspectives on the law.

In his speech Langdell emphasised the logic of law and the significance of legal texts. Legal rules are discoverable within a self-contained record.

> If law not be a science, a university will consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft and may best be learned by serving an apprenticeship to one who practices it. If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all that light that the most enlightened seat of learning can throw upon it. Again, law can only be learned and taught in a university by means of printed books…if printed books are the ultimate sources of all legal knowledge,—if every student who would obtain any mastery of law as a science must resort to these ultimate sources, and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him,—then a university and a university alone, can afford every possible facility for teaching and learning law.[22]

[21] Text of speeches published here *Harvard Celebration Speeches* 3 Law Q Rev 124 (1887).

[22] Christopher Columbus Langdell *Harvard Celebration Speeches* 3 Law Q Rev 124 (1887) p 124.

It is clear that Langdell's initial intention is to promote the legal education in universities as opposed to learning on the job as an articled clerk. In the nineteenth century legal education was more commonly a process of professional apprenticeship. To this day tensions exist between the universities and the profession in regard to respective emphasis on vocational aspects of a university education.[23] Further Langdell's rationale is all the law that needed to be known could be contained in the texts of cases and statutes and could be taught by non-practitioners. Legal principles can be extracted from texts, with a focus on judgments, and these principles can be presented to students in a situation removed from the context of practice. This so-called case method is still relied upon in most law schools, at least in core doctrinal subjects, and is attributable to Langdell's promotion of law as a science. While his legacy is subject to criticism[24] it still fundamentally informs a law student's initial engagement with law.[25]

Holmes on the other hand emphasises a more expansive approach to the teaching of legal principles.

> We will not be contented to send forth students with nothing but a ragbag full of general principles—a throng of glittering generalities like a swarm of little bodiless cherubs fluttering at the top of one of Correggio's pictures. They have said that to make a general principle worth anything you must give it a body. You must show in which way and how far it would be applied actually in an actual system. You must show how it has gradually emerged as the felt reconciliation of concrete instances no one of which established it in terms. Finally, you must show its historic relations to

[23] See for example Maureen Fitzgerald 'Stirring the Pot of Legal Education' 10 J Prof Legal Educ 151 (1992). See also Jeremy Webber 'Legal Research, the Law Schools and the Profession', (2004) 26 *Sydney Law Review* 565.

[24] See for example overview of Langdell here: Allen D Boyer 'Book Review: Logic and Experience: The Origin of Modern American Legal Education. By William P. La Piana' 80 Cornell L Rev 362 (1995): 'Langdell seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius' Reviewer's quotation p 363. The reviewed also considers Holmes and Langdell together here: William P La Piana 'Victorian from Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship' (1990) 90 Colum L Rev 809. Note also Penny Pether observation 'the Langdellian model of legal science assumes that the texts of the law describe legal rules that are really there, rather than constituting the law themselves': 'Measured Judgments: Histories, Pedagogies, and the Possibility of Equity' (2002) 14 Law & Literature 489 p 497.

[25] See Chapter 2 What is Law?—Law as taught to undergraduates.

> other principles often of very different dates and origins, and thus set it in the perspective, without which its proportions will never be truly judged.[26]

Holmes is arguing that legal rules do not exist in a vacuum—they have a broader context. It may not be apparent from this quotation alone, but this is a part articulation of Holmes' analysis of judicial decision making. Rules described by judges in deciding cases before them were not drawn solely from a self-contained logical system but from an interplay of other factors including public policy, morality and even a judge's own prejudices.[27]

While Holmes saw learning the law as going beyond the apprehension and application of rules and dependent on the context of a dispute and the decision maker; Langdell identified a strictly logical approach to law. For Langdell law was the scientific application of rules which could be discovered through the interrogation of key texts. The content and the circumstances of the speeches are interesting because they are nineteenth century contemporaries expressing distinct aspects of a debate which we might see as modern. The debate about the impact of technology in law could be seen as speculation coming from a Langdellian perspective which could be argued to be narrow or anachronistic.

Critique of a positivist approach

The Langdellian approach has been critiqued by Pether,[28] partly because of its corrosive effect on legal education, but also because it is a one dimensional view of how law operates.

> Langdell's legal science forgets the common history of law and rhetoric, drawing instead on the tradition that sources law's legitimacy in its tracing 'to a point of origin so old or so extreme that its authority could not be challenged.'[29] His 'concentration on the form of law, upon law as writing or law as charismatic oral tradition and judgment, . . . [is] a concentration upon the source and authority of law and not upon the fundamentally rhetorical character of legality.'[30] This entails a forgetting of

[26] Oliver Wendell Holmes *Harvard Celebration Speeches* 3 Law Q Rev 124 (1887) p 121.

[27] See Oliver Wendell Holmes *The Common Law* 1881 p 1.

[28] Penelope Pether 'Measured Judgments: Histories, Pedagogies, and the Possibility of Equity' (2002) 14 Law & Literature 489.

[29] Pether quoting Peter Goodrich 'Law' in Thomas O. Sloane ed *Encyclopedia of Rhetoric* Oxford (2001) p 417-18.

[30] Ibid p 18.

> history. It also entails a hostility to theory, or scholarship of the kind that does something other than labour doctrinal points to death with the accompaniment of an hysterical profusion of citations to authority. This model of scholarship, an artefact of U.S. legal education, is engendered both by the limiting of resources available to pedagogy, and by the kinds of people who are selected for the professoriate fashioned in the image of Langdell's ideal…

Pether distinguishes between a perception of texts used transparently to record rules, and texts which comprise the law which are subject to all the contextual ambiguities of language. Pether is also drawing attention to the artificiality of assuming the operation of a definitive authority or ultimate rule in the resolution of a legal dispute. Goodrich (who Pether quotes above) describes rhetoric in ways not dissimilar to the Holmes view of law, emphasising aspects of context and language.

> For the rhetoricians, speech is always a process, action within a context, and it would be wrong to allow any one context a privileged claim to have access to truth or to objectivity; precisely because discourse is situational it is concerned not with truth but with probability and improbability (verisimilitude), with what seems to be true to a particular audience or with that which has the effect of truth in a given context.[31]

Theoretical approaches to law canvass the tension between the assumed certainty of rules and the malleability of language and context. The publishing of law in hard copy and the legal hierarchy embedded in its tangible form made it easier to assume that rules were fixed. It was able to engender a type of complacency which is now disrupted by technology which arguably forces researchers to look at law in a more abstract way.

Socially constructed authority

This thesis is an exploration of the impact of online access to law on the way law is understood from the perspective of a person who was inculcated in the primacy of legal authority both educationally and professionally. So the notion of a challenge to authority refers to both the challenge to the established legal sense of authority and a challenge to my own expectations about how authority operates in law.

[31] Peter Goodrich *Reading the Law: A Critical Introduction to Legal Method and Techniques* Oxford (1986) p 179

Lloyd has identified a two-step process for describing information literacy in the workplace.[32] In a range of occupations information literacy is initially presented as text. This is assumed to be an objective and neutral transfer of information. However there is a second stage where information is clearly subjective.

> Understanding information literacy in a workplace context requires recognition that information and knowledge are socially produced and distributed, and that access to it can be effected by social relationships. This requires learners to reorient themselves away from individualised learning towards information and sites of knowledge valued by the community of practice. Workplaces are not neutral sites; they are underpinned by relationships with power, which can act to contest practices, including information literacy practice, within the site. For workers, learning about the landscape of practice and profession through information access may not follow the paths chartered by training or study.[33]

Information literacy is therefore not solely a textual practice but a social practice.[34] At work or in a profession there are other sources of information that are mediated by the exigencies of the workplace. Lloyd uses the metaphor of an information landscape to illustrate the range of sources of knowledge which are necessarily contextual. It is useful to note that on first reading 'effected' looks like a misspelling. However the choice of a word which is often mistaken for its homonym helps emphasise that social interaction is the mechanism for exchanging information rather than simply qualifying its meaning.

This dichotomy is useful for this discussion. When dealing with legal information the common sense approach is to focus on texts and assume that everything a lawyer needs to know is contained within these sources. The community of practice, that is in Lloyd's terms, the complete landscape of information sharing, is barely acknowledged. Even within the

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[32] Annemaree Lloyd 'Information literacy landscapes: an emerging picture' (2006) 62(5) *Journal of Documentation* 570-583; Annemaree Lloyd 'Information literacy as a socially enacted practice: Sensitising themes for an emerging perspective of people-in-practice' (2012) 68(6) *Journal of Documentation* 772-783.

[33] Annemaree Lloyd 'Information literacy landscapes: an emerging picture' (2006) 62(5) *Journal of Documentation* 570-583 p 574.

[34] Annemaree Lloyd 'Information literacy as a socially enacted practice: Sensitising themes for an emerging perspective of people-in-practice' (2012) 68(6) *Journal of Documentation* 772-783 p 776.

information science profession, knowledge is taught as bibliographically centred rather than contextual. However over the last thirty years there have been developments which recognise the 'whole-person-in-the-landscape'[35] approach.

This is a cross disciplinary exercise. In law there has been the traditional emphasis on texts and authority, in information science there is a traditional emphasis on bibliography and findable knowledge. The value of this thesis is in analysing a disruptive technology to reveal the bifurcation between objective textual knowledge and contextually created meaning by revealing that perhaps the subversion of the structure of textual resources has not had the predicted impact on law. The structure of the repositories of law may have changed but it is possible the broader context of the profession's use of information has not. It is the community of practice which provides stability in law and not the tangible nature of hard copy works.

Overview of thesis chapters

Law is a profession which deals with the application of the rules which regulate society. In common law jurisdictions these rules can be made by parliament or established in case law. The applicability of law derived from cases is subject to an established hierarchy. A higher level of court corresponds with a greater weight accorded to the rules articulated by them. These rules have traditionally been contained in hard copy. The arrangement of texts in law libraries reflected the hierarchy. In legal writing no statement of law can be made without reference to the original source of the law, that is, primary authority. Because of the vast volume of existing legal materials secondary sources such as case digests, encyclopaedias and legal indexes have become available which enable researchers to navigate the primary sources.

Online access to law hides the established structure and enables the existing research navigation aids to be bypassed. The key outcomes are predicted to be a breakdown of stability in law:[36]

- As the hierarchy of cases as established by both the library layout and the indexing services is avoided, researchers will discover a range of perhaps contradictory authorities.

[35] Annemaree Lloyd 'Information literacy landscapes: an emerging picture' (2006) 62(5) *Journal of Documentation* 570-583 p 578.

[36] See Chapter 3 Collapse of the Legal Universe.

- The distinction between primary and secondary materials will be lost because both are easily accessible online and both will be served up in search results lists.

If the library structure and the hierarchy in texts are central to law then this may well have been the case. However if legal knowledge and meaning is exchanged amongst the profession in a greater range of ways than solely through hard copy libraries, the disruption represented by online access may not have the impact predicted. The Langdellian privileging of the library as law's laboratory may not be borne out. It may be that our assumptions about legal knowledge needs be re-examined.

Further, at the same time legal scholars were predicting challenges to legal stability in the late eighties and early nineties, theories about the nature of knowledge were being developed in information science.[37] Information literacy is not simply about the ability to find relevant information online but recognition that knowledge and meaning can be derived from the context in which the research is being done. In law this may mean that interactions between legal professionals, that is, as a *community of practice*, may be as important in determining the structure and hierarchy in law as the topography of a law library.

When looking at the responses to online access to information both from the legal profession and information scientists there are parallels. Law is ostensibly a positivist profession. It relies on rules which are objectively verifiable. This perspective may hide the process of creation of meaning by the activities of the profession as a whole in their dealings with each other as a community of practice. Librarians have a not dissimilar bibliographic perspective which focuses on the ability to find information without regard to the context in which it might be needed or understood. While this thesis will demonstrate that both in law and information science there exist alternative perspectives of how knowledge is consumed, nevertheless, there is a conceptual connection between lawyers and librarians who demonstrate complementary yet essentially positivist approaches to characterising sources of knowledge.

This thesis, in exploring the legal notion of authority and the challenge of online access to law, will rely on recent developments in information science theories of information literacy to understand the impact of the new technologies on how law is understood.

This thesis will contain the following sections:

[37] See Chapter 5 Discovering Legal Information in Context.

Chapter 2 What is Law? will introduce the reader to law as an authoritative practice. The Australian common law system will be explained, the use of legal materials will be illustrated and competing theories of law will be canvassed in a way which reveals that law is not necessarily a positivist discipline. This chapter establishes the traditional legal concept of authority as it is used in the legal research, but also acknowledges that the meaning of authority will depend on a range of contexts. The argument is that the scholarship in this area uses the notion of authority loosely.

Chapter 3 The Collapse of the Legal Universe considers the scholarship which initially speculated about impact of online access to law on the profession.

Chapter 4 Law as a Community of Practice examines the development of notions of information literacy through the eighties and nineties and considers the absence of correlation with the contemporaneous concerns of legal information scholars regarding the impact of online access to law. The argument is that discussion of the impact of online access to law on the legal profession overlooks information science theories related to the way professions engage in knowledge transactions socially.

Chapter 5 Discovering Legal Information in Context describes the methodology used to reveal the impact of online access to law on the profession. It comprises interviews with law librarians as a way of testing how the profession may have changed over the last 20 years.

Chapter 6 Convergence will also look at parallel research done in the United States and look at case law which has considered authority and the impact of technology.

Chapter 6 The Expanding Legal Universe questions if in fact online databases of legal information lacks the equivalent structure of online resources. Also in the context of the chapters above will argue that the legal profession operates as a *community of practice*[38] where the hierarchy of information is not determined by the arrangement of hard copy texts but has its own innate methods of dealing with information which a law library reflects, whether it is manifested in hard copy or digitally.

Focus of the thesis

The initial premise of this thesis was that online access to law would have made a measurable impact on the way law is understood within the legal profession based on the operation of the

[38] See Chapter 4 Law as a Community of Practice.

notion of legal authority. The research was expected to confirm the degree of change. However as my research indicated that there had been limited impact it created the opportunity to investigate what it is about the nature of law which maintains stability. This thesis evolved from being an exercise in testing the impact of technology and instead has become a vehicle for examining the way knowledge is dealt within the legal profession relying on theories of information science.

2 What is law?

One of the seminal legal education texts Glanville Williams' 'Learning the Law'[39] does not anywhere define the law. Most tertiary introduction to law subjects will canvas competing theories of law but without acknowledging the fact that the existence of competing theories demonstrates there is an element of uncertainty in determining exactly what law is. In the learning of law the emphasis is on praxis rather than theory. It is possible to successfully complete a law degree without having to confront difficulties with the basis of law's ultimate authority.

As suggested in the *Introduction*, a simple definition of law might be that law comprises rules which regulate or govern society. For the purposes of explaining how legal referencing or legal bibliography works this should be sufficient. If we regard law simply as a set of rules it makes the organisation of legal reference materials easy to understand.

In this chapter law will be looked at in two ways. One will be a focus on the law as rules and how those rules are established, discovered and applied. The other will examine theories of law in order to ascertain how law can be understood conceptually. This second part of the analysis will attempt to show that law may not be strictly positivist. It will illustrate there is flexibility in the way laws are construed and that law is more than simply a set of rules which are sourced and applied in an objective and systematic way. This analysis reflects the Lloyd concept of an 'information literacy landscape' which acknowledges both a textual and a social practice.[40]

As alluded to above, there are two ways of explaining law to laypersons. There is the way it is taught in universities or the way it might operate in practice. And despite this apparent dichotomy, if the experience of practice demonstrates that law does not operate in the same way it is taught, those with practice experience may nevertheless continue to write about the law using the language and conventions of the undergraduate exemplars. There is a type of duality in law which makes it difficult to describe comprehensively. It is this duality which allows legal writing about research to privilege notions of bibliography, precedent and

[39] Glanville Williams *Learning the Law* (12 Ed) Sweet & Maxwell

[40] See Annemaree Lloyd 'Information literacy landscapes: an emerging picture' (2006) 62(5) *Journal of Documentation* 570-583.

classification without having to acknowledge that law may not necessarily be underpinned by this formal infrastructure. The purpose of this chapter then is to first explain how law is taught to students and then introduce the various ways law has been analysed to demonstrate that a rules based explication of law provides a limited perspective.

Law as taught to undergraduates

This introduction to law will be confined to law as typically taught to university law students. As mentioned above in this context we accept that the law comprises the rules which regulate society.

Australia is a common law jurisdiction. In a common law jurisdiction there are two main *sources of law*: a source of law being where legal rules can be found. The two main sources are legislation, which is rules drafted and passed by Parliament and regulations; and case law which comprises judgments handed down by superior courts.

As legislation is a product of directly elected representatives it does not represent obvious difficulties in relation to authority.[41] Acts and regulations have the status of a definitive record of what the rules are in a particular area. There may be problems with interpretation of legislation which may be resolved by litigation. However in the context of this discussion legislation does not on the face of it pose issues in regard to determining hierarchy.

The common law comprises rules derived from judgments. The common law has been defined as 'a judge-made system of law, originating in ancient customs, which were clarified, extended and universalised by the judges…'[42]

The High Court of Australia adopted the analysis of Simpson[43] in accepting that the term the 'common law', encompasses a number of senses including identifying jurisdiction, procedural processes as well as rules. [44]

> The term 'common law' came...to have the connotation of law based on cases, or law evolved through adjudication in particular cases, as opposed to law derived from the

[41] Although Parliament is not necessarily the ultimate authority. See for example HLA Hart *The Concept of Law* Oxford (1961).

[42] Kenneth Smith and Denis J Keenan *English Law* Pitman (1975) p 3.

[43] AWB Simpson *The New Oxford Companion to Law* (2008) pp 164-166.

[44] *PGA v R* (2012) 245 CLR 355.

> analysis and exposition of authoritative texts. Indeed sometimes 'common law' is more or less synonymous with the expression 'case law'. Since the common law was developed by the judges, interacting with barristers engaged in litigation, the expression 'common law' came...to mean law made by judges. [45]

There are distinct areas of law which arise initially from the common law. For example the law of negligence and the law of contract are common law derived. Other areas of law such as patent, trademarks and copyright are solely products of legislation. The exact origins of and the ultimate authority of the common law are generally addressed superficially in undergraduate legal education. Common law rules in these areas are taken at face value.

The doctrine of precedent

Where there is a dispute which turns on the application of a common law rule, the decision of the initial court applies only to the parties who have come to have their dispute resolved. However, on appeal, a subsequent judgment may contain an articulation of the relevant law which could apply more generally than merely to the subject litigants. In the common law an appeals court judgment in favour of a single person may be relied upon in the future as the source of a rule which may have an impact on subsequent litigants in analogous situations.

The above explanation has been careful to distinguish between the initial decision and an appeals court decision in the same matter. In order to understand how the law works there needs be an understanding of the respective hierarchies in the system.

If a trial outcome or a first instance decision goes on appeal to a higher court any appeal is usually based on an argument that there has been an error in the application of the law. The facts are not challenged nor are witnesses re-examined.[46] Because an appeals court is only making a determination about the application of the law then a decision of an appeals court can be seen to be a statement of what the law is in the circumstances which gave rise to the litigation.

The respective treatment of a first instance decision or a trial decision and that of a subsequent appeals court demonstrates the way the hierarchy of common law judgments

[45] Professor A W B Simpson in P Cane and J Conaghan (Eds), *The New Oxford Companion to Law* Oxford (2008) pp 164–6.

[46] There may be exceptions to this in criminal appeals.

operates. A trial outcome only impacts on the litigants; an appeals decision which is in effect a ruling about what the correct interpretation or application of the law is, can be a general statement of the law which might have a wider impact because it may be relied upon in other disputes.

The court hierarchy

There is also a hierarchy represented by the levels of court. In New South Wales for example there may be a finding of fact in a local court, from which there may be an appeal to a single judge of the Supreme Court on the basis of an error of law. There may then be an appeal from that decision to three judges sitting on the Court of Appeal and then finally an appeal to the High Court of Australia. Each of these appeal decisions will be determination about the law rather than the facts. And if each of these decisions applies the law differently then it will be the ultimate court, in this case the High Court of Australia, which will represent the definitive version of the law. The way the law is applied at this ultimate stage will oblige lower level courts to apply the law as stated in the same way.

Where there is litigation arising from a dispute about the application or interpretation of legislation the same system applies. Once an appeals court has decided how legislation might be interpreted this reading of the legislation must be applied by the lower courts in the jurisdiction. Note that this is not the operation of the common law. Legislation is not the common law. Parliament made law always prevails over the common law which is why the common law of negligence must be read together with the *Civil Liability Act 2002* (NSW) and the common law of contract must be read together with the *Sale of Goods Act 1923* (NSW), the *Contracts Review Act 1980* (NSW) and the *Australian Consumer Law*[47]. Decisions regarding the interpretation of legislation are more correctly referred to as case law.

In a common law jurisdiction then, there are parallel sources of law: Parliament generated legislation and judge made common law. In the event of any overlap between the two, legislation will prevail. A decision of a higher appeals court may explicate the law which will bind lower courts. This is fairly straightforward.

Decision hierarchy

However there are further gradations.

[47] *Competition and Consumer Act 2010* (Cth) Sch 2.

Within the levels of appeals courts there are other hierarchies. Not all judgments at the same level represent the same degree of importance. For example an appeals court decision may be described subsequently as 'being confined to its own facts'. This means the outcome, despite being an appeals court decision, is only of interest and relevance to the litigants. Also the law articulated in the decision is not something that is able to be relied upon in reasoning in subsequent decision because it is expressed in terms which may only have meaning in the context of the facts of the particular case. The higher court may simply be correcting an error in the application of law in a lower court and not resolving long standing difficulties with interpretation or applying the law to a novel situation. So the decision can have no greater significance than it being merely a result one way or the other for the parties involved.

Then there will be other appeals decisions that represent novel applications of the law or new law or a reconciliation of conflicting interpretations or a resolution of doubts about a rule. These may be decisions that are relied upon in reasoning in subsequent judgments. However the significance of a decision may not be apparent straight away. While cases which contribute to the development of the law may enjoy immediate notoriety sometimes it might take years or decades for a particular judgment to establish a reputation as being the best articulation of an aspect of the law.

In the range of cases which are handed down by appeals courts there will be a continuum of impact or significance. A dilemma for a researcher is determining which decisions are the most important or more particularly which cases will be most effective in developing a persuasive legal argument. To some extent the decision in a case taken at face value does not represent more than a result for the parties involved. But how that case may be treated or relied upon subsequently may determine the impact on the law generally. If it is accepted that this is the way precedent operates then it needs to be accepted that there are uncertainties and ambiguities in the common law. The weight of a case will depend on a range of contexts including its standing at the time and how its reputation has developed over time.

For a common law researcher a way of overcoming the difficulty of filtering all the apparently relevant decision and isolating the more important or most reliable judgments, is by taking into account both the hierarchy of the respective courts as well as the hierarchy in the publishing of the decisions.

Publishing hierarchy

The publishing hierarchy analysis applies equally to hard copy and online access to law. The reporting of judgments is traditionally represented by a three tiered hierarchy: *unreported judgments*, *reported judgments* and *authorised judgments*.

Unreported judgments were so called because they were not formally published. They comprised the type of appeals case referred to above where the outcome was only important for the litigants involved, and despite being an appeals court decision made no contribution to the development of the law. They were only accessible from court libraries or major university libraries. There was a time when they could not be referred to in court without consent of the bench because of the possible inequity in having authority only available to a few. Ironically now it is the unreported judgments which are most easily accessible on free websites. Nevertheless the term *unreported* connotes a judgment with limited status as a source of the law.

Reported judgments are formally published decisions. These judgments have been chosen from amongst all the appeals court decisions by the editors of legal publishing as decisions which will be valuable to their subscribers. These will be published in series which collect leading judgments or a so called specialist series which contain decisions confined to a specific practice area such as criminal law, family law, motor traffic law or intellectual property. The decisions collected in these specialist reports series may not represent significant developments in the law but may be useful to lawyers who practice in the area.

Authorised judgments are those chosen by editors who are not commercially motivated but have specific criteria to enable the choice of judgments which will have an impact on the law. The process is undertaken by so called councils of law reporters who are represented in each of the common law jurisdictions. This includes state or province as well as national jurisdictions. They are set up slightly differently and the criteria for selection of cases may vary but the outcome is report series which comprise the most important judgments.

In New South Wales the council of law reporters is a statutory body, that is it is established by legislation,[48] and the criteria applied include:

> a case which introduces a new principle or new rule of law; a case which materially modifies an existing principle of law or settles a doubtful question of law; a case which

[48] *Council of Law Reporting Act 1969* (NSW).

> applies an existing principle in a novel area; a case in which the language of legislation is definitively interpreted; a case in which clauses, phrases or words in common use in documents... are construed; all cases which for any reason are particularly instructive.

The source of these criteria is the original proposal for the establishment of a council of law reporters in the United Kingdom in 1863. It is has been drawn on by councils of law reporters in common law jurisdictions in Australia and around the world. The decisions are known as *authorised* not only because have they been selected by the respective council of law reporters for that jurisdiction but because once edited, in most jurisdictions, they go back to the judge or judges who wrote it for final approval.

Authorised decisions comprise reports series which best record and represent developments in the law and are an essential research tool for determining what the law might be. While the same judgment might be available as an unreported, a reported and an authorised judgment version, a legal writing convention is the authorised version must be cited because it is the definitive version and therefore the most reliable.

This brief explanation of the way judgments are published is important in the understanding of how precedent operates. While an appeals court may make a determination regarding the legal rights between parties, and further, any appeals court decision theoretically has precedential value, the most important decisions will usually be reported as well as authorised.

Reputation hierarchy

As mentioned above, the fact of selection or publication is not the sole determinant of the importance of a judgment. Subsequent appeals court references to a case may also contribute to the status of a decision as authority. Even if a case has not been selected to be published in an authorised series the reputation of a decision can be established over time.[49]

As discussed in the Introduction law has its own terminology for describing the subsequent treatment of cases when referred to in the reasoning of later decision. These terms characterise their actual or potential precedential weight. These terms include *applied*, *followed*, *distinguished* and *overruled*. I will explain just a few to provide an idea of how the reputation of a decision might be established based on references in subsequent decisions.

[49] *Hughes v Metropolitan Railway Co* (1876-77) LR 2 App Cas 439 only became an important case when referred to in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

If in a judge's reasoning an earlier case is *applied* to a later case it means there is a general principle of law which can be extracted from the earlier decision and relied upon even in a fact situation which is different from that of the earlier case. *Applied* is perhaps the highest approbation for a case. It is a clear indication that the law as expressed in the decision is not simply limited to the parties involved or the circumstances which led to the litigation.

If the earlier case is *followed* it means that the facts of the earlier case parallel that of the case at hand. So the precedent can be relied upon but the law as expressed is limited to a specific fact situation.

If the earlier case is *distinguished* it means the principle of law is good but the facts of the current case are too different so the earlier precedent is not relevant. It could also mean the judge disagrees with the application of the law as expressed in the earlier case and the superior court may 'distinguish' it in order to not be bound by it. It is an example of the subjective and flexible way earlier decisions might be dealt with.

If the earlier case is *overruled* it means that for that principle of law the earlier case ceases to have precedential weight. This can only be done by a court at a higher level than the one which handed down the decision although the High Court of Australia is not bound by its own decisions.

These so called annotations in subsequent references to a case in subsequent cases are compiled in case citators. These are commercially published tables of treatment of cases which are a consolidated version of the noting up I used to do in chambers.[50] Researchers use these case citators as a way of determining the value of a judgment which they might want to rely upon. The citator will build up a profile of a case which at a glance reveals its value as a source of legal rules.

Table 2-1

Applied	*R v Makoare*	[2001] 1 NZLR 318
Applied	*Executive Director of Health v Lily Creek International Pty Ltd*	(2000) 22 WAR 510; [2000] WASCA 258

[50] See Chapter 1 Introduction.

Applied	*R v Chai*	[2000] NSWCCA 320
Considered	*R v MacKenzie*	(2000) 113 A Crim R 534; [2000] QCA 324
Considered	*R v Lewis*	(2000) 1 VR 290; [2000] VSCA 140
Considered	*Zoneff v R*	(2000) 200 CLR 234; (2000) 172 ALR 1; (2000) 74 ALJR 895; (2000) 21(9) Leg Rep C3; (2000) 112 A Crim R 114; [2000] HCA 28
Considered	*Conway v R*	(2000) 98 FCR 204; (2000) 172 ALR 185; [2000] FCA 461
Applied	*R v Carter*	(2000) 1 VR 175; [2000] VSCA 6
Considered	*R v Serratore*	(1999) 48 NSWLR 101; [1999] NSWCCA 377
Applied	*Nestorov v R*	[1999] WASCA 303
Considered	*R v Helene*	[1999] NSWCCA 203
Applied	*Johnson v R*	[1999] WASCA 75
Applied	*R v Lukacevic*	[1999] VSC 93

The table above illustrates how such a table might be useful. *Osland v R*[51] is a 1998 case in which an issue was the recognition of so-called *battered women's syndrome* as a category of provocation which the law recognises may be sufficient to lead a person to commit homicide. Provocation is a partial defence to murder which means the accused may be instead found guilty of manslaughter. Historically the provocative action which led the defendant to lose control must have immediately preceded the homicide. However battered women's syndrome acknowledges that a woman can be abused over years and eventually lose control. It is clear from the table how the case has been relied upon subsequently with a series of *applieds*.[52]

[51] *Osland v R* [1998] HCA 75; 197 CLR 316

[52] This table is simply an illustration of how a citator might be useful. What must be taken into account in this case is the *Osland* case is a High Court decision which binds lower courts. Also the decision was not simply about battered women's syndrome but criminal procedural law issues. The *Zoneff* case in the above table is clearly important because it has been reported in a number of reports series including the authorised *Commonwealth Law Reports* (CLR). However the case is about criminal procedure and the focus is on directions to the jury.

Citators are one of the most used legal research tools. That they are central to a legal research strategy demonstrates the significance of a hierarchy established by subsequent reference as well as the level of court.

The fact/law distinction

I have demonstrated that as well as the hierarchy of the court hearing the matter, and the status of the publication of the decision a researcher needs to take into account the frequency of positive subsequent citation which will also determine the value of a case as authority. Yet there is a further aspect of the judgment which needs to be taken into account. The law is assumed to be applicable to a particular fact situation and the relevance of a principle will depend on whether another case has arisen within analogous circumstances. However researchers need to be aware of how broadly the notion of *analogous* can be drawn. In a decision a principle of law can be expressed narrowly or generally, that is a principle may only apply to a confined set of circumstances or more widely. For example the law of negligence has developed with a broad range of principles. Liability in negligence might arise from a breach of a duty of care in manufacturing, or in the provision of professional advice or when warning about danger. The specific facts might involve a rotten snail in a bottle, an incorrect audit which misleads investors or a swimmer diving into shallow water on council land.[53]

A dilemma a researcher might have is determining how far removed from the original fact situation a principle of law expressed in a case may be applicable. The facts giving rise to a legal dispute and the principles applied, at an appeals court level, to resolve it, are not easily distinguished. In law there is an expression, the *fact/law distinction* which counter-intuitively is rarely used in the context of asserting there is a clear difference between fact and law but to highlight the difficulties which arise when a court needs to differentiate between fact and law.[54]

As alluded to above in the context of first instance decisions, in a jury trial, the jury is meant to determine matters of fact based on the evidence. Judges apply legal rules appropriate to the finding of fact. However there are no clear legal definitions of fact and law. Aronson[55] uses the

[53] See respectively *Donoghue v Stevenson* [1932] AC 562; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Vairy v Wyong Shire Council* (2005) 223 CLR 422.

[54] See Stephen A Weiner 'The Civil Jury Trial and the Law-Fact Distinction' 54 Cal L Rev 1867 (1966)

[55] Ibid p 1875.

example of the law of negligence to illustrate the conflation of law and fact. In the law of negligence one element which needs to be established is that one party owed a duty to another to *take reasonable care*. A breach of this duty leading to a foreseeable loss may give rise to a liability.

> The standard of reasonableness performs different functions within the tort of negligence. It is generally classified as an issue of fact, but the large number of judicial expositions as to how the reasonableness standard is to operate in particular areas is clearly designed to set guidelines or parameters for future cases. As with causation, the reasonableness standard can become a question of law to the extent that a court limited to such questions intervenes to lay down general guidelines governing the tribunals of fact.[56]

In determining liability superior courts are also deciding the criteria which will be applied when determining reasonable care in particular circumstances which will bind lower courts as legal rules. The difficulty arises when the criteria are regarded as a fact but the threshold at which a duty arises is at the same time a legal issue.

This malleability of the fact law distinction has also been seen as a rhetorical device used by judges.

> No two terms of legal science have rendered better service than 'law' and 'fact.'…They readily accommodate themselves to any meaning we desire to give them.... What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy.[57]

Facts and precedent

The fact/law distinction issue does not only apply to discerning the point at which an integer represents a value which gives rise to a legal right or liability. It is also used to refer to determine what general rule might be derived from the case. Is the rule derived independent of the facts, or can the rule only be known in the context of the facts?

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[56] Mark Aronson 'Unreasonableness and Error of Law' (2001) 24(2) University of New South Wales Law Journal 315 [6].

[57] Dean Green *Judge and Jury* (1930) p 270 quoted in Stephen A Weiner 'The Civil Jury Trial and the Law-Fact Distinction' 54 Cal L Rev 1867 (1966) p 1869.

Overall this thesis is not going to explore the common law fact/law distinction in detail. It is sufficient to argue in the context of this paper that when identifying the law in a common law decision there are uncertainties. The expression of the legal rules to resolve a dispute in a superior court is always going to be dependent upon the facts which gave rise to them. So whether a rule relied upon is able to be applied more generally, rather than tied to the specific facts of the original dispute, can be a matter of interpretation.

Interpreting legislation

The ability to establish the generality of application of a rule is not simply a difficulty with the common law. There may be a misapprehension that legislation must be relatively straightforward because legislation comprises rules, independent of facts. However legislation can present similar difficulties to the common law.

For example below is a provision from the New South Wales *Legal Profession Act 2004*.[58] I have placed the key terms in italics.

> **345 Law practice not to act unless there are reasonable prospects of success**
>
> (1) A law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate responsible for the provision of the services concerned *reasonably* believes on the basis of provable facts and a *reasonably* arguable view of the law that the claim or the defence (as appropriate) has *reasonable* prospects of success.

Above we looked at the example of the difficulties posed by the term reasonable in the context of reasonable care and liability in negligence. S 345(1) of the *Legal Profession Act* is arguably as challenging. 'Reasonable belief' can be subjective, 'reasonably arguable' could be objectively assessed but then 'reasonable prospects' can be a question of degree. Also, *reasonable* in law can connote either an objective view or a balanced view or even both. S 345(1) of the act has three potentially contentious elements in a single sentence.

A practitioner would hesitate to advise a client as to the application of this provision without checking case law first. The meaning of this provision has recently been discussed in the case *Keddie v Stacks*[59] in which the court relied upon a 2005 decision[60] which had interpreted an

[58] *Legal Profession Act 2004* (NSW) s 345.

[59] *Keddie v Stacks/Goudkamp Pty Ltd* [2012] NSWCA 254 [55]-[59].

equivalent provision in an earlier act.[61] The 2005 decision was subsequently cited with approval[62] which underpinned the 2012 *Keddie v Stacks* interpretation.

So the provenance of the most recent interpretation of this provision is an older version of the legislation; interpreted in February 2005 in a decision by a single judge; the reasoning of whom was applied in a May 2005 decision by three judges in an appeals court decision; which in turn was relied upon in the 2012 Appeals Court decision. As with common law decisions, in order to understand what a legislative provision means, a researcher may in the same way be constrained by the fact situations which gave rise to the respective interpretations.

For the purposes of this thesis the ultimate meaning of the provision is less important than the process which the court goes through to support its interpretation. While in a common law jurisdiction there are two distinct sources of law in cases and legislation, the interpretation of legislation can be seen to involve the same reasoning processes, that is, a reliance on precedent, as the determination of the application of a common law rule.

Rules and their meaning

It can be seen from the discussion above there is a distinction between the apparently easily locatable law to which students are initially introduced; and the filtering and synthesising process which enables a practitioner to advise about what the law is and how it might be applied. The law does not appear to exist as distinct identifiable rules in cases and legislation. Statements of law or rules may be able to be extracted from these sources, but determining their meaning or the way they might be applied is a more complex process.

When researching the common law a researcher needs to take into account not only the statements of law extracted from the decisions, but also the context, that is the facts in which the rule was relied upon; the respective hierarchy of the court which handed down the decision; the subsequent reputation or citation record of the decision (which may not always be dependent upon the court hierarchy) as well as the purpose for which the research is being done.

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[60] *Degiorgio v Dunn* (No 2) [2005] NSWSC 3; 62 NSWLR 284.

[61] *Legal Profession Act 1987* (NSW) s 198M(1).

[62] *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153; 63 NSWLR 300

As demonstrated above even when researching legislation in a common law jurisdiction, while a starting point may be a more readily identifiable rule, the interpretation or application of it will also require a search for cases which may have considered its meaning. Any case found may in turn have been subject to subsequent scrutiny which may also need to be checked.

When looking at the cases a researcher will also take into account the publishing hierarchy. An authorised decision may have greater weight than a reported or unreported decision. However an unreported decision may have facts which parallel the facts which have generated the research in the first place. Law is not simply about the location of rules, it also involves determining the provenance or reliability of the rules as expressed in cases as well as considering the respective source's value as material which may persuade a court. A decision which may not necessarily be considered authoritative because of its position in the hierarchy may nevertheless be persuasive because a fact situation which mirrors that of the researcher's legal issue has already been adjudicated on.

It is this aspect of legal research, that is, the navigation amongst the various sources of law, rules, cases, court hierarchy and publishing hierarchy that Berring and others are writing about when they speculate about the impact of online access to law.[63] It is in this context, when faced with the balancing of court and publishing hierarchies as well as the respective weight of a range of decisions that the hard copy organisation of decisions and the classification of law have proven their value.

However an explanation of how the sources of law are used and published is not sufficient to understand what underlies the concern regarding the challenge of online access to law.

Concepts of law

In the above discussion the interplay of court and editorial hierarchy as well as the development of the reputation of a decision was discussed in the context of identifying authority in law. It showed that apart from the statement of law as it applies to the facts which gave rise to a dispute there are a range of variables which will impact on the weight given to a case. However authority has another meaning apart from the original source of the law. Authority also means the ultimate legitimacy of law. Do higher universal principles exist from which our laws are derived such as natural law or God's law? Or is law solely the product of society and in turn manifests society's flaws, self-interest and transience? Concepts of law look

[63] See Chapter 3 Collapse of the Legal Universe.

at questions regarding the origin of law, how the law established its legitimacy, the social or political interests which law serves or how the nature of judicial reasoning determines how rules might be applied subjectively or objectively. The explication of what law might be also contributes to the elusive nature of isolating rules.

Amongst competing theories of what law is, there is tension between the concepts of law which assumes rules are objectively verifiable and applicable; and concepts which acknowledge doubt whether rules can ever be definitively identified.[64] In the introduction to this paper[65] I contrasted the views of the two nineteenth century legal education contemporaries Langdell and Holmes. The former expressed his faith in law being analogous to science whereas Holmes argued law operates in society and interpretation is subject to context. The continuum is characterised as the difference between *formalism* and *legal realism*.

Wetlaufer divides legal concepts school loosely into the 'Grand Alliance of the Faithful' and the 'League of Skeptics'.[66] The former being those who believe in the objective nature of rules and the latter being those who concede rules can not be definitively identified because their interpretation is subject to context. Berring alludes to legal realism as an example of the impact of West's comprehensive publication of United States judgments in the early nineteenth century:[67] the ready availability of a wide range of decisions where a researcher could come across conflicting authority led to doubts regarding the objective nature of legal rules.[68]

Legal formalism and legal realism

Formalism is a strict and literal application of principles of precedent. It reflects what has been described above as the way an undergraduate may be introduced to law. The assumption is

[64] See for example Michael Steven Green 'Legal Realism as a Theory of Law' 46 Wm. & Mary L. Rev. 1915 (2005).

[65] See Chapter 1 *Introduction*.

[66] Gerald B Wetlaufer 'Systems of Belief in Modern American Law: A View from Century's End' (1999) 49 *American University Law Review* 1 p 61.

[67] See discussion of Berring's writings in Chapter 3 Collapse of the Legal Universe.

[68] Robert C Berring 'Legal Research and Legal Concepts: Where Form Molds Substance' (1987) 75 *California Law Review* 15 p 23.

rules exist in isolation and are applied predictably in a way which is independent of social context, policy or politics; whereas realism accepts that laws are interpreted within a range of contexts.[69]

The term legal realism encompasses a continuum of characterisations of the law. At one end of the continuum there is the pragmatic approach. It is artificial to pretend that rules mean the same to all those who apply them. There is an element of malleability in the way laws are interpreted and the ultimate interpretation in a decision may be subject to the respective judge's personal biases or beliefs yet the range within which such a discretion might be exercised is constrained by the fundamental principles which underlie a rule. At the other end of the continuum, law is simply a rhetorical exercise and once a person looks beyond the political or ideological interests which underpin the rules there is no absolute authority. The fundamental principles do not really exist.

The differences then are formalism assumes that laws are objectively verifiable and applied; and realism accepts that the interpretation and application of law has a subjective or contextual element. Elsewhere in this paper I have discussed the difference between a bibliographic and contextual understanding of knowledge sharing in information science. There are parallels in law which are represented by these competing concepts. As argued above if law is strictly an authoritative practice and reflects a formalist approach to rules then these rules are readily the subject of bibliographic classification, storage and retrieval. However the necessary centrality of hard copy texts would mean law is likely to have been vulnerable to the disruptive new technologies which disintermediate libraries. If online access to law does not have the results predicted in the literature then perhaps other concepts of law rather than positivism may be useful in determining exactly how the profession deals with information.

There is a range of so called formalist approaches. Hart for example portrays a positivist approach to law yet acknowledges that there is flexibility in the application of rules, but not on the basis of context determining meaning, but that rules can only be stated at a general level because the law cannot be conceived as being able to anticipate every possible permutation of facts which may lead to a legal dispute.

[69] For a good overview see Gerald B Wetlaufer Systems of Belief in Modern American Law: A View from Century's End (1999) 49 *American University Law Review* 1. See also Arthur Goodhart 'Determining the Ratio Decidendi of a Case' (1930) 40 *Yale Law Journal* 161 as an example of formalism.

> If the world in which we live were characterised only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world for for 'mechanical' jurisprudence.[70]

It could be argued that strict formalism is 'mechanical' whereas the Hart approach sees rules as identifying principles at a general level which in application to various circumstances necessarily must take into account the variety of fact situations in disputes which might arise. In this way law can be seen as 'open textured'.[71]

Stone, a realist, identifies a contradiction in the narrow formalist approach.[72] If legal rules exist in a vacuum, that is indifferent to community expectations or social circumstances, how does this explain the way the law evolves seemingly in response to the context in which cases are heard? The answer must lie in the nature of judicial reasoning. Stone identified a pragmatic approach to precedent. Principles are constantly reviewed in the light of 'policy', 'ethics', 'justice' or 'expediency'.[73]

Holmes in his history of the common law points out that the common law is not necessarily logical.[74] The resolution of legal disputes may be based on considerations outside the law itself but rationalised with reference to black letter law.

> The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.[75]

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[70] HLA Hart *The Concept of Law* Oxford (1961) p 125

[71] Ibid p 121ff

[72] Julius Stone 'The Ratio of the Ratio Decidendi' (1959) 22 *Modern Law Review* 597; see also by the same author '1966 and all that! Loosing the Chains of Precedent' (1969) 69 *Columbia Law Review* 1162; and *Precedent and Law: The Dynamics of Common Law Growth* Butterworths, Sydney (1985).

[73] Julius Stone 'The Ratio of the Ratio Decidendi' (1959) 22 *Modern Law Review* 597 p 618.

[74] Holmes, Oliver Wendell *The Common Law* (1881)

[75] Ibid p 42.

In our understanding of judicial reasoning and the application of rules we can see there is a continuum of assumptions about how the law operates. At one end there is legal formalism which sees law as a science with stable predictable rules while at the other end there is *rule scepticism* which challenges whether rules can be identified at all. The notion being that any expression of a legal rule can only ever be a prediction. The definitive expression of the rule can only exist once a court has ruled upon a dispute.

Stone discussed the nature of rules distilled from cases in detail as a challenge to the formalist assumptions about the use of precedent. Stone's initial critique is based on the paradoxical outcome of a strict adherence to precedent. If the common law relies strictly on precedent why is it the common law is able to adapt to change?

> The doctrine of *stare decisis*…implies the stability of the legal system along the stream of time, that despite all the vast social, economic changes of the last eight or nine hundred years, society remains nevertheless in some meaningful sense under the governance of the same system of law.[76]

Stone also questions the assumption that a case can on its own stand for a specific rule. He relies on the leading case of *Donoghue v Stevenson*[77] to make his point. *Donoghue v Stevenson* is the seminal negligence case. In the facts a Scottish woman is bought a bottle of ginger beer. While consuming it she discovers there it contains a dead snail. She suffers nervous shock and sues the manufacturer. All lawyers know this case and understand that it stands for the liability in negligence of manufacturers but is also drawn on for its explication of the so called neighbour principle which relies on foreseeable harm as a criterion for determining a duty of care in negligence actions.

While every common law lawyer knows what this case represents Stone toys with our expectations about it in order to make a point.

> If the *ratio*[78] of a case is deemed to turn on the facts in relation to the holding…there may be as many rival *rationes decidendi* as there are possible combinations of distinguishable facts in it.[79]

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[76] Julius Stone 'The Ratio of the Ratio Decidendi' (1959) 22 *Modern Law Review* 597 p 598.

[77] [1932] AC 562

[78] By *ratio* or *rationes* lawyers mean the rule or rules derived from the decision.

Stone identifies nine facts in the case and examines each one to demonstrate the range of rules which could be derived from the decision. The three excerpted facts below and Stone's analysis will make the point he is making clear.

a) *Fact as to Agent of Harm*. Dead snails, *or* any snails, or any noxious physical foreign body, *or* any noxious foreign element, physical or not, *or* any noxious element.
b) *Fact as to Vehicle of Harm*. An opaque bottle of ginger beer, *or* an opaque bottle of beverage, *or* any bottle of beverage, *or* any containers of any chattels for human use, *or* any chattel whatsoever, *or* any thing (including land or buildings).
c) *Fact as to Defendant's Identity*. A manufacturer of goods nationally distributed through dispersed retailers, *or* any manufacturer, *or* any person working on the object for reward, *or* any person working on the object, *or* anyone dealing with the object.[80]

The fact that he is dealing with a leading case in which the principles are well established and unchallenged is a rhetorical device to illustrate a point about the derivation of legal principles from decisions. In practice there is no difficulty with the extraction of rules from this particular case, but it forces a rethink about the assumptions which underpin precedent.

Stone makes two points. When determining the rule established by a case, that is the *ratio*, in the reasoning of the judge it is important to separate the descriptive element of the ratio and the prescriptive element. The descriptive element comprises the process of the judge's reasoning in the face of the facts and the prescriptive ratio is the rule which can be extracted from the decision and which may be binding on other courts.[81]

By separating the descriptive and prescriptive elements of the reasoning Stone is able to demonstrate how the common law avoids articulating the law in a way which is specific fact dependant, but also shows that a decision does not necessarily stand for a single definitive proposition.

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[79] Stone above p 603.

[80] Julius Stone 'The Ratio of the Ratio Decidendi' (1959) 22 *Modern Law Review* 597 p 603.

[81] Ibid p 600.

The second point Stone makes is that a case on its own does not represent the law. A case may stand for a number of different principles of law and only subsequent treatment of the case over time will assist in determining what the prevailing interpretation might be.[82]

Further the law relies on terms which Stone describes as indeterminate reference, such as reasonableness and fairness, where a court has flexibility in determining when a threshold of reasonableness or fairness is reached.[83]

That an outcome of a case may arguably support a range of iterations of a legal principle and that the principle a case stands for can be qualified over time means that when it comes to being bound by precedent judges are in fact given a range of approaches in their application of a decision to a current dispute.

So rather than being bound by prescriptive rules judges are within certain constraints given choices when it comes to interpreting the law. The choices may arise for example in resolving differences in determining the ratio in a single case or in reconciling a range of cases with differing views on the law or in determining the range or limits of indeterminate references.

However the reasoning process is not open ended. Stone emphasises that dealing with precedent represents choices, that is, a decision between a range of options rather than a free hand.[84] Nevertheless it does offer judges the flexibility to enable the common law to evolve.

> For the universe of problems raised for judicial choices at the growing points of law is an expanding universe. The area brought under control by the accumulation of past judicial choices is, of course, large; but that does not prevent the area newly presented for still further choices by the changing social, economic and technological conditions from being also considerable.[85]

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[82] Ibid p 608.

[83] Ibid p 612. See also the discussion of the notion of reasonableness earlier in this chapter Mark Aronson 'Unreasonableness and Error of Law' (2001) 24(2) *University of New South Wales Law Journal* 315 [6].

[84] Stone above p 612.

[85] Ibid p 612.

In another text Stone refers to these choices as *leeways*.[86] And while within these leeways a judge's own background and subjective outlook may determine the ultimate outcome the leeways are also constrained by the authorities' boundaries beyond which a judge cannot stray.

In this way as a legal realist Stone could be seen as conservative. As referred to above there is a school of legal realism which argues that any explication of a rule can only be prediction so in law rules only exist as decisions applicable to a single concluded dispute. Legal advice necessarily solely comprises predictions about what a judge might decide.[87]

Law and authority

For the purpose of this discussion it is also important to explore the notion of authority. As expressed elsewhere in this thesis, authority can mean both the source of law's legitimacy or power, as well as the identification of the most reliable source of legal rules.

Hart looks at the origin of the authority which supports a rule. What is the source of a parliament's or a court's power which establishes an obligation to comply?

> How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to moral obligation? What are rules and to what extent is law an affair of rules?[88]

Hart acknowledges that law is not simply about rules representing sovereign orders which require obedience based on the threat of sanctions. A model of law comprising 'coercive orders' is at odds with laws which may impose obligations but also bestow powers; or enable individuals to create rights or obligations between themselves.[89] The operation of law then does not readily lend itself to being described simply as the application of rules, it includes the process of recognition of rules independent of direct enforcement.

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[86] See Julius Stone *Precedent and Law: The Dynamics of Common Law Growth* Butterworths, Sydney (1985).

[87] See for example Michael Steven 'Green Legal Realism as Theory of Law' 46 Wm & Mary L Rev 1915 (2005).

[88] HLA Hart *The Concept of Law* Oxford 1961 p 13

[89] Ibid pp 47-48

By way of further explanation, Hart distinguishes between primary and secondary rules. Primary rules are the rules which represent legal obligations and then there are the rules of recognition or secondary rules which are the mechanism for identifying the primary rules. Secondary rules represent the criteria for identifying primary rules.

> The criteria so provided…take any more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decision in particular cases.[90]

This analysis resolves difficulties with the analysis of law simply comprising rules. If law was simply rules then it would lack a mechanism for both resolving legal disputes and conveying authority. The distinction between primary and secondary rules accommodates both a concept of authority which does not require a sovereign's omnipresence or sanctions and the identification of not just the rules but how they operate.

It may also be useful to discuss the work of Peter Goodrich in this context.[91] Goodrich argues that legitimacy of law is conceptual and the various approaches to the definition of law make assumptions about the origins or bases of law which tend not to be tested. A strict doctrinal approach is a way of overcoming the fragile ideation of law.

> The divine origin of law becomes the secular sovereign, the State or even the 'will of the people', but as a source of law it retains its quality as an external and absolute justification for legal regulation, discipline and law. This external, non-legal legitimation of the legal order provides the law with its ideational unity and renders the wide spectrum of substantive legal rules into a system of rules. It represents the foundation of law—in theology, politics or myth—yet paradoxically, this ideational source is always a deferred or absent source, it is always in its nature hidden rather than explicit, abstract rather than readily available, past rather than present.[92]

Goodrich is pointing out that the law's emphasis on authority is essential for a discipline whose objective is social control but that the absolute legal sovereign does not exist. The

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[90] Ibid p 97.

[91] Peter Goodrich *Reading the Law: A Critical Introduction to Legal Method and Techniques* Basil Blackwell Oxford (1986) p 16.

[92] Ibid p 5.

preoccupation of law with a notion of authority is mythmaking. [93] Law does not need to be defined except by reference to sources of law or the law represented by texts.[94]

Following Goodrich, an argument might be that a strictly doctrinal approach to explaining law does not effectively describe how law operates and also that legal rules are more elusive than we imagine. The term black letter law creates a confidence in the existence and determinability of rules which is unfounded. Looking more closely at concepts of authority and rules may help us understand the disconnection between law and the structure of texts. [95]

Rules and authority

The above discussion has illustrated a range of areas where there may be uncertainty in the identification, interpretation and application of legal rules. In black letter legal research the researcher needs to be mindful of hierarchies of legal information which includes the level of court, the source of publication, the reputation established over time of a decision as well as the relation between a decision and the facts of the litigation which gave rise to it.

Further to this an examination of apparently contrasting concepts of law which consider both the way rules might be relied upon as well as the notion of authority had demonstrated that there is uncertainty in the concepts of the ultimate source of law.

However it could be argued that there is not a great difference between the Hart concept of open textured law and the leeways that Stone identifies in legal reasoning. It is acknowledged that both of these jurists represent the pragmatic middle ground of formalists and realists respectively. Nevertheless they both indicate that there is flexibility or malleability or room to manoeuvre in the interpretation of legal principles.

It may be legal apostasy but I would also argue for the purposes of this thesis that when it comes to characterising authority in law that Hart's distinction between primary rules and the rules of recognition are not unrelated to Goodrich's notion of ideation of legal rules which obviate the need for an absolute authority.

[93] Ibid.

[94] Ibid p 8.

[95] Ibid p 16.

This survey helps us to understand that in the area of identification and interpretation and application of legal rules that there is a lack of certainty in meaning and a reticence in identifying an ultimate source of law.

The introduction of this thesis referred to the Langdellian approach to law which is based on law being analogous to science. Law comprises objectively verifiable rules which are discoverable and applied in a predictable way. Notionally the objective of the thesis is to discover whether online access to law has challenged these positivist assumption regarding law. However elusiveness of the notion of authority in law is not something new and not an area that has only recently been challenged by online access to information.

When looking at the impact of online access to law and how law is understood, the concerns of the literature turn on meaning and interpretation. The traditional availability of law in hard copy which indicated a clear hierarchy based on authority and supervised by editorial overview presented law in a way which maintained consistency, stability and predictability. Unmediated and unstructured access to law challenges these ideals, if they in fact exist. If rules are objectively identifiable and these rules are discoverable partly through the agency of the way hard copy libraries are structured then online access to law which subverts this structure and disguises the hierarchy of rules will have an impact on the law. However if rules do not exist as ideals in the first place and the interpretation of law is contextual and subject to legal community interaction, then perhaps the change in medium will not have as great an impact. An argument being developed in this thesis is that if there has not been the dramatic changes predicted, then the assumption that law is exclusively an authoritative practice based on a positivist approach to identifying rules may not be supportable. The challenge to the legal concept of authority may not lie in unmediated access to legal resources but the revelation that law is not necessarily as hierarchical or scientific as formalists may believe.

3 Collapse of the Legal Universe

Introduction

Chapter 1 adverted to an area of legal scholarship which focused on the impact of online research on the understanding of law.

In Chapter 2 I explained how law is recorded and how these resources are relied upon by the profession. I also discussed the variety of meaning of the term *authority* in law, explaining that authority can refer to: the hierarchy of courts where the higher courts of appeal state the law which binds lower courts; and also the term can suggest the persuasive weight accorded to particular reports or reports series of judgments. Finally here is another concept of authority which addresses the question of why a statement of law by a court should be recognised or accepted by the profession or the community. The various meanings of authority tend to be conflated so when reading the literature it is important to consider where what is being written about is court hierarchy, reputation of specific judgments or recognition of rules. A protean notion of authority undermines the arguments of those who considered it under threat by online access to law.

As well as the elastic nature of the term *authority*, there are disparities in the contexts in which authority might be discussed. There tends to be an overlap between a bibliographic concept of authority and the idea of authority in law as being rhetorical, that is a product of discourse or language. A bibliographic approach to law focuses on the manifestation of authority in texts. This could be the arrangement of the reports series on a shelf which reflects the hierarchy of the courts as well as the volumes' respective authority enabling a researcher to navigate the law in an ordered way by having an immediate impression of the respective weight of rules. However rather than seeing a shelf of volumes as demonstrating the underlying architecture of law it could be seen instead as simply perpetuating the myth of authority. Law as published could be seen an aspect of legal rhetoric. If law is simply rhetorical as Goodrich[96] argues then its authority may be inherently fragile. So a fracturing of the way it is published through online access may impact on this stability. So in the examination of the impact of online access to law, and specifically the removal of the tangible hard copy meaning, the outcome could be either seen as the foundations of law become invisible or the myth of law becomes visible. What is

[96] See Peter Goodrich Reading the Law: A Critical Introduction to Legal Method and Techniques Basil Blackwell Oxford 1986.

curious is the arguable result is the same. If the established bibliographical structure of law becomes invisible the legal universe collapses, if law is simply rhetorical and the myth of authority is exploded the legal universe collapses. The literature[97] focuses on the former but sometimes informed by the language of the latter. It is a difficulty when the literature is generally not founded on an explication of theories of law. So, while the research which considered the impact of online access to law addressed the technology developments, and speculated about the impact, in the main, the literature lacks theoretical approaches and is based on limited empirical research. Nevertheless it represents an established concern regarding the impact of online access to law on the concept of authority in law.

This chapter will provide an overview of the leading authors in this area. I am conscious that literature reviews on this topic already exist. I do not wish to simply mirror this work. So while I will be looking at the seminal journal articles closely, I will also be critically analysing the existing literature reviews.

The collapse of the legal universe

In the canon of authors who considered the impact of online access to law on the profession the leading scholar is Robert Berring. He has an unusual background with roles as deans of both the School of Library and Information Studies, and the Law School at Berkeley University.[98] Berring has been writing in the area of the impact of online research on law since the mid-eighties[99] and his articles are usually referred to in any discussion of this issue. Generally his arguments cover:

- the history of legal publishing,

[97] See for example Berring, Robert C 'Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information' (1994) 69 *Washington Law Review* 9 (What legal authority means in the context of hard copy report series being replaced by digital sources); 'On Not Throwing Out the Baby: Planning the Future of Legal Information' (1995) 83 *California Law Review* 615 (Quality of subscription services as against free access sites—the paper champions the added value of the commercial publishers' editorial processes); 'Legal Research and Legal Concepts: Where Form Molds Substance' (1987) 75 *California Law Review* 15 (Jurisprudential effect of easy access to online legal information); 'Symposium on Law in the Twentieth Century: Legal Information and the Search for Cognitive Authority' (2000) *88 California Law Review* 1673 (Legal information is becoming a 'free for all of competing authority').

[98] See website for biographical details:.www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=12

[99] See generally Frank G Houdek *From the Reference Desk to River City: A Bibliography of the Writings of Robert C. Berring* (2007) 99 Law Library Journal 413.

- the contribution of publishing to the structure and hierarchy of law and
- how a move to an online environment threatens the structural integrity of law.

Perhaps the best starting point for an assessment of Berring's scholarship is an article which encompasses his key themes: the amorphous nature of law absent a data structure which establishes authority, the history of legal publishing which is the development of this structure and the impact of online access to law which challenges this structure. Berring published 'Legal Research and the World of Thinkable Thoughts' in 2000.[100] In the article Berring identifies the dramatic generational change represented by the new technology but concedes that two constants—the functional basis of the resources and the inherent conservatism of judges—have together moderated the impact.[101]

By 'functional basis of the resources' the assumption is Berring is arguing that the arrangement of online publications simply reflect the way the legal profession operates. A proportion of what is being published is a record of a legal system's court's proceedings and as they contain references to other law also represent tools to navigate around these cases. Publishing is generated by the profession's processes rather than following in the steps delineated by the architecture of legal publishing. For example, a case citator is going to help identify the most important cases determined by how often they are cited; or a statute annotator will identify current judicial consideration of specific legislative provisions; and a commercially published reports series is going to represent the most important judgments from a court. Legal publications are a record of the activity of the profession which arguably has not been changed by the impact of technology.

Berring's fear however is that younger practitioners will bypass these resources altogether.[102] In this context Berring develops an argument that without an inculcation of the importance of these resources in legal research the way we think about the law will change fundamentally[103].

In the article Berring charts the history of the application of Blackstone's *Commentaries*[104] to make his point. The *Commentaries*, published in the 18th Century, was the first time English

[100] Robert C Berring 'Legal Research and the World of Thinkable Thoughts' (2000) 2(2) *J App Prac & Process* 305.

[101] Ibid p 306.

[102] Ibid p 313.

[103] Ibid p 307.

common law was organised and classified in a coherent way. According to Berring this work was so influential that the organising principles were adopted in the United States both by Langdell in his scientific approach to the teaching of law and West's *American Digest System* first published in the 1890s. The *American Digest System*, now currently more commonly known as West's *Key Number System,* represents a detailed taxonomy of legal issues with every legal topic identified by a unique code which enables easy searching and cross referencing. This legal classification system underpins the way the published law is interrogated in the United States and Berring argues it is this level of organisation which is threatened by online access to law. When reading Berring it is important to understand that there is a distinction between case reports, which reflect the court hierarchy when a decision (and the attendant binding rules) is handed down, and the classification system relied upon when a researcher is looking for materials relevant to solving a legal problem. Berring's argument is based on the importance or centrality of the legal classification to the ability to be able to discover and more crucially select the primary materials.

Berring analyses the significance of a classification systems generally. He relies on the work of Bowker and Star[105] to explain the operation of classification systems. Once a domain or subject area has been classified the organisation or structure which has been created to describe it becomes established as the common sense approach to viewing the structure and the classification system itself disappears. The domain becomes understandable transparently without any conscious realisation or acknowledgement of the artifice behind the structure. The classification system, that is, the structure, over time 'becomes authoritative'.[106] Berring describes this as the creation of a 'conceptual universe of thinkable thoughts'.[107] The organisation of a specialist domain through a classification system ultimately directs how the domain may be understood or how it can be thought about with the assumption that it is the natural way to engage with the discipline and not as a result of the imposed system.

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[104] William Blackstone *Commentaries on the Laws of England* (1765-69).

[105] Robert C Berring 'Legal Research and the World of Thinkable Thoughts' (2000) 2(2) *J App Prac & Process* 305 p 310 referring to Geoffrey C Bowker & Susan Leigh Star *Sorting Things Out: Classification and its Consequences* MIT Press 1999

[106] Berring above p 310.

[107] Ibid p 311.

While the common law may be contained within individual judgments published in report series, because they traditionally could only be navigated using indexing resources, these indexing resources necessarily imposed a structure or a meaning of their own which is not apparent until online technology enables it to be bypassed.

Berring relies on Bowker and Star to argue that the operation of a classification system operates transparently in a way which creates conventions and expectations in law which give it structure and meaning. The article also should encourage us to look to other aspects of the profession where these conventions and expectations determine meaning and hierarchy or authority. However the question might asked whether it is limiting to confine a discussion about the impact of online research on law to solely to the legal classification system.

So in this context we note that in 'Legal Research and the World of Thinkable Thoughts' [108] Berring invites the reader to consider two aspects of the impact of technology on law. It is argued that it is the centrality of classification in the common law which has created a way of not only navigating rules, but has also created a structure within which law may be comprehended. We also need to accept that despite the fundamental nature of change in relation to the medium of legal information it is the contribution of the function of legal sources and the conservatism of the judiciary which has in some way stabilised the universe in the face of these changes.

We shall see when we examine Berring's subsequent writings, that it is the centrality of classification which he discusses most expansively. It could be argued it is a limitation of Berring's scholarship that he has not addressed the community represented by the profession and how information is shared within the community. Nor has he addressed the relationship between the profession and the texts and their content, both of which may in fact constitute the universe of which the classification is only a small part. It is possible accept that change is not as dramatic because of the conservatism of the judiciary and the functional content of the sources. However a qualification might be it is not because they are a drag on the dynamism of unstructured access to law, but because they represent the structure of law rather than the classification system.

'Legal Research and the World of Thinkable Thoughts' encapsulates the essence of Berring's view of the impact of technology. It is important because it is the first which introduces the

[108] Berring above p 305.

work of Bowker and Star in this context and interesting because the thesis on the centrality of classification is suggested in Berring's earlier works, but without a theoretical basis.

In 'Legal Research and Legal concepts: Where Form Molds Substance'[109] Berring takes a traditional McLuhan approach to the relationship between the structure of resources and how that form is imposed on the way law is understood. It is Berring's most clear explication of the connection between the form of texts and the way law is structured. Essentially the article is an overview of the history of legal publishing. It is the progenitor of 'Thinkable Thoughts'[110].

Berring discusses the English nominate[111] reports. These were not so much judgments but accounts of judgments which could be part transcripts, or summaries derived from records or documents of proceedings. There was no consistency of approach or formal editorial processes to establish or maintain standards. The most important nominate reports have been selected and republished in the English Reports[112] compilation which reflects their importance despite the variation in their reliability.

In the United States early case reporting was in the same form as English nominate reports. Berring notes that they were subject to reviews and specific reporters developed a reputation for veracity and reliability.[113] The advent of West Company led to a more structured approach to case reporting with uniformity of style and presentation. However the objective of West's was comprehensive reporting making available all appeals court decisions from all jurisdictions. This did not necessarily improve the situation because despite the improvement in editorial standards there was no hierarchy established in the relative importance of the decisions. There was a potential difficulty with contradictory or inconsistent authority.

Berring identifies two resources which overcame the difficulties with comprehensive reporting. One was the *American Digest* which set up detailed classification system for law and the

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[109] Robert C Berring 'Legal Research and Legal Concepts: Where Form Molds Substance' (1987) 75 *California Law Review* 15.

[110] Robert C Berring 'Legal Research and the World of Thinkable Thoughts' (2000) 2(2) *J App Prac & Process* 305.

[111] Berring refers to them as *nominative* reports.

[112] *English Reports* 1220-1865 Butterworths

[113] Berring above p 19. Berring cites a volume of reviews of the US nominate reports.

American Law Institute *Restatements*[114] which were a codification or restatement of the common law in particular topic areas. Each of the *Restatements* attempted to state the key principles derived from the leading cases and so represent a distillation of consensus decisions in relation to those principles.

It is in 'Legal Research and Legal concepts: Where Form Molds Substance' that Berring states what he considers an obvious proposition: that it was the access to the complete unqualified range of West's judgments containing contradictory legal propositions which led to the development of *legal realism*.[115] The publishing situation punctured the myth of a set of coherent principles underpinning the common law.

In contrast Wetlaufer identifies legal realism as being connected with the liberal ideals represented by Roosevelt's depression era presidency.

> And finally, the legal realists may be understood in terms of their commitments to progressive legislation, to the work of the New Deal, and to the removal of the judicial and constitutional impediments to those political projects.[116]

There is arguably a social and cultural context for the development of legal realism. It could be seen as one dimensional to suggest a movement which recognises the malleability of law is based on legal publishing initiatives.

Berring draws an arc from the disorganised and contradictory nominate reports series and subsequently comprehensive case reporting in the US, to the pinnacle of structural organisation represented by the *American Digest* and the *Restatements*, back to the current position of an amorphous unstructured range of online resources.

> We are at the point where the ability to search without an imposed structure will nakedly expose the myth of the common law and the beauty of the seamless web to

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[114] See for example American Law Institute, *Restatement of the Law: Contracts*, 2nd ed. (1981). Such is the reputation of the series that the Contracts title has been considered in numerous Australian High Court leading contracts decisions including *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [1988] HCA 44; (1988) 165 CLR 107; *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1992) 174 CLR 64; *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387.

[115] Robert C Berring 'Legal Research and Legal Concepts: Where Form Molds Substance' (1987) 75 *California Law Review* 15 p 23. For discussion of legal realism see Chapter 2 What is Law?

[116] Gerald B Wetlaufer 'Systems of Belief in Modern American Law: A View from Century's End' (1999) 49 *American University Law Review* 1 p 24.

> the general legal world. There is no underlying rational structure to the law other than what the positivists give it. Allowing people to go online in free text liberates them from any requirement to fit their thoughts into a pre-existing structure. Individual researchers are able to order legal doctrine as it suits their needs, but in doing so they must concentrate on narrower areas of law in order to develop the expertise and sophisticated vocabulary free text searching requires. As a result, law is likely to atomize and specialize even further.
>
> This could create a crisis in legal thinking.[117]

The central themes of Berring's writings are encapsulated in this 1987 article.

- Online access to law will expose law's lack of coherence and structure.
- Law will become subjective and malleable.
- Expertise in law will only arise through specialisation.

Subsequent writings in this area are developments of these ideas. Berring also alludes to a *positivist* approach to law without really explaining it.[118] But the assumption is that without the structure imposed by the West research tool only *positivists* have a conceptual basis for asserting law's ultimate authority. Positivists have faith in law's objectivity and coherence despite the absence of a tangible structure represented in the arrangement of texts and indexing services. Goodrich would refer to this as an ideation of law.[119]

The 1987 article creates the basis of Berring's subsequent writings. It could be argued that a misunderstanding of this foundation may lead to a misunderstanding of what Berring is arguing. It would be wrong to assume that Berring is looking at the impact of online access to law solely in isolation. In this article he adverts to the connection between unstructured access to law and legal realism in the nineteenth century, he alludes to elusive nature of positivism in law and then suggests the circumstances may lead to a crisis in law.

What is interesting about this article is the observation that the exponential growth in published cases over time manifested itself first in hard copy and then online. The advent of

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[117] Berring above pp 26-27.

[118] See discussion of positivism in the Chapter 2 What is Law?.

[119] Peter Goodrich *Reading the Law: A Critical Introduction to Legal Method and Techniques* Basil Blackwell Oxford (1986) p 5.

online research is the second time in recent legal publishing history that the profession has been faced with unstructured unmediated access to law. The first time there was a jurisprudential response in the form of the development of *legal realism* (judges are essentially pragmatic) and jurimetrics (legal principles should be applied logically and objectively) and critical legal theory (law perpetuates dominant power structures). The so called myth of a coherent common law was established and sustained by indexing and classification resources created by the legal publishers.

Berring suggests a response of the profession in order to maintain a skill in the face of these developments is to specialise in a particular area of law even more than currently. He does not expand on the nature of this specialisation but the assumption is that a lawyer's expertise will be necessarily narrower.

As in 'Thinkable Thoughts' Berring acknowledges a drag on the dynamism wrought by technology. Despite the changes the majority of lawyers are still using the traditional research methods.

> Perhaps this tension—between the theoretical recognition of the death of the 'grand' scheme by theorists and the continuing use of a tradition-bound subject structure by practitioners—has contributed to the odd nature of the current debate on the nature and the structure of law.[120]

A difficulty with 'Legal Research and Legal Concepts' is the loose chronology. Berring declares that at this stage, 1987, already the 'old system of grand structure is gone' and '[n]o serious scholar can posit a belief in the myth of Blackstone's common law'. Yet at the same time the majority of practitioners carry on in apparent ignorance of the changes happening around them.

It may be worth restating that the problem with the Berring thesis is the concentration on texts rather than an understanding of how the profession operates. This thesis will argue there is no neat correspondence between the publishing and technology innovations and developments in jurisprudence. The existence of online access to law may only be part of an

[120] Berring above p 26.

overall development in the history of legal publishing. Perhaps online access simply accelerates the process.[121]

While 'Legal Research and Legal Concepts' encapsulate the core of Berring's ideas, for the sake of completeness it is important to canvass the range of his approaches to the topic.

'Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information' is the initial inspiration for this thesis.[122] The title itself has an impact arising from the hyperbolic metaphor, however it is a rhetorical device. The article should be seen as a call to action emphasising the importance of rigorous legal research training for law students in a world where the absence of texts makes it more difficult to learn on the job or cover up mistakes.[123] It is important to make this observation as the title of this much cited article lends itself to be taken out of context: including by me.

It should also be conceded that as a librarian Berring may have derived the language from Patrick Wilson who in his *Two Kinds of Power* text has a chapter heading 'The Bibliographical Universe'[124] where the significance of bibliographies is discussed.

In this article Berring spells out the conventional concept of authority in law—that is the reliance on texts, and in particular primary authority.[125] He adverts to the 'continuum' or 'research spectrum' in the weight of materials discoverable in the legal research process with primary authority at one end and presumably secondary materials at the other.[126] Berring finds the focus on authority in law curious in an age where cognitive studies is critically analysing the notion of authority in other disciplines. In law itself Holmes was arguing a hundred years ago

[121] NB see also Ithiel de *Sola Pool Technologies Without Boundaries* (1990) (perhaps the development is evolutionary rather than revolutionary).

[122] Robert C Berring 'Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information' (1994) 69 *Washington Law Review* 9.

[123] Ibid p 33.

[124] Patrick Wilson *Two Kinds of Power: An Essay on Bibliographical Control* University of California Press (1978) p 6.

[125] Berring above p 10.

[126] Ibid p 11.

that judicial decisions necessarily had a subjective element which is at odds with the scientific, logical absolutes represented by role of authority in law.[127]

The focus is in making a point of this dichotomy in law. Legal theorists have for generations been at odds with the so called scientific approach to legal reasoning yet from a legal education and practical perspective the authority status quo approach to legal reasoning is assumed to be the way law operates. So the in practice reliance on traditional common law reasoning or an 'absolutist' approach to law sits uneasily not only with contemporary legal theory but with the way other disciplines approach information in their own domain. Berring refers to the work of Patrick Wilson, an information science scholar, who singles out law as having a singular approach to the notion of cognitive authority.[128]

In the article Berring attempts to resolve these contrasting approaches to law.

As in other articles Berring distinguishes between the data itself and the tools or resources which assist in navigating or interrogating the data. Faced with the challenge of the publication of all appeals court cases in the United States he emphasises the importance of the West's *American Digest* system and the Shephard's citator[129] as enabling a lawyer to get an overall sense of the law. There are two outcomes of this which he discusses.

One is the neglect of legal research as a focus of study in a law degree. Because finding law is a simple mechanical process achieved by referring to indexes and citators there is no need for it to be taught as anything other than a series of treasure hunt exercises.[130] In treasure hunt exercises students are required to look for specific cases or legislation and the subsequent *Eureka* moment is the objective. However students do not necessarily learn the value of what they found, nor how to read or analyse the resources.

The other outcome Berring fears is a distorted view of the law. The indexes create a *Gestalt* or a *universe* of law. The whole could be apparently understandable but without an understanding of the detail. In the context of legal education a student would gain an overview

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[127] Ibid p 11. See also Oliver Wendall Holmes *The Common Law* (1881).

[128] Berring above p 11. See also Patrick Wilson *Secondhand Knowledge: An Inquiry into Cognitive Authority* 1983. See also Patrick Wilson *Two Kinds of Power* University of California Press (1968). See also Chapter 4 Law as a Community of Practice.

[129] Citators are discussed in Chapter 2 What is Law?.

[130] Berring above p 24-25.

of the legal universe but would lack the skills to understand the detail of the content.[131] In effect the reliance on existing indexes in the face of technological change means there is a challenge or challenges to legal education in particular.

These challenges include the sheer number of judgments. As at the turn of the last century when West's started comprehensive publishing of US decisions, there is easy access to judgments which would otherwise be unreported.

Further to this, while in a hard copy world the publisher determined how materials would be accessed either through the indexes or the arrangement of the volumes themselves which were visible and tangible in an online world the publishers lose this control.

Berring lists the main changes between hard copy publishing and online publishing:[132]

- Free text searching enables a researcher to engage with the database in an idiosyncratic way. So searching can be completely unstructured.
- The respective databases are different with unique interfaces and search engines. Users can access the same data but needs to be familiar with the way the respective databases are used. However the interface may impose limited structure on the search process.
- The respective databases use their own citations. This further removes the presentation of materials from the hard copy presentation of works.
- As both LexisNexis and Westlaw also have secondary sources including news in their databases they encourage the use of other sources.
- The publishers code or tag their sources, which enables field searching, which determines how a database might be interrogated.

These observations are in a way dated. They are made before the acceptance of the Internet browsers as the standard method to access online databases. At the time Berring was writing most of the established online databases were still mainly accessible using a proprietary dial up software which was command driven rather than graphical. The use of WWW standards now means it is much easier to move from one database to another. There may be some variations in the layout of the way content and search hits are presented, and there are still

[131] Berring above p 11.

[132] Ibid.

some differences in search engines, but there is not much that would require training to enable initial use.

In Australia the use of media neutral citations provided by the courts now means all online databases have at least one consistent citation. While, for example, LexisNexis Butterworths still persists with its internal citations they are no longer used in searching or writing and may only be of use in LexisNexis Butterworths internal database management.

While each publisher codes its materials in a slightly different way the structure is not always obvious to the user in a way volumes on a shelf was. An adept user can search on a particular field such as case name or judge but the structure is mainly used for hypertext linking between documents and the automatic generation of tables and not so much to convey structure to the user.

From Berring's list it can be seen that today there is still some structure, and a certain level of organisation even if doing Boolean searching. However the point that Berring is making is that students are no longer able to rely on the published volumes to create a sense of the structure of law.

> ...one does not have to be part of the 'Gestalt' any longer...
>
> ...This form of access breaks the gestalt because the students no longer must work within the constraints of the West digesting system. Indeed, students no longer need to even come to Langdell's laboratory of the law, the library, to work. They can do it via modem from home. Thus, the last vestiges of control imposed by the West system, the last form of the glue of subject structure, is gone.[133]

The collapsing universe analogy is not as dramatic as it sounds. The move to online access to law is more a dilemma for those in legal education. In order for institutions to properly prepare students for practice teaching legal research needs to be taken seriously.

> The world where legal research training could be forgotten because the law student or young lawyer would learn it 'on the job' is gone. Finding materials, and carrying out good searches, are important skills. Legal education had better start paying attention to them.[134]

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[133] Berring above p 31.

[134] Ibid p 33.

Nevertheless the title of the article 'Collapse of the Structure of the Legal Research Universe' has been referred to in a way that removes it from the context of the original discussion. It is also possible that the balance of Berring's output is read or judged from the point of view of the drama of the title. The article is more a warning and an advice regarding the status of legal research education rather than a prediction about the future of law.

In 'Legal Information and the Search for Cognitive Authority'[135] Berring explores the concept of *cognitive authority*. For Berring cognitive authority is 'the act by which one confers trust upon a source'.[136] There is a process by which quality or weight of authority is determined before it can be relied upon. Previously the process was a structured search through established texts, which means it was already facilitated by publishers. In the near future the process may solely be a conscious subjective one.

Surveying the literature there appears to be difficulties in explicating how the notion of cognitive authority can be applied to law. The conventional understanding of what is meant by a legal authority is not dependent on the context of the reader/researcher/subject. In formal legal writing if a legal researcher does not find or reference the correct authority then it is assumed there is something deficient in their understanding of how the law is meant to work. Berring appears to isolate authority in law within a publishing context rather than looking at court hierarchies or reputation of judges or indeed the reputation of specific cases.

It can be accepted that publication of law is part of the way the authority is externally imposed. Law can be found in texts which are selected through an editorial process which determines its status, but the cases are sourced from either courts which have their own hierarchy or statues from sovereign parliaments whose authority is absolute. Nevertheless Berring distinguishes between published law where the cognitive process is external and subjective; and law found in an unstructured online universe where the cognitive process becomes personal.

The premise prompting my research is that because online access to law disintermediates publishers as well as overcoming jurisdictional boundaries, it necessarily must have an impact on this aspect of the way law is understood.

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[135] Robert C Berring 'Legal Information and the Search for Cognitive Authority' 88 Cal. L. Rev. 1675 (2000).

[136] Ibid p 1676.

A difficulty with Berring is that there is limited theory underlying his speculation about the impact of online access to legal resources on law. He does not write as a positivist or legal realist or information scientist but relies on assumptions which can be drawn from these disciplines. A concern about lack of coherence in law might be the fear of a positivist, but a legal realist will accept that law is not a science, or a critical legal theorist might argue incoherence has always been the nature of law and any apparent structure is political or ideological. But Berring's perspective is fundamentally bibliographical which limits not only his analysis but the subsequent treatment by other authors of the issues he raises.

Nevertheless the publication of sources of law is part of the way legal authority is externally imposed. Law is found in texts which are selected in an editorial process which determines their status, and the texts themselves are sourced from either courts which have their own hierarchy or sovereign parliaments whose authority is absolute. In published law the cognitive process is external and subjective; in an unstructured online universe the cognitive process becomes personal. A premise prompting my research is that because online access to law disintermediates publishers as well as overcomes jurisdictional boundaries, it may have an impact on the practice of law.

The Berring response or warning is that law researchers as consumers should demand that the online services should provide the navigation tools and editorial processes which will obviate the need to trawl through unfiltered and possibly conflicting judgments.

Overall Berring is arguing that the stability, predictability and certainty in common law countries is based in the way the law is published and the services which facilitate navigation within the published sources. The fact of publishing is not sufficient to provide structure to the law, the discipline requires a selective editorial process to identify the most valuable authorities. This can be either the publication of key cases or an indexing or classification tool which identifies key authorities. For Berring this principle applies whether the sources are in hard copy or online. Subsequent commentary focuses on the impact of online access to law which perhaps distorts Berring's central arguments.[137] Nevertheless what is being explored in

[137] Richard A Danner Legal 'Information and the Development of American Law: Writings on the Form and Structure of the Published Law' 99 Law Libr. J. 193 2007; Katrina Fischer Kuh 'Electronically Manufactured Law' 22 Harv. J. L. & Tech. 2008; Judith Lihosit 'Research in the Wild: CALR and the Role of Informal Apprenticeship in Attorney Training' Law Library Journal Vol. 101:2 [2009-10].

this thesis is the connection between law and the way it is published. The impact of online access to law is one aspect of the relationship.

Pantaloni, writing at the same time as Berring's key works criticises the assumption of a link between classification and law.

> These perceptions of the influence of indexes on the law suffers from the same notion of technological determinism that plagues the writing about legal databases. While legal indexes may have influenced the conceptual coherence of the law, they are as much a product as a progenitor of that conceptual structure. That is, while the digests may have shaped some legal concepts, the idea that it is possible to create a universal subject index is, in large measure, dependent upon a view of the law as already ordered and discernible, regardless of the validity of such a view.[138]

There may be a chicken and egg difficulty with assuming that indexes underpin the law. Although to be fair to Berring this is not the assumption he is making. Berring is looking at the development of legal publishing over time, and the creation of indexes is part of that evolution.

Most of Berring's key publications were published in the decade between the mid-eighties and the mid-nineties. This was the decade where Westlaw and LexisNexis established the online publishing business model and towards the end of the decade the rolling out of online law to professional end users bypassing both libraries and hard copy structures.

Berring's most recent work on this topic is 'The End of Scholarly Bibliography: Reconceptualising Law Librarianship'[139]. The focus here is on the loss of a law librarian's skill. Berring's desire for a law academy response to the changing circumstances has not been fulfilled. With the advent of online access to law Berring is lamenting the outsourcing of this traditional skill to a Google algorithm. Legal research is still a low status subject which in the United States at least is not usually taught by law professors but by law librarians.

[138] Nazareth Pantaloni III 'Legal Databases, Legal Epistemology, and the Legal Order' 86 Law Libr J 679 (1994) p 699.

[139] Robert C Berring 'The End of Scholarly Bibliography: Reconceptualizing Law Librarianship' 104 Law Libr. J. 69 (2012).

The dominance of unmediated and unstructured online access overcoming the level of organisation of the hard copy library is regarded as a *fait a compli*. But Berring appears to not address the possible consequences.

> The mediated world where a bibliographer organized the works of the past, or a cataloguer made contemporary works available by ordering them into comprehensible bits saved from the maelstrom of data, is gone.[140]

Berring may be focusing on a world solely constructed by bibliographers. This does not mean that he is arguing that legal information online will be totally unmediated. It means a specific role which made a contribution to the organisation of legal resources will soon no longer exist.

> The inevitable conclusion is that the careful, methodical work of great bibliographers is a vocation being consigned to the past. It was tied to the three dimensional object, and it solved the problems and challenges of the era of the book. Trusting an authoritative mind has given way to the use of a great search engine. In that sense, BEAL stands as one of the last of its class. Like Sam Thorne's belief in reading only by natural light, the authoritative bibliography has become a shining artefact of history.[141]

A consequence is the loss of a specific skill. The assumption is it will be replaced by the operation of search engines. This may not necessarily be the case. Online commercial publishers still add value to the publishing process which is analogous to these skills. This will be discussed in a later chapter of this thesis[142] but examples include automation of bibliographic skills, for example the automatic generation of tables; as well as meta-tagging where information about the text is embedded in the text in a way that a bibliographer was never able to achieve. So not all information available online is unmediated. Nevertheless as argued by Berring elsewhere, the search engine may create the opportunity for the online structure of commercially published works to be bypassed.

In summary, the Berring scholarship has generated further commentary on the impact of online access to law on the way law is understood. But we are in a better position to

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[140] Ibid p 76.

[141] Ibid.

[142] See Chapter 7 The Expanding Legal Universe.

understand the points Berring was making when we understand that he was writing from the perspective of a librarian and a legal research educator rather than a lawyer.

Law and cyberspace

As we have seen Berring focused on texts and bibliography in speculating about the impact of online access to law. In Ethan Katsh's *Law in a Digital World*[143] the focus is on the impact of technology on the profession as a whole. The table of contents establishes Katsh's perspective—for example: *Interacting in Cyberspace*; *Beyond Words: Visualizing in Cyberspace*; *Hypertext: Constructing Cyberspace*. The focus is the disruption of physical dimension. The term cyberspace now sounds dated but its use here reveals the contemporary concern with the distinction between the real world and the virtual world. The cultural touchstone reached its apotheosis with the making of *The Matrix*[144] in 1999. Now the term 'cyberspace' is probably more likely to be used ironically, sarcastically, historically or anachronistically. It has not yet reached the stage where it is used in a supercilious way such as is 'information super highway' or in faux ignorance such as is 'interweb' or ridicule as in 'multifunction polis'. Now we are less discomfited by the idea of parallel worlds or are more likely to regard each as more integrated. Nevertheless the focus of *Law in a Digital World* is the idea of virtual space exclusive of a three dimensional one which from the benefit of hindsight could be regarded as a narrow perspective.

Katsh is not simply concerned with the treatment of legal information. He is looking at all the appurtenances of the legal profession. He looks at space and symbols as well as textual content:

> The myth of the law's independent character, however, has been pervasive and it was supported and reinforced by palpable and tangible symbols. Images that, even in this transition period, still resonate and have meaning, such as impressively bound law books or judicial robes or wood-panelled court rooms, suggest that legal space, like any space, is distinctive in many ways and that the activities that take place in it are different from activities taking place in other kinds of spaces. Indeed, the familiar symbols just mentioned may be considered to be part of the boundary that

[143] Ethan Katsh *Law in a Digital World* OUP (1995).

[144] A triumph of style over substance but is important as an artefact of contemporary thinking. See also Disney's *Tron* (1982) and the lesser known *The Thirteenth Floor* (1999).

> differentiates law from other institutions and processes. All of these symbols separate, create distance, and focus attention inward thereby fortifying institutional boundaries and helping to support a perception of a distinct law space.[145]

Law is described as a self-contained, self-referential profession that maintains its singular mystique through its traditions. The argument is once the boundaries are breached, once the physical dimension is subverted through a virtual practice then what makes law unique and what separates law from other professions disappears; so online access to law or online legal practice may change this aspect of the profession.

However Katsh's perspective is the context of the literature of the time. In this thesis it is important to acknowledge that an underlying assumption was a clear bifurcation or dichotomy between physical space and so called cyberspace. Today we are more likely to see the real world and the virtual world as being more integrated. The fact that many tasks can be achieved virtually may not necessarily mean that institutional boundaries have broken. What Katsh did not see is this 'self-contained, self-referential' nature of law may also lead to self-preservation. Law may be more resilient than assumed by Katsh. This is something which is going to be explored in more detail in this thesis. One way of interpreting the literature in this area is from the perspective of the assumed importance of space, dimension and symbolism.

Katsh, who acknowledges Berring in the text, specifically addresses the treatment of authority.

> The problem with authority and authenticity is not an insurmountable problem, but it is also not an insignificant problem. It is clearly a problem of the transitional phase we are currently in where we have been blind to some value provided by information in printed form...[146]
>
> ...Those concerned with law need not only to extend the frontier but to organise it. The law is not simply a body of information or knowledge, but a body of authoritative information, and the legal process cannot be dependent upon the medium of communication whose reliability is open to question. Authority and authenticity have

[145] Katsh above p 196.

[146] Ibid p 100.

> been embedded in print materials. They are not yet embedded as well or as clearly in electronic materials.[147]

Katsh discusses aspects of this transitional process. Texts were able to communicate elements of their provenance through their physicality and the way they were presented and promoted. By the use of the term 'embedded' Katsh is accepting that the volumes themselves communicated their status. A specific published report series may respectively be authorised (that is validated by the court that handed down the judgment) or selected by the publications editor. A mere copy of a judgment supplied by a court, not selected through an editorial process, not edited for style or grammar, absent any interpretive assistance such as a headnote has no status embedded in it apart from the hierarchy of the court which produced it in the first place. We now take for granted that this information which was visible in hard copy volumes can be literally embedded in texts through meta-tagging.

The transitional process means that online most of the judgments accessible will be of the latter type, that is judgments directly from the court with no editorial intervention and no direct validation of the definitive version. Or it might be added that it may be less easy to distinguish between edited and unreported texts. Note that Berring's main concern was more the ability to research without the benefit of indexing sources rather than simply the availability of unreported decisions.

Katsh further identifies hypertext linking as impacting on the way legal texts will be read.

> Hypertext involves acquiring information in nonlinear fashion. To understand its nature and significance, therefore, it would seem beneficial to look not at examples of linear communication, such as print, but of non linear modes of experience.[148]

Katsh acknowledges the dramatic change in the delivery of information but does not make claims about whether law will be significantly affected. The hypertext analogy may not be so important to law. Cases are generally not necessarily read in a linear way. Postmodern literary criticism taught us that books speak of other books.[149] Judgments in law have necessarily referred to other authorities, either other cases and legislation, or secondary materials. To

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[147] Ibid p 101.

[148] Ibid p 200.

[149] This is the theme of Umberto Eco *The Name of the Rose* (1983)

understand a case in depth may require reading those other sources. Reading court judgment is a non-linear experience. The credibility of a judgment is founded on the other sources relied on to support the reasoning. This will be a reason why hypertext linking very quickly became a central element of online legal publishing and perhaps its major selling point. It facilitates the more convenient reading of a case rather than changing the way a case might be read. There may be no paradigm shift here at all.

A literature retrospective

When researching in this area, Berring and Katsh are the names that usually arise in citations in subsequent texts. It is partly because they were pioneers in thinking about the impact of computing on legal research and the legal profession. But it is also because they established a framework for analysing or speculating about the impact of the technology. When we look at literature reviews on this topic we see that the thinking is constrained by the influence of Berring and Katsh even perhaps with the benefit of hindsight. So despite a more contemporary experience of online legal research recent authors tend not to acknowledge the limitations of the Berring or Katsh assumptions.

Like Berring, Richard Danner also has a background in information science as well as law. In 'Information and the Development of American Law: Writings on the Form and Structure of the Published Law'[150] Danner has compiled a literature review of Berring's works and subsequent articles which explore the issues raised by Berring. I refer to this as a 'retrospective' because it is an overview of past writings which are taken at face value. Danner himself does not add to the analysis. Any implicit critique is based on the juxtaposition of summaries of the respective sources relied upon. There is limited analysis. Nevertheless it stands as a useful contribution to the discussion.

The following is a revisiting of the sources Danner has discussed but set in a broader context. What is interesting about the Danner article is how it reveals the impact of the Berring scholarship in this area and how this dominance may prevent a more critical analysis of the limitations of the Berring approach.

The structure of the Danner article is to first acknowledge the impact of Berring's scholarship

[150] Richard A Danner 'Information and the Development of American Law: Writings on the Form and Structure of the Published Law' 99 Law Libr. J. 193 (2007).

> Nearly everything else written on the topic accepts and elaborates on Berring's ideas. Because his ideas have been so widely accepted, anyone wishing to understand the influences of legal information on American legal culture and the development of American law must start with an understanding of the model that he developed over the course of his research and ruminations.[151]

After canvassing a range of views on the topic of the form of structure in law conclusion Danner states

> Whatever directions our explorations take in the future, the core of the literature on the influences of legal information will continue to be found in Bob Berring's writings and those who have taken seriously the questions he raises concerning the impacts of the forms and structures of legal information on the American legal culture. The literature stimulated by Bob's work continues to be vibrant…[152]

The discussion within the article reveals the limitations of the Berring approach yet Danner does not concede that there are other ways of exploring these issues. Berring writes of the importance of cognitive authority and subsequently his own works have established their own authority largely through being one of the first to write in this area rather than being the most analytical or theoretical. There is an irony here.

Danner's review covers the key points already discussed above: that Berring tracks the history of legal publishing, noting the contribution to the structure of common law of Blackstone's Commentaries which benefited both United Kingdom and United States law; the impact of West's in its comprehensive publishing of case law in the late 19th century and again the modifying impact of the West's *American Digest*. This classification of the law perpetuated the notion that a diligent researcher could find *the* case on point which would resolve a legal dispute. And the challenge of online access to law was that the classification system would be bypassed and the myth of the predictability and stability of the common law would be exploded.

[151] Ibid p 193.

[152] Ibid p 227.

After reviewing the key points raised by Berring, Danner considers the debate between Barkan and Schanck[153] which addresses the nature of legal research. Barkan characterised the objective of legal research as: the finding of rules, the authority of which has been determined by the way in which it was published or indexed. Schanck in response challenged the assumption that publishing or indexing determined authority, by arguing practitioners were not dependent upon indexes or classification systems. In practice it was more likely that they used a range of strategies to find relevant materials.

After considering the role of classification in law Danner's literature review focuses on the 'medium is the message' perspective providing an overview of articles which cover the impact of the technology as distinct from the content. A contention is, classification and bibliography aside, the fact of online access to law must change the nature of the profession's use of legal resources.

Any critique within this literature review is not so much a personal analysis but is implicit based on the selection of the range of readings. For example the Schanck observation that legal researchers do not rely on indexes suggests in the context that Berring's assumption regarding the centrality of classification is not demonstrated or supported.[154]

Danner's overview, while comprehensive, does not explore the significance of the different perspectives provided within the review. For example, Berring, as mentioned above, relies on information science theories to support his assumptions regarding the importance of the classification of law. Berring's use of the concept of 'cognitive authority' as a basis of his arguments is most likely to have been drawn from the Wilson analysis.[155] Berring in a later text

[153] See Steven M Barkan 'Deconstructing Legal Research: A Law Libarian's Commentary on Critical Legal Studies' 79 Law Libr J 617 (1987); Peter Schanck 'Taking Up Barkan's Challenge: Looking at the Judicial Process and Legal Research' Vol 82(1) Law Library Journal 1 (1990); Steven M Barkan 'Response to Schanck: On the Need for Critical Law Librarianship, or Are We All Legal Realists Now?' 82 Law Libr J 23 (1990)

[154] Danner above p 212ff.

[155] Robert Berring 'Symposium on Law in the Twentieth Century: Legal Information and the Search for Cognitive Authority' (2000) *88 California Law Review* 1675 p 1690. See also Patrick Wilson *Second-hand Knowledge : an Inquiry into Cognitive Authority* (1983).

refers to the work of Bowker and Star to further explore his analysis of the operation of classification.[156]

Despite having an information science background himself Danner does not discuss Wilson. However he refers in passing to Bowker and Starr.

> Certainly, the Bowker and Star propositions adopted by Berring and others are correct: once in place and commonly used, classification systems constructed initially as mere organizing tools come to be seen as expressing never-intended truths about the subject being classified. But how does (or did) this actually manifest itself in law?[157]

Danner concedes that there has not been sufficient research on exactly how lawyers research, which means that the Berring (and Barkan) premise is untested.[158] Following this reference Danner uses examples of the *West Digest System* to demonstrate that this index atomises the law and hides the relationships between complementary topics. Because for example *Licenses* is listed alphabetically between *Libel and Slander* and *Liens* the index cannot show the connection between *Licenses* and other related areas of law. Danner does not appear to be convinced there is a connection between classification and legal practice. It is possible he has missed the point of what Berring and also Bowker and Starr are arguing. The West Digest System will enable all cases which deal with a particular topic to be found. If it is clumsy and hides aspects of the interrelationships in law this demonstrates a difficulty with legal indexes but does not rebut necessarily rebut the Berring premise. There is not necessarily a connection between the efficacy of a classification and its ability to impose meaning. It is not simply that classification may create assumptions but because the classification process is transparent it becomes the common sense way to interrogate the law despite its flaws. It may not be obvious

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[156] Robert C Berring 'Legal Research and the World of Thinkable Thoughts' (2000) 2(2) *J App Prac & Process* 305 p 310 referring to Geoffrey C Bowker & Susan Leigh Star *Sorting Things Out: Classification and its Consequences* MIT Press 1999.

[157] Danner above p 225.

[158] In Australia see for example Terry Hutchinson *Legal Research in Law Firms* (1994) Hein Buffalo. The focus here is on research as a process, for example focusing on total hours of research undertaken, billable hours and training. The study investigates who does the research and proportion of time spent on research but it is library focused. The value of this work is as a snapshot of how research was done just prior to Internet end user access, but does not have a theoretical framework nor does it look at collegially shared knowledge as a way of determining knowledge hierarchies.

because of this transparency. There is scholarly analysis of legal taxonomy which provides illustrations of how this might operate in practice.[159]

Instead of acknowledging Berring's analysis of the function of classification Danner focuses on classification from a *Critical Legal Studies* (CLS)[160] perspective. CLS examines law on the basis that legal rules exist to perpetuate the advantages of a ruling class. Law is political or ideological and is a tool which tends to entrench social inequality. Examples might be the focus of the law on the protection of private property, the disparity between the treatment of white collar crime and other types of theft (that is without violence or intimidation); the disparity between the treatment of social security fraud and tax avoidance. The latter is a useful example because it shows how society as a whole may consider the two quite differently in the degree of disdain felt in regard to the respective perpetrators but the cost to the community of tax evasion is much greater than that of social security fraud. This is a normative assessment which a CLS analysis would tend to expose as unjust.

There is no coherence in law—whatever structure or consistency is apparent is simply a reflection of the objectives of the privileged classes. The operation of law in this way is insidious because the way it operates to benefit a particular class is not obvious. So the way law embeds itself, for a critical legal theorist, is the same way a classification system may operate as described by Bowker and Starr. However the major difference is that bibliographic classification may have the objectives of quality or truth whereas a critical legal theorist will view the dominant legal classifications as unwittingly hiding a truth.[161]

The major difference of course is that those in the position to make the laws perpetuate their interests. So it is important to see that the way classification operates in the terms described by both Bowker and Star as well as Wilson are one step removed from the ideological focus of

[159] See Peter Birks (Ed) The *Classification of Obligations* OUP 1998; See also Darryn Jensen 'The Problem of Classification in Private Law' (2007) 31(2) *Melbourne University Law Review* 516.

[160] Critical Legal Studies needs to be explained again briefly but will be discussed in the *What is Law* chapter. Note overview Gerald B Wetlaufer 'Systems of Belief in Modern American Law: A View from Century's End' (1999) 49 *American University Law Review* 1.

[161] See Steven M Barkan 'Deconstructing Legal Research: A Law Libarian's Commentary on Critical Legal Studies' 79 Law Libr J 617 (1987).

the CLS movement even though a bibliography may reveal an ideological bent.[162] Danner does not make this distinction clear.

Danner also discusses Ross who is in turn reviewing other articles on this topic and is one of the few who considers the scholarship from the perspective of prevailing theories of communication.[163] Ross points out that the arguments of Katsh and others arise from a 'particular theoretical tradition'. Ross cites Marshall McLuhan and Harold Innis as establishing the distinction between the medium of communication and the content. The nature of the medium will determine how ideas may be recorded and expressed.[164] The oral tradition is multivalent whereas print is linear and logical. Innis had an historical approach where he identified examples of social changes effected by record keeping technology: for example printing in clay enabled long term record keeping, privileging history and tradition which favoured religion. But a lack of portability of clay tablets prevented expansion. More portable paper and papyrus facilitated empire building and bureaucracy.[165]

So there is a comparatively recent but nevertheless an established line of scholarship which connects methods of recording information to societal change. Ross argues that Katsh and others are operating within those assumptions but superficially. Ross characterises the authors as 'universalists'. The view is they are identifying a single variable, that is online access to law, and speculating there will be a predictable effect.[166] Ross contrasts universalists with 'contextualists' who in their analysis will consider the impact of online technology in a broader context.

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[162] For a detailed discussion of Bowker and Star and Wilson see Chapter 4 Law as a Community of Practice.

[163] Richard J Ross 'Communications Revolutions and Legal Culture: an Elusive Relationship' (2002) 27(3) *Law & Social Inquiry* 637. Texts reviewed are Ethan Katsh *The Electronic Media and the Transformation of Law* (1989) and *Law in a Digital World* (1995); Ronald Collins, David Skover 'Paratexts' 44 Stan L Rev 509 (1991-1992).

[164] Ross above p 643.

[165] Ibid p 644.

[166] Ronald Collins, David Skover 'Paratexts' 44 Stan L Rev 509 (1991-1992) p 515-516.

> For contextualists, the implications of media are multiple and potentially contradictory rather than singular, mediated rather than direct, of uncertain intensity rather than necessarily powerful, and limited and situation dependent rather than global.[167]

This perspective echoes Pantaloni on the same topic who was writing a decade earlier, that is prior to end user browser access.

> A fundamental problem with this view is that it regards the relationship between technological change and societal and cultural changes as unilateral: printing and other communication technologies are seen as the cause of all that is surveyed. However, written and oral forms of communication are influenced by cultural and societal factors, and it would be more felicitous to describe the relationship as recursive and circular, acknowledging that changes in some societies and their institutions are correlated with technological changes and innovations, which are in turn shaped by the uses and demands (sometimes conscious, at other times unthinking) of the culture.[168]

The universalist approaches focus on an assumption that law is found in a single medium, that medium determines how legal information is consumed and understood and it is this medium which provides law with its predictability, reliability and authority. Berring's position is also arguably based on this assumption regarding the use of legal resources. Nevertheless it is important to be reminded that Berring's predictions are less extravagant than those of the writers Ross is criticising.

Ross also looks more broadly at how law may operate within society which is also relevant to understanding how legal information may operate. In the analysis Ross distinguishes between 'recontextualisation' and 'decontextualisation'.

Decontextualisation is the removal of law from community or its *abstraction*. Ross quotes from Abel[169] 'the logic...will become more autonomous, internally coherent, and independent of patterns in the larger society'. Decontextualisation is a result of population growth in

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[167] Ross above p 647.

[168] Nazareth Pantaloni III 'Legal Databases, Legal Epistemology, and the Legal Order' 86 Law Libr J 679 (1994) p 682

[169] Richard Abel 'A Comparative Theory of Dispute Institutions in Society' 8 Law & Soc'y Rev. 217 1973-1974 pp 217-347 esp 264

communities, the growing plurality in these communities and the requirement for bureaucratisation to maintain order. Law in this context required logic and order and rules which will apply across a range of interests in a community which means it becomes abstracted from that society. These are not new concepts. Weber and Honnies in analyses of the impact of industrialisation in communities and the changing social relationships used the terms *Gemeinschaft* and *Gesellschaft* where the former describes customary law societies and the latter societies where formal or abstracted law developed. The terminology suggests that the driving force was industrialisation rather than writing technology. Ross in any case argues that the decontextualisation is not simply the impact of print (order, logic, linearity) but the demands of a commercial/industrial society. 'The thinning of our communal ties could be another reason for the growth of abstraction in law'.

Recontextualisation is the possible impact of technology—that law again becomes situated in a social or community context.[170] This will be a result of Internet access enabling a researcher to easily find sources in other disciplines related to a legal issue such as psychology or sociology rather than simply black letter law. The argument seems to be results of legal research will necessarily be delivered in a broader context than simply as a list of rules. A legal researcher may choose to search other disciplines however online legal research will not accidentally, serendipitously or tangentially deliver related documents any more than a hard copy search. The fact that is may be done more easily does not mean a legal researcher will want to find these sources.

Ross also relates the history of writing technology and the law with an overview of the impact of print on the legal profession.[171] Ross argues there were parallel concerns with the advent of print in that it would diminish the exclusivity of the legal profession. Lay persons with access to printed law books could act as advocates. However in practice the barristers were able to enforce an exclusive right to appear in court and the abstruse nature of legal reasoning was one step removed from mere access to the texts.

> '…it suggests how readily intelligent and sensitive contemporaries can go wrong in predicting the pressures supposedly latent in a communications medium. Social and

[170] Ross above p 651.

[171] Ibid pp 654-664.

> intellectual forces can stunt or contain these pressures in ways too complicated to foresee.'[172]

Ross is not arguing that because there was a misconception in relation to the application of technology to the profession in the past that the advent of online research will lead to the same error. Ross is warning of the danger of applying a *universalist* approach to the impact of one aspect of change in a profession when the entire context of the legal community information may need to be taken into consideration.

Of all the authors canvassed in this overview Ross is one of the few to consider the importance of determining a way of testing the particular assumptions which he criticises in the texts he is reviewing. As mentioned above the literature tends to speculation without considering methodologies to test the propositions.

Ross suggests ways of determining the causal connection (if any) between technology change and the practice of law.[173]

> The goal in the ideal is to find and compare two or more cases that are as similar as possible in all relevant aspects except in the dependent variable which varies among the cases. The researcher can then explore, in isolation, the effect of the independent upon the dependent variable.[174]

Ross's methodology suggestions include a comparison of distinct jurisdictions for example Germany Japan and the United States to see if technology has had an impact in the same way in each. A difficulty here is that each of these jurisdictions has a different legal system: Germany is civil law, the United States is common law and Japan is a combination but still has a customary approach to law. In Japan the tendency is to avoid legal disputes which can be resolved by other means other than reliance on black letter law.

Another suggestion is a comparison of mostly similar jurisdictions where other differences are identified as well as having online technology and determining if this variable has had an impact on the law. This method should determine if the other variables are really the cause of changes in the legal profession rather than the technology itself. It could also determine the

[172] Ibid p 659.

[173] Ibid p 664.

[174] Ibid p 671.

degree of impact if any of technology in comparison with other causative effects. Unfortunately similar jurisdictions, in our case common law jurisdictions, will each arguably have been exposed to the exigencies of online research. It is worth pointing out that the United States is unique in its assumed reliance on the West's Key Numbering system. However it is only Berring who asserts its centrality and vulnerability in the face of online access to law.

The Ross contribution is important in the literature discussing the impact of technology on law. It is one of the few journal articles to critique the assumptions of Katsh et al and propose methodologies to test them. Its only limitation in relation to testing the assumption is that the Ross approach is an overarching view of the connection between law and technology. There has not been a suggestion that the whole legal authority edifice would come crashing down. Ross interprets the predictions of Katsh to be

> '…that electronic communications threaten the prestige, income and coherence of the legal profession'.[175]

First I would not agree that's what Katsh et al are arguing. Katsh in a page reference referred to by Ross states:

> Where is the legal profession in this far more intense information environment? My purpose is not to look into a crystal ball to understand some of the stresses that are already beginning to be felt. What is clear is that informational changes occurring in the background will have an impact on what is taking place in the foreground, on what lawyers do and on how they define themselves. The future of the profession is tied, therefore, to how invested it is in an increasingly outmoded information paradigm or whether it will be able to reorient itself in response to a new communications environment, one that may ask lawyers to approach conflict in new ways and one that does not support the status of professions in the same way as occurred in the past.[176]

Katsh is considering the impact of advances in communications technology on the profession as a whole rather than merely in relation to legal research. He is focusing on the connection between information medium and the status quo but is not spelling out a threat to the profession but rather tensions which may arise within a profession which is so closely tied to a

[175] Ibid p 671.

[176] Katsh above p 184-5.

particular medium. The basis on which Ross draws his inference can be seen but what Katsh is arguing is more subtle.

The value of the Ross article is the assertion that any predictions or speculation in this area should be tested.

In a more recent article Kuh refers to empirical research which supports the contention that online access to law has had an impact but concedes that the various approaches engage with elements of the issue but there is no definitive methodology.[177] The results are taken at face value. Kuh helpfully lists the approaches.

> The majority of these analyses are grounded in: (1) extrapolation from historical shifts in the organization and communication of case law, (2) comparisons between pre- and post-electronic research methods, (3) the personal research experiences of the author or interviews with other researchers, (4) experience gleaned from legal research and writing instruction, and (5) anecdotal observations about how lawyers conduct legal research and use the results.[178]

These ad hoc methodologies are not that much more helpful than the speculation of Berring and Katsh. Kuh concedes the limitations of the research.

> The difficulty of this endeavour underscores the utility of employing some analytical tool (in this case, cognitive psychology) *beyond reasoning from experience and conjecture* before setting out to conduct empirical inquiry.
>
> Ultimately—as difficult as it may be—it is a worthy endeavour to better understand how present and future changes in the communication of law, including electronic legal research, influence the profession and practice.[179]

Kuh's article establishes the centrality of hard copy law resources to the legal profession, addresses the established research that the medium which delivers information can also determine meaning and concludes that the online access to law must necessarily have an impact on the profession's use or interpretation of legal resources. Kuh also adverts to the discipline of cognitive psychology, that is the biases in interpretation which can arise out of

[177] Katrina Fischer Kuh 'Electronically Manufactured Law' 22 Harv J L & Tech 228 (2008) p 232.

[178] Ibid p 238.

[179] Ibid p 227.

labelling, as both an explanation of the impact of the removal of conventional indexing and classification on the understanding of law as well as the the basis of a methodology to test the thesis. However Kuh does not go as far as describing a detailed methodology which might be implemented.

Kuh's place in this literature review is a more recent canvassing of the literature with an exploration of the idea of a methodology which may assist in determining the impact of online access to law on the profession. The exploration of an epistemological approach to rationalising the impact is a step beyond most of the other scholars in the area.

However it appears Kuh has fallen into the trap of accepting the assumptions of the literature without testing them.

> For present purposes, this legal and historical scholarship is significant because it supports the general proposition that shifts in how law is communicated affect the way law is understood and practiced. Prior shifts in the communication of law contributed to, or caused, law to change and develop.[180]

As already discussed the literature speculates about possible changes but do not strictly support the proposition that there have been or will be changes with empirical evidence. Ironically the labelling and descriptions relied upon in the literature appears to have established this non-proven assumption in Kuh's arguments which perhaps is an example of the operation of cognitive psychology.

Drawing from the literature as surveyed in this chapter, what needs to be looked at closely are the points:

- The change in medium may not be the only factor in the development of the legal profession.
- It is important to examine the fundamentals of what law is and how it operates: for example how legal rules are recorded, navigated, interpreted and applied and the relationship between law and society generally and the operation of the profession itself as a community.
- Consideration of methodologies which can be relied upon to measure the impact of technology on law.

[180] Ibid p 231.

- The communications technology or information science theories which need to be considered in order to understand the impact (if any) on law.

The articles discussed have informed the basis of the research question, that is, whether online access to legal information presents a challenge to the concept of authority in law. There is little in the way of empirical research to test the proposition only suggestions as to how the proposition might be tested. Nor is there exploration of theories of information science to explain the impact of online research on the profession.

When planning a research approach it is important to differentiate between changes that have occurred because of online access to law for example changes in citation practice; cutting and pasting; and the use of secondary materials contrasted with any change in which the law deals with authority. The fact of practical work flow changes and the status of legal authority are not unrelated but the impact is different. One criticism of the literature is these differences are conflated. Just because there is a practical change does not necessarily mean there is a fundamental ontological or epistemological one.

Outside the canon

Before completing this overview it is important to note that there is another text which should be referred to, which Berring and others might have acknowledged but did not: Brenner's 'Of Publication and Precedent: An Inquiry into the Ethnomethodology of Case Reporting in the American Legal System'.[181] This article is first a history of legal publishing in both the UK and the US. But then it discusses the impact of online research in similar terms to Berring. It speculates about what the changes might be in more detail. What is interesting is this article is not part of the online research and authority canon. It has been cited subsequently but only in the context of the controversy in the United States over admissibility of unreported judgments in the Federal Court which the article explores in detail.

One comment which might be made is, in the context of establishing cognitive authority Berring has gained it by being the first to write in this area, without necessarily being the most

[181] Susan W Brenner 'Of Publication and Precedent: An Inquiry into the Ethnomethodology of Case Reporting in the American Legal System' 39 DePaul L Rev 461 (1989-1990). There is also related book Susan W Brenner *Precedent Inflation* (1992).

thorough. It is an example a process of establishing cognitive authority. It has as much to do with peer recognition as the quality or weight of an individual contribution.[182]

Brenner developed a book from this article called *Precedent Inflation* which expands on the ideas raised.[183] Brenner's argument is that in the common law system decisions are made based on precedent. In order for the system to work precedent needs to be made available. However in order for the system to operate in a predictable stable way not all precedent can be made available. There needs to be a balance between complete open access or none. Unlimited access would provide too much material to go through before making a decision, and because of the range of accessible decisions the contradictions or inconsistencies which may be discoverable will undermine confidence in the decision makers.[184] No access would be completely at odds with the principle of stare decisis. It would be a 'logical impossibility'.[185] In practice the history of the common law has been a shifting balance between the two. The common law has had a history of changes to access to the common law and with each change there has been an impact on the way law has been understood.

> When existing access changes, the system changes the way it uses precedent. Access can be altered by changing the *methods* used to distribute precedents and/or by changing the *amount* of precedent that is distributed.
>
> ...the use of computer technology may produce the most traumatic change that the common law has experienced in its millennial existence, as computers possess the capacity to alter in dramatic fashion both the methods used to distribute precedent and the number of precedents that are distributed. [186]

The essential premise is the operation of precedent is a key element to the social construct of legal practice. The text covers the range of changes to the way law has been communicated or accessed over time, for example oral declarations, digests, yearbooks, cases, as well as online,

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[182] See further discussion in Chapter 4 Law as a Community of Practice.

[183] Susan W Brenner *Precedent Inflation* New Brunswick (1992).

[184] Ibid p 9.

[185] Ibid p 10.

[186] Ibid p 12.

and argues that each stage over time has represented a paradigm shift which has had or will have an impact on the profession.

Brenner's analysis of the use of precedent is based on an ethnomethodological approach. It is argued to be an effective way to explain social phenomena, because social interaction is based on persistent routines which are legitimated because of the routines.[187] A person who is inducted into the social group learns the conventions and in the process becomes convinced of their legitimacy. The older an institution is the more conservative it becomes. The nature of these conventions is taken for granted, so in effect the way they operate becomes invisible. The process of ethnomethodology helps the researcher become aware of these processes, routines or conventions as part of socially constructed modes of behaviour.[188]

Because the processes are uncritically assumed as legitimate it is difficult to perceive them as in any way *problematic*. The processes are accepted as common sense, any flaws in the processes are not perceived, there are then no attempts to improve them or think of alternative approaches to achieving the same objectives.

Brenner's focus is on the role of precedent in common law legal practice.[189] Reliance on precedent is one of these routines or processes and Brenner argues that an ethnomethodological approach could consider the operation of precedent as problematic.[190] There are paradoxes in the use of precedent.[191] If precedent must be followed, the common law cannot change; if the law is dynamic and mirrors community standards, does this instead mean the common law is not strictly precedent based?

Brenner also identifies a judgment accessibility paradox. For precedent to operate it must be made available. If every judgment is easily available it would create uncertainty as contradictory decisions could be cited in argument. If no precedents are available then no one

[187] Ibid p 1.

[188] Ibid p 29-31.

[189] Contrast ethnomethodology with *ethnographic* research. The latter typified as being 'a stance which emphasised seeing things from the perspective of those being studied before stepping back to make a more detached assessment': Nigel Fielding 'Ethnography' *Researching Social Life* 2nd Ed Sage (2001) p 147.

[190] Brenner above p 33.

[191] See discussion of precedent in Chapter 2 What is Law?.

would know the common law. Therefore precedents need to be selectively available in a way which enables stability and predictability.

Precedent in practice is rarely seen as unwieldy in these terms despite the clear difficulties with conceptualising exactly how it is used.

Brenner identifies changes in the way precedent has been made available to practitioners over the preceding 700 years and because the common law has adapted to these changes the notion of precedent has been taken for granted so there is an absence of 'general theory accounting for the history of the common law'. Brenner's objective in the text is to make the operation of precedent visible: that is to 'suspend belief' in case reporting and analyse precedent as *problematic*. This suspension of belief is achieved through a detailed historical overview of precedent, and the revelation that the notion of precedent is comparatively recent in legal history, and that in any case in English law the notion of binding precedent was comparatively short-lived.

The most interesting aspect of Brenner's approach is her analysis of the dichotomy between natural and rational law.[192] Natural law is the assumption that law is innate, moral and objectively discoverable. When applying natural law there is no concept of judge made law. However the prevalence of case reports over time undermined the notion of an eternal body of legal rules.

> The increase in the supply of case reports and the practice of printing 'reports' that were written judicial decisions combined to transform the way cases were used: Instead of being 'evidence' of law, they became the 'law'. And using discrete cases as 'law' gave rise to a conception of the law as consisting only 'of the rules which the courts... lay down'.[193]

If the comprehensive availability of case reports removes the explication of law from an external referent, that is either natural law or customary law, then the only way law can be known is from the reports themselves. This creates a demand for reports. Judges at the same time necessarily refer to previous decision in order to justify their reasoning. What is created is

[192] Brenner above Chapter 9 'Case Reporters and the Rule of Precedent in Systems Legitimated by Rational-Legal Principles'.

[193] Ibid p 157. Brenner relying on the terminology of Max Weber 'Basic Sociological Terms' in *Understanding and Social Inquiry* Ed Dallmayr, McCarthy 1977.

a 'factual' approach to legal research. The rules exist as facts within judgments rather than existing as overarching principles. In legal research instead of discovering a single articulation of a general principle a researcher will need to find all the cases on point. And because this explication of rules is a self-contained universe divorced from an outside referent it becomes less stable.

> ...the practitioner in a rationally-derived legal system has no assurance that because he knows what the law was yesterday he knows what it is today, let alone what it will be tomorrow. This creates an insecurity that expands as the legal system continues to articulate rules of an ever-increasing complexity.[194]

This is a variation of legal realist rule-scepticism. Because law can only be a prediction about what might be resolved in litigation there cannot be certainty in stating rules.[195] Nevertheless the outcome is similar to the Berring concern. Stability in law is threatened by excess access to precedent rather than by the subverting of established classification and indexing systems.

Conclusions

This chapter has established there is a range of scholarship predicting a significant impact on the legal profession of online access to law. The disruption is based on the disintermediation of editorial processes, the untrammelled access to precedent and more broadly the democratisation of law which threatens the professionalization of the provision of legal advice.

Within the literature itself are examples of legal thinking in the creation of an authoritative hierarchy of opinion. Berring is established as the leading scholar in the area so the debate is discussed from the perspectives established in his articles. For example Danner's view is coloured by the established orthodoxy of the Berring approach. It prevents a clear analysis of how law may in fact operate when it comes to dealing with legal information.

While Danner acknowledges the contribution of Pantaloni and Ross in challenging the assumption that technology will have a direct impact on the way law may be understood he concludes that Berring is still the starting point of any analysis.

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[194] Brenner above p 159.

[195] See Chapter 2 What is Law? and Green, Michael 'Legal Realism as a Theory of Law' 46 Wm. & Mary L. Rev. 1915 (2005).

Perhaps what needs to be accepted about Danner's article is that it is a literature survey rather than a critique. The publications referred to are valuable in providing at least an introduction to the debate.

> Whatever directions our explorations take in the future, the core of the literature on the influences of legal information will continue to be found in Bob Berring's writings and in those of others who have taken seriously the questions he raises concerning the impacts of the forms and structures of legal information on the American legal culture.[196]

Danner has not attempted to do much more than list the key authors and summarise the issues. While it enables the reader to develop a sense of contributors to the debate, their views are taken at face value. Also it could be argued that the Danner literature review while examining a range of opinions still maintains the status quo position which is traditionally library centred. However information transactions relating to rules within the profession are far more complex than simply the mediation of information through libraries or bibliographies. Faller describes the way the law could be seen but this comment was not written in the context of online research.

> In the legal systems most familiar to lawyers, there is an elaborate institutional machinery which mediates between the courts and the rest of the sociocultural system, shaping the interaction between them. Reporters collect, analyse, and publish important cases. Scholars organize legal ideas and legislative and judicial acts into coherent 'fields.' Philosophers reconsider the moral and intellectual bases of legal thought. Legislatures and appellate judges, from time to time, tidy up sections of the law. Politicians and publicists debate legal principles in the public forum.[197]

The current debate tends to overlook all the elements of the profession. It would be helpful when examining this topic to investigate how the legal profession deals with information. However a starting point might be to expand on the information science theories alluded to by Berring but not expanded on by him in a way which might have better informed his writings.

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[196] Richard A Danner 'Information and the Development of American Law: Writings on the Form and Structure of the Published Law' 99 Law Libr. J. 193 (2007) p 227.

[197] Lloyd A. Fallers, *Law without Precedent* (1969) p 35 quoted in Nazareth Pantaloni III 'Legal Databases, Legal Epistemology, and the Legal Order' 86 Law Libr J 679 (1994) p 700.

Another criticism of the research in this area is that none of the leading figures had developed a methodology to determine empirically if the predictions were verifiable. Berring compares Supreme Court judgments from different generations to demonstrate that there is a wider range of references and there are similar citation analysis works which reveal the same pattern.[198] These works do not prove cause and effect. They simply illustrate that law has become more complex and more subject to global jurisprudence over time.

Citation surveys such as Berring's approach are currently fashionable as objective ways of ascertaining impacts on the courts of changes in the law or changes in legal culture. They are fashionable because technology makes it possible to do them, however it is not necessarily the case that they are useful. For example a recent Monash University study of Victorian Supreme Court citations suggests that in Australia also online access to legal authority has increased the number of average citations in judgments.[199] The difficulty with these citation studies is that they are not always driven by a research question. Essentially the methodology tallies citations and then the researcher looks for patterns. Patterns of citation may well reveal increasing numbers of citations in judgments or greater reference to other jurisdictions however whatever conclusions are drawn need to be tested. Online access to legal information may play a part in any perceived changes however over the same time the law has become more complex, more pervasive—more social regulation for example in the areas such as health and safety, social security, human rights, environment, consumer protection; and society is more global.

Another aspect of citation studies is they perpetuate the legal notion of authority. It prevents a researcher from examining the reasoning drawn from references. In the Victorian study unreported judgments were not counted. If only formal published citations of judgments are

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[198] For Australian analysis see Fausten D, Nielsen, I, Smyth R 'A Century of Citation Practice on the Supreme Court of Victoria', (2007) 31(3) *Melbourne University Law Review* 733. See also Nielsen I, Smyth R 'One hundred years of citation of authority on the Supreme Court of New South Wales' (2008) 31(1) *University of New South Wales Law Journal* 189; Smyth R 'Citation to authority on the Supreme Court of South Australia: evidence from a hundred years of data' (2008) 29(1) *Adelaide Law Review* 113.

[199] Fausten D, Nielsen, I, Smyth R 'A Century of Citation Practice on the Supreme Court of Victoria', (2007) 31(3) *Melbourne University Law Review* 733. See also Nielsen I, Smyth R 'One hundred years of citation of authority on the Supreme Court of New South Wales' (2008) 31(1) *University of New South Wales Law Journal* 189; Smyth R 'Citation to authority on the Supreme Court of South Australia: evidence from a hundred years of data' (2008) 29(1) *Adelaide Law Review* 113 (there are 14 of these studies—I need to review all of them).

counted then it would be difficult to discern changes to legal culture (hierarchy/authority/positivism) wrought by online access to legal sources.

The precedent inflation which Brenner writes about is the impact of excessive access to authority. The concern in regard to stability in law is not unrelated to the concerns of Berring and Kuh. Berring highlighted the centrality of classification and indexing, and Kuh focused on access to cases available online. However Brenner is more interested in exactly how precedent works. Brenner first suspends belief in precedent in order to step away from the assumptions about how it governs law. The two key premises are first that for the precedent approach to work there needs to be a balance in relation to access to judgments. Wholesale access to all judgments lays bare inconsistency in the law. The second is that the existence of precedent and reliance on judgments has created an internal self-contained universe of legal rules no longer referrable to external objective, innate, eternal, moral principles. Online access to law will have an impact because it subverts a balanced approach to law reporting and creates an appetite for reports which further removes judges from external standards.

Brenner is no less a worthy contributor to this discussion than the more vaunted Berring and Katsh. That there appears to be a canon of literature on this topic which does not include Brenner, means the Brenner writings, apart from their content, are a practical demonstration of the operation of Wilson's concepts of authority and the Bowker and Star notion of classification[200] which suggest that bibliographies are subjectively constructed and over time become established as orthodox while the classification rationale disappears. A canon of literature becomes self-contained and self-evidently common sense.

The literature overall, with some exceptions, notably Ross, Brenner and Pantaloni, neglect the need for empirical verification and analysis. The opportunity to analyse the way legal information is used at an abstract level is forgone. However the discussion of the impact of online access to law is incomplete without making observations in the context of theories of law or theories of information. As Webber has observed:

> Theoretical writing is the lawyer's equivalent of basic research: the mathematical formulae, conceptual models and bold hypotheses that permit real advances in

[200] See further discussion of Wilson and Bowker and Star in Chapter 4 Law as a Community of Practice.

> knowledge and striking practical innovations. It lays the foundation for the creative solutions of the future.[201]

The speculation about the impact of online access to law on the way law is understood has been widely traversed but the literature does not appear to have engaged with empirical research or theoretical analysis.[202]

The objective of this thesis is to remedy those limitations. In the next Chapter[203] I will examine ways of viewing the practice of law with an understanding of modern principles of information science and in Chapter 5 Discovering Legal Information in Context, I will reveal the outcomes of interviews with law librarians which tracked the changes in legal practice over the last generation.

[201] Jeremy Webber, 'Legal Research, the Law Schools and the Profession', (2004) 26 *Sydney Law Review* 565 p 582.

[202] See as an exception Judith Lihosit 'Research in the Wild: CALR and the Role of Informal Apprenticeship in Attorney Training' *Law Library Journal* Vol. 101:2 [2009-10]

[203] Chapter 4 Law as a Community of Practice.

4 Law as a Community of Practice

Introduction

In Chapter 3 of this thesis I suggested that the speculation by certain law scholars regarding the impact of online access to law on legal practice lacked a theoretical approach. While Berring for example, considered the centrality of bibliography and classification in supporting his arguments that the structure of law would be undermined, there was no detailed exploration of exactly what bibliography or classification represented in the context of law. Further to analysis of classification there are also aspects of the way knowledge is exchanged and shared in the profession which are relevant to an understanding of the role of libraries and texts in law.

The discipline of information science offers frameworks for interpreting information use amongst professionals which will provide a basis for assessing the claims about the impact of online access to law.

This discussion is going to look at three aspects of information use amongst communities of professionals.

1. The subjective nature of interpretation in law and specifically the interpretation of information based on the context in which it is received; including the technology relied upon, as well as the purpose for which the research was being done.
2. The way professional groups filter information or create structures of information or meaning amongst themselves.
3. The information exchanges amongst legal professionals which reflects the social nature of information sharing which typifies the way a community of professionals may operate.

These aspects of dealing with information correlate with the information science concepts of *sense-making*, *small worlds* and *socio-technical practice*.

This chapter is also going to look in detail at notions of bibliography and classification which Berring and Danner allude to but do not analyse.

Sense-making

In Chapter 1[204] I provided some examples of different types of research tasks initiated by a librarian, a practitioner and an academic pointing out that each of them would be looking for

[204] See Chapter 1 Introduction—The research question.

materials for different purposes. For each of them the meaning or interpretation of the materials would depend on the purpose of their research. Conventional approaches to legal research would characterise each of these tasks the same way. However the discipline of information science would consider that each of these activities may determine the value and application of what is found.[205] Information science takes into account the context of research. This context can be the purpose for which the research is being done, the place or circumstances of the research as well as the professional community within which the research is situated.

When coming to an understanding of what context means, a useful point of departure is the Dervin concept of *sense-making*.[206] Sense-making is a notion which recognises that meaning is determined by context, not simply because of the differentiated nature of individuals but also because meaning can be dependent on the circumstances in which information is received. An example in law might be the use of unreported judgments. If a judgment is unpublished the assumption may be that it does not contain any significant law and only impacts on the parties to the dispute. However this unreported judgment may have weight depending on the purpose of the research which led to its discovery as it could provide a valuable perspective on an issue where there is no other Australian authority.

The value or significance of a source may be determined by the purpose of the research and the situation of the researcher. For legal researcher A the source could be tangential to an issue; to researcher B the source may only be persuasive; to researcher C the source is authoritative. This is looking solely at the respective importance of the decision. Once the meaning of the law expressed in the judgment is considered then again there may be a variety of interpretations.

[205] See discussion of history of information literacy (IL) in Kimmo Tuominen, Reijo Svolainen, Sanna Talja 'Information Literacy as a Sociotechnical Practice' *Library Quarterly* vol 75 no 3 329-345 (2005).

[206] See Brenda Dervin, Lois Foreman-Wernet with Eric Lauterbach [ed] *Sense-Making Methodology Reader: Selected Writings of Brenda Dervin* Hampton Press Inc 2003.

Dervin's research arose out of an exploration of the digital divide,[207] the concern being 'information poverty'. While information technology apparently makes knowledge more widely available, poorer classes are less able or less disposed to making the best use of it. [208]

While Dervin's focus is on information inequities, there are general principles of reception of information which have a wider application. The idea that information objectively describes reality, is merely an assumption.

> Essentially, these assumptions are the very assumptions that have been most often associated with logical positivism or positivistic science. The idea here is that the world can be seen as discoverable, describable and predictable and the purpose of information is to so describe it and predict it...
>
> What is important about this complex of assumptions is that they all rest on one fundamental assumption—that information can exist independent of the observer.[209]

Dervin further argues that while information is interpreted subjectively, the ability to understand information is also dependent upon the context of the person who receives it.

> ...the very notion of a communication-produced gaps and inequities rests on the assumption that the informational content of messages exist independent of either sources or receivers and can have impacts on receivers independent of any intervention by receivers.[210]

It could be argued that it is these positivist assumptions as critiqued by Dervin which inform the speculation about the impact of online access to law. The predictions ignore the context of the lawyer researcher and how legal published information might be dealt with. Recognising or understanding sense-making helps us see how there can be a distinction between the published form of the legal text and the way the materials may be interpreted. The structure of text holdings and resources used to navigate then are not the sole determinants of meaning.

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[207] Brenda Dervin 'Users as Research Inventions: How Research Categories Perpetuate Inequities' *Sense-Making Methodology Reader: Selected Writings of Brenda Dervin* Brenda Dervin, Lois Foreman-Wernet with Eric Lauterbach [ed] Hampton Press Inc 2003. Work originally published in 1980.

[208] Ibid p 21.

[209] Ibid p 31.

[210] Ibid p 35.

In the late eighties there was debate which contrasted bibliographic and process oriented approaches to teaching legal research.[211] A bibliographic approach to teaching focused on the sources and how they were used whereas a process oriented approach looked at the use of the sources in the context of problem solving. A bibliographic approach would for example introduce students to a legal encyclopaedia, a legal dictionary, a statute annotator and a case digest and explain how they worked and what their purposes were. Whereas a process oriented approach would identify where each of these sources would fit in an overall legal research strategy and teach students using problem solving exercises which required the use of these tools. The argument was whether only the latter approach would enable students to adequately understand legal research. The controversy was more about legal education than interpretation, so in the legal research sphere the notion of context has had limited exploration.

Law as a small world

The idea of 'small worlds'[212] is the characterisation of the way information is shared and understood by self-contained groups that share common expectations, values and experience. The origin of the concept of small worlds was a study of janitorial staff in the US and how they receive, process and understand information. The methodology was an ethnography based on observations and interviews with janitorial staff over two years. The subjects of the study were chosen because they belonged to a lower socio-economic group. Like Dervin, Chatman had an interest in information divides.

[211] For an overview of the debate see Robert Berring 'Twenty Years On: The Debate Over Legal Research Instruction' Perspectives: Teaching Legal Research and Writing Vol 17(1) Fall 2008. The original articles are Christopher G. Wren & Jill Robinson Wren 'The Teaching of Legal Research' 80 Law Libr J 7 (1988); Robert Berring & Kathleen Vanden Heuvel 'Legal Research: Should Students Learn It or Wing It?' 81 Law Libr J 431 (1989); Christopher G. Wren & Jill Robinson Wren 'Reviving Legal Research: A Reply to Berring and Vanden Heuvel' 82 Law Libr J 463 (1990). See also Terry Hutchinson 'Taking up the Discourse: Theory or Practice' (1995) 11 QUTLJ 33.

[212] See Elfreda Chatman 'Life in a small world: Applicability of gratification theory to information-seeking behaviour' *Journal of the American Society for Information Science* Volume 42, Issue 6, pages 438–449, July 1991; Gary Burnett, Michele Besant, Elfreda Chatman 'Small Worlds: Normative Behaviour in Virtual Communities and Feminist Bookselling *Journal of the American Society for Information Science* Volume 52, Issue 7, pages 536–547, 2001. See also Reijo Savolainen 'Small world and information grounds as contexts of information seeking and sharing' Library & Information Science Research 31 (2009) 38–45.

The study discovered that this class of worker was largely fatalistic and regarded any change for the better in their living standards or income as being based on luck or good fortune rather than an exercise of personal initiative. Their perspective of planning was short term rather than long term. Credibility of information was based on confirmation of personal experience or first-hand information from known persons. An example of the constrained nature of their view of knowledge meant they would ignore workplace notices which informed them of educational opportunities or promotions.

While janitors and legal professionals represent contrasting social classes it could be argued that the notion of small worlds applies as readily to professional communities as it might to working class communities. The crux of the small worlds study is that homogenous groups will filter information selectively or understand information the same way. While there is a gulf between the knowledge perspectives of janitorial staff and legal professionals the information transactions amongst law professionals can also be filtered, and in the same way, meaning determined by the context of membership of the group. Law professionals will share relevant knowledge amongst themselves in a way which conveys the import, weight or authority of the information.

The characterisation of information exchanges amongst the profession as subject to a small worlds analysis may help us to understand that the legal profession's reliance on the organisation and indexing of texts is less crucial to their information needs than the Berring et al arguments assumed. The speculation that the move from hard copy to online access to law will have an inevitable impact on the profession ignores the larger role that the legal community as a whole may exercise over what may be seen to be and accepted as authoritative.

Law as a sociotechnical practice

From the discussion above we can see it may be helpful to view legal research as a process where meaning may be determined by the context of the research. This will include the purpose for which the research is being done as well as the circumstances in which the research is being done. This may include the difference between searching in hard copy in a library or researching at the desktop isolated in an office. In the same way it may be helpful to view the legal professional community amongst themselves creating expectations regarding meaning and value of resources. The legal community may represent a small world where information is filtered and interpreted in a particular way.

> Reading may be seen as essentially a shared activity in the sense that it deals with the evaluation of different and often conflicting versions of reality. Groups and communities read and evaluate texts collaboratively. Interpretation and evaluation in scientific and other knowledge domains is undertaken in specialised 'communities of practice' or 'epistemic communities'.[213]

Both these notions of constructed knowledge and interpretation of information in a community of practice are addressed in the notion of a sociotechnical practice.

A sociotechnical profession is one where information transactions are effected using technology but in a specific social context.[214] Interpretation of information is not done unilaterally but within the professional community context. Technology facilitates the research objectives of the community but at the same time may determine how the community deals with the information.

The scholarship of the nineties which was the catalyst for this thesis is for the most part written from the basis that a legal researcher will need a specific type of information, for example an expression of a legal rule; and will be assisted in finding it by reference to a legal taxonomy or bibliography; and will know that the articulation of the rule is reliable based on its place in the legal hierarchy of authority. As discussed earlier in this chapter, this perspective represents a narrow view of information literacy.

> Most IL [Information Literacy] standards assume that the 'truths' packed in information are certain and objective and are generally helpful to the learner or fact finder.[215]

There is a distinction between information literacy being a set of 'generic skills' where the information seeker discovers and assesses resources autonomously with an assumption that objective facts are discoverable;[216] and a set of skills which cannot be separated from the

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[213] See Kimmo Tuominen, Reijo Svolainen, Sanna Talja 'Information Literacy as a Sociotechnical Practice' *Library Quarterly* vol 75 no 3 329-345 (2005) p 337.

[214] Ibid.

[215] Ibid p 334.

[216] Ibid pp 334-336

context, professional or otherwise, which has generated the need for information. Information seeking may be a collaborative exercise which needs to be taken into account.[217]

It could be argued that the Berring et al predictions are based on an individualist conception of information literacy where a change in technology may have a significant impact, however in the context of the legal profession as a whole, as any information seeking must be done in a much broader context any impact may be attenuated by the demands of the profession.

However as we have seen in the discussion of sense-making, the context of research may determine interpretation and the professional community to which the researcher belongs can be a factor in meaning.[218] A sociotechnical analysis goes one step further and considers the impact of technology.

> …there is a symbiotic relationship between literacies and technologies, and, in fact, social practices and technologies mutually constitute each other.[219]

In the context of this thesis it is arguably superficial to regard technology simply as a factor in disintermediation of the structure created by hard copy publishing whereas it can be viewed facilitating a community of practice in a way which maintains stability in the dealing with legal information.

Hara and Kling provide examples of where technology complements the community of practice in law.[220] This may include the use of legal research databases; criminal records databases; e-mail and discussion listservs. From the library research examples of decentralisation of the library functions can be added to this list.

Law could be seen as a 'sociotechnical practice' where research is done in a 'specialised community of practice', that is information is not sought by an individual for a unique self-contained purpose but in the context of broader collegial objectives; and that this communal

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[217] Ibid pp 336-341.

[218] See Chapter 1 Introduction—The research question, for examples of different contexts of legal research.

[219] Kimmo Tuominen, Reijo Svolainen, Sanna Talja 'Information Literacy as a Sociotechnical Practice' *Library Quarterly* vol 75 no 3 329-345 (2005) p 338.

[220] Noriko Hara Rob Kling 'IT Supports for Communities of Practice: An Empirically-based Framework' Center for Social Informatics Working Paper No WP-02-02 https://scholarworks.iu.edu/dspace/bitstream/handle/2022/1022/WP02-02B.html?sequence=1 p7

sharing of knowledge is facilitated by new technologies. Characterising law as a sociotechnical practice then encourages a view of the profession which recognises that is operates socially in the way information is exchanged and understood, that the receipt of information is contextual rather than absolute and that technology can facilitate the social aspects of the profession.

Solomon develops a different perspective of the operation of a sociotechnical practice. In relation to the impact of a technology on a community of practice.

> …information systems focus attention on a particular sphere of activity, allow some tasks to be performed, prohibit others, and through these capacities exercise power. [221]

Solomon is writing in the context of software design and provides examples where the prohibitions of a system are overcome in the workplace by instituting workarounds. This is an inefficient application of technology design but it also illustrates that the exigencies of workplace practice can be more resilient than the systems which are meant to direct them.

There is a stark example in a study of air traffic controllers[222] which illustrates a socio technical practice where the observation is made that the information technology systems used cannot replicate the handing of slips of paper ('flight strips') from one controller to another. Not only does the 'flight strip' contain the information indicating flight number, destination, speed and height of an aircraft but the physical handing over of the flight strips signifies the handing over of responsibility and an acknowledgement that the receiver knows where the aircraft is. Herbert and Hughes analyse the processes of air traffic controllers and compares the exchange of flight strips containing flight information with the detail available on radar screens and observes the importance of the interaction involving the paper slips in assuring controllers can monitor aircraft movement effectively. It is the flight strips which enable a new controller starting a shift to make sense of air traffic rather than the radar images on the computer.

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[221] Paul Solomon 'Discovering Information in Context' *Annual Review of Information Science and Technology* (2002) Vol 36 Issue 1 229-264 p 232. Relying on LD Introna *Management, Information and Power* London Macmillan (1997).

[222] RHR Harper and John A Hughes 'What a f-ing system! Send 'em all to the same place and then expect us to stop 'em hitting": Making Technology Work in Air Traffic Control' *Technology in Working Order: Studies of work, Interaction and Technology*, Graham Button ed Routledge, London 1993

> The point is that rules, procedures, regulations, endemic to work of all kinds, do not, stand independently of the activities of work but furnish those who do the work with ways of seeing and recognising things and activities as relevantly features of the work.[223]

The air traffic control study focuses on processes in the work place. While technology or software can impose 'rules', that is tasks that must be undertaken to satisfy a work objective, the imposition of these rules necessarily must take into account the social activity and interactions which best facilitate staff achieving the work objective.

If we apply the tension between the use of technology and the social elements of the workplace to the practice of law it helps us understand how the change of format from hard copy to digital legal resources may not have necessarily led to an impact on notions of authority in law. If law is a sociotechnical practice then authority may be something that is constructed socially by the profession rather than by the structure of published texts organised in a library. And further, the contribution of technology does not so much undermine the status quo of legal information but could sustain it by enabling the operation of the community.

This discussion of communities of practice only scratches the surface of the way information transactions might be described or analysed. There are a range of approaches to information science which can be related to law which extend the understanding of what lawyers do when they research.

Each of these theoretical approaches can be seen as ways of revealing the relationship between texts and the practice of law. There is not a relationship of interdependence which determines that a significant change in technology in one will lead to a corresponding change in the other.

Indexing, classification and authority

If we accept that the dealing with information in the legal profession has a social element as well as a bibliographical one, then we can also see that this might be a reason the disintermediation of hard copy libraries did not have the predicted disruptive impact on legal practice. The speculation by legal academics regarding the impact of online access to law

[223] Ibid.

overlooked these theories of the social aspects of professional information seeking which were being developed a the same time.[224]

But there is a more traditionally library centred element of information science which should also be considered in detail. The focus of legal academics was the utility of the indexing and classification resources that enabled a hard copy library to be interrogated. A curious aspect of Berring's writings is that he appears to rely on key information science texts in the indexing and classification area to inform his essential premises but does not articulate the basis of his opinions in detail.[225] He alludes to them without explaining how they have influenced his writings. It would be useful in this context to consider the works of Patrick Wilson and Bowker and Star.[226]

The power of indexes

In *Second Hand Knowledge* Wilson expounds in depth on the concept of 'cognitive authority' whereas Berring's definition is cursory and restricted to the context of law:

> For most of the twentieth century, the legal world had agreed to confer cognitive authority on a small set of resources. By 'cognitive authority' I mean the act by which one confers trust upon a source.[227]

Curiously Berring footnotes this definition to the psychologist Stanley Milgrim's study of authority and obedience.[228] It is not too much of a leap to assume that it is really Patrick

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[224] For an overview of this speculation see Chapter 3 The Collapse of the Legal Universe.

[225] See Robert C Berring 'Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information' (1994) 69 *Washington Law Review* 9 p 11; Robert Berring 'Symposium on Law in the Twentieth Century: Legal Information and the Search for Cognitive Authority' (2000) *88 California Law Review* 1675 p 1690; Robert C Berring 'Legal Research and the World of Thinkable Thoughts' (2000) 2(2) *J App Prac & Process* 305 p 310.

[226] Patrick Wilson *Two Kinds of Power*, University of California Press (1968); Patrick Wilson *Second Hand Knowledge: An enquiry into cognitive authority*, Greenwood Press, Connecticut (1983); Geoffrey C Bowker, Susan Leigh Star Sorting *Things Out: Classification and Its Consequences* MIT Press Cambridge (1999).

[227] Robert C Berring 'Legal Information and the Search for Cognitive Authority' 88 Cal. L. Rev. 1675 (2000) p 1676.

[228] See Stanley Milgram *Obedience to Authority* (1983). The focus in these experiments is obedience rather than an abstract notion of authority and not necessarily relevant to our understanding of legal rules.

Wilson who informs the essential premise of Berring's writing. While Berring only alludes to Wilson, the language and analysis, for example the persistent 'universe' analogy and reliance on the concept of cognitive authority, could be seen to be drawn from Wilson's ideas.[229]

Berring does not define cognitive authority expansively. His focus is simply on trust. The Wilson text is useful because of the analysis of what cognitive authority is and how it relates to authority *per se*.

> Cognitive authority is curiously different from the other familiar kinds of authority, that of the person who is in a position to tell others what to do. Administrative authority, as we can call it, involves a recognised right to command others, within certain prescribed limits.[230]

Wilson distinguishes between the influencing ability of cognitive authority, or the ability to persuade; and the type of authority which necessarily must be complied with. This is a critical distinction in law and does not appear to be addressed in Berring's writings.

Wilson's focus when he is discussing cognitive authority is on the combination of credibility and the ability to influence:

> Cognitive authority is influence on one's thoughts that one would consciously recognise as proper.[231]

By proper Wilson means credible. Authority and credibility go together. However Wilson recognises that particular types of people and institutions can be persuasive without necessarily being credible.

While Wilson covers the notion of cognitive authority in a way which helps us better understand the source of Berring's thesis it is the chapter on the so-called knowledge industry which provides a way of characterising how law operates.[232]

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[229] See Robert C Berring 'Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information' (1994) 69 *Washington Law Review* 9 p 11; Robert Berring 'Symposium on Law in the Twentieth Century: Legal Information and the Search for Cognitive Authority' (2000) *88 California Law Review* 1675 p 1690.Patrick Wilson *Second Hand Knowledge: An inquiry into cognitive authority* Greenwood Press Connecticut 1983.

[230] Patrick Wilson *Second Hand Knowledge: An inquiry into cognitive authority* Greenwood Press Connecticut 1983 p 14.

[231] Ibid p 15.

Wilson's *knowledge industry* term refers to the 'systematic production of new knowledge'. In a footnote Wilson concedes that the term is derived from a text which focused on knowledge distribution rather than knowledge creation. However we could see law as a coalescence of both. While law is inherently stable the constant publishing of new cases represents an industry within Wilson's terms. Legal publishing is prolific and profitable and new texts do not need to justify themselves as representing the results of new research. It is to borrow from Wilson a constant process of analysis, synthesis, interpretation and evaluation.[233]

What is it then that Wilson is focusing on or analysing? What we are interested in within this thesis is the use or consumption of knowledge as produced by a particular knowledge industry. Wilson characterises these works as representing 'conversations' amongst professionals. The community of professionals judges, then rates, and validates this knowledge.[234]

What is being established here is that knowledge creates what Berring would refer to as a closed universe, that is the creation of knowledge or the consumption and benefit of others in that knowledge class. Note that this is different from the Wilson bibliographical universe which contains all versions of all texts.[235]. Berring is writing about the editorially selected texts which create the legal knowledge universe.

Wilson makes a distinction between the general conversations amongst members of a specialist community and the contribution which changes the opinion of that group.[236] It is this change of opinion determined by a group of specialists which represents *knowledge*. The corollary is knowledge is subjective because it depends on the opinion of a group of specialists.[237] This is not problematic if it is accepted that a particular group is competent to make a decision about what comprises *knowledge*.[238] We can immediately see the appeal this analysis has to a person writing about knowledge in the legal profession. Law as a profession is

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[232] Patrick Wilson *Second Hand Knowledge* 'The Knowledge Industry: Quality and Fashion' Greenwood Press Connecticut (1983) p 39.

[233] Ibid p4

[234]Ibid p 47.

[235] Patrick Wilson *Two Kinds of Power* University of California Press (1968) Chapter 1.

[236] Patrick Wilson *Second Hand Knowledge* Greenwood Press Connecticut (1983) p 48-49.

[237] Ibid p 50.

[238] Ibid p 51.

constantly having these conversations which may predominantly be in the form of the resolution of legal disputes. However rather than being a group consensus it is the court hierarchy which may determine what new developments or changes to legal knowledge, that is the law, might be. The cognitive authority is based on a definitive judgement from an appeals court but may also reflect a developing consensus arising from prior conversations. These prior conversations may well comprise community standards or developments in other areas of law which may persuade the court.

Wilson also discusses fashions in knowledge. He uses examples in history, social science and literary criticism[239] to the extent where older generations of specialists would not recognise the activities of new generations of specialists writing ostensibly in the same field. What is important in the context of this thesis is an analysis of Wilson's explanation is regarding how these developments in fashion in knowledge come about. Wilson uses the idea of cognitive authority as a way of explaining changes. The ability to change intellectual values is based on the authority of the person or persons who attempt to effect that change. It is a result of consensus or acceptance within the specialist community.[240] It is helpful to consider law as being similar to other knowledge communities described by Wilson where there are constant conversations. These conversations may lead to a consensus where new knowledge is created. In the case of law this new knowledge can also be imposed by a binding appeals court decision.

Wilson warns of the danger of rapid change in intellectual values as well as stasis.

> ...It does appear that cognitive authority seems to weaken if one supposes that it rests on changeable intellectual taste…
>
> And the larger and more rapid the changes of taste, the less weight one is likely to feel able to give to the work that expresses that changeable taste.[241]

The Wilson analysis of cognitive authority is useful in the context of this discussion because it provides a basis for considering what might happen to the law in the face of technological change. Too rapid change in intellectual values may undermine the cognitive authority of the members of the community. The advent of online access to law threatened to open up the

[239] Ibid p 56-57.

[240] Ibid p 63.

[241] Ibid p 71.

closed universe of law by allowing unmediated access to judgements files changing the content of these conversations. The suddenness of this change may also lead to an abrupt change in the intellectual values of the profession according to Wilson's terms. It can be seen how law scholar such as Berring who is familiar with Wilson and his approach to knowledge would share these concerns.

The power of classification

As discussed in Chapter 3[242] the challenge to established legal classification is also a concern for Berring. If legal research is done in the absence of an orthodox legal taxonomy, the basis for establishing cognitive authority will be lost.[243] In *Sorting Things Out*[244] Bowker and Star establish the centrality of classification in any social organisation. Bowker and Star are not simply writing about bibliography or taxonomy they are also writing about social information infrastructure, that is the way in which an organisation or profession sets up mechanisms to deal with information.

Classification is insidious because once categories and labels are applied, the criteria relied upon to establish it becomes invisible; the process behind it disappears belying the subjective elements. Over time the classification is assumed to be right because that is the way it has always been. The taxonomy becomes the common sense way to view a discipline for those who rely on it.[245] However once the basis of the classification system is bypassed, for example, the hard copy bibliographically ordered regime is replaced by online access, the understanding of the content will also be disrupted.

The Bowker and Star analysis is not simply about classification but the integration of classification and communities of practice; that is the interplay between categories and the profession that relies on them. To this end they discuss classification as well as infrastructure.

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[242] See Chapter 3 The Collapse of the Legal Universe.

[243] See Robert C Berring 'Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information' (1994) 69 *Washington Law Review* 9; Robert C Berring 'Legal Information and the Search for Cognitive Authority' 88 Cal. L. Rev. 1675 (2000).

[244] Geoffrey C Bowker Susan Leigh Star *Sorting Things Out: Classification and its Consequences* MIT Press (1999).

[245] Robert C Berring 'Legal Research and the World of Thinkable Thoughts' (2000) 2(2) *J App Prac & Process* 305 p 310 referring to Geoffrey C Bowker & Susan Leigh Star *Sorting Things Out: Classification and its Consequences* MIT Press (1999).

By infrastructure they mean amongst other things the organisation and processes of a profession or discipline or product. For example the authors use the example of a CD. The infrastructure which allows a CD to be playable includes the standards negotiated which determined the size, packaging and recording bit rate. From a legal point of view the infrastructure would include music copyright, licensing, royalties and publishing rights all divided amongst respective countries or regions.

> Good, usable systems disappear almost by definition. The easier they are to use, the harder they are to see. As well, most of the time, the bigger they are, the harder they are to see.[246]

When we listen to a CD we take the ability to enjoy recorded music for granted. We are not conscious of either the technological or legal infrastructure behind it. Expanding on the Bowker and Star analogy, when the music is moved to an online model, for example iTunes, the technology is more elaborate, the legal aspects more complex, the scale much greater, but its ease of use makes the exigencies of providing the service less apparent.

The infrastructure of law relevant to this topic could be the operation of precedent; the storage of texts and their indexing; the hierarchy of courts and the hierarchy of judgments; the rules of practice and procedure within courts; the methods judges use to apply precedent; as well as the way information is shared amongst the profession in day to day practice. The function of the library is the most apparent whereas the operation of the other elements in relation to information sharing is more elusive. We can see the hard copy texts but the rest of the legal infrastructure is invisible. This identification of an infrastructure in law correlates with Bowker and Star's identification of the historical development, work practice routines, hierarchies of knowledge and perpetuated practices identified as infrastructure in other professions.

It could be argued that Berring and Danner,[247] both librarians *see* the function of texts in a library but cannot see the *infrastructure* which provides law with its stability.

Classification or categories are a subset of infrastructure. Bowker and Star describe classification systems as

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[246] Geoffrey C Bowker Susan Leigh Star *Sorting Things Out: Classification and its Consequences* MIT Press (1999) p 33.

[247] See Chapter 3 Collapse of the Legal Universe.

> an attempt to regularize the movement of information from one context to another, to provide a means of access to information across time and space.[248]

The aim is to establish consistency in the dealing with the description of things in different contexts. When Bowker and Star analyse classification they point to an objective of classification as achieving consistency or establishing a standard. This means that criteria for classifying a thing must have the attribute of comparability so that the criteria which determine classification or the classification itself must mean the same thing amongst professionals in different areas or different countries.

In *Sorting Things Out* the problems with classification relate to absolutes. Is a customised Harley Davidson still a Harley Davidson? Not according to the Oregon Department of Motor Vehicles.[249] In the application of apartheid, there may have been conflicting criteria to determine if a person was Bantu, Indian, coloured, or white. However, whatever classification was arrived at was determinative of a social position.[250] In the delineation between administration and direct care in nurses' job descriptions, ultimately the subject will be classified as either being involved in nursing or not.[251]

The examples demonstrate an end point of the purpose of classification, the recognition of similarity and difference. There is a determination that an item belongs in a named category. However in law labelling is a starting point. A judgment may be classified as a negligence decision. Yet it still has to be read by the researcher to reveal how the reasoning applied to the facts may make it relevant to what the researcher hopes is a situation analogous to the subject of the research. In law the utility of a label such as negligence, depends on the context in which a source is going to be used, whether it is legal advice, scholarly research or a judgment.

In the circumstances where categories may be relied upon in a range of situations Bowker and Star use the term *boundary objects* to describe the way the different interpretations of category in different contexts might be reconciled. The boundary objects retain an essence or informational requirement for a range of users in different contexts or different communities

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[248] Geoffrey C Bowker Susan Leigh Star *Sorting Things Out: Classification and its Consequences* MIT Press (1999) p 290.

[249] Ibid p 43.

[250] Ibid Chapter 6.

[251] Ibid.

of practice. The display of bird specimens in a museum is used as an example. The specimens will mean different things to birdwatchers and biologists, however they are still birds.[252]

> Boundary objects are those objects that both inhabit several communities of practice and satisfy the informational requirements of each of them. Boundary objects are thus both plastic enough to adapt to local needs and constraints of the several parties employing them, yet robust enough to maintain a common identity across sites. They are weakly structured in common use and become strongly structured in individual-site use.[253]

If we accept that law may comprise subsets of communities of practice, for example communities of judges, barristers, solicitors and academics, then an authority could also be seen as a boundary object. In these terms it has the quality of plasticity, that is its utility and interpretation depends on the context of the user.

Bowker and Star discuss the process of integration of a range of meanings. They express the reconciliation or acknowledgement of difference in interpretation as a *representation*.[254] Knowledge arises because there is 'tension between contexts'. This is not unrelated to Wilson's notion that the acceptance of novel authority within a peer group is new knowledge or the result of true research.[255]

Even when dealing with merely labels, that is, determining a category as an ultimate descriptor Bowker and Star argue such a label is borne out of negotiation.

> The trick is to read the classification itself, restoring the narratives of conflict and compromise as we do.[256]

In the organisation of the *Halsbury's Laws of Australia* legal encyclopaedia there was a debate regarding whether in the first volume reference should be to *Aborigines* or *Aboriginals*. Is one

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[252] Ibid p 296-97.

[253] Ibid p 297.

[254] Ibid p 291.

[255] Patrick Wilson *Second Hand Knowledge* 'The Knowledge Industry: Quality and Fashion' Greenwood Press Connecticut (1983) p 39.

[256] Geoffrey C Bowker Susan Leigh Star *Sorting Things Out: Classification and its Consequences* MIT Press (1999) p 296-97.

term an adjective and the other a noun? Or did the former identify the race and the latter better recognise the status of indigenous Australians as being the original inhabitants of Australia? The term Aboriginal hides the variety of languages and cultures amongst the peoples and also fails to explicitly include Torres Strait Islanders. The debate comprised grammar as well as the burden of history. The very first title of *Halsbury's Laws of Australia* is 'Aboriginals and Torres Strait Islanders' and it can be seen as borne out of 'narratives of conflict and compromise'.

While *Halsbury's Laws of Australia* was meant to be an objective black letter law compilation of legal statements and authorities it can be see that the mere process of classification can be contentious, even in law. Wilson identifies the same dilemmas in the process of constructing a bibliography.[257]

Bibliography and classification in law is a subset of how information is dealt with in practice. Classification needs to be seen in the context of information transactions in the legal community of practice as a whole. Legal indexes are not transparent, common sense absolutes but borne out of a classification process which involves conflict compromise and negotiation. Instead of representing the objective ordering of information they can be seen as the product of a community of practice.

We can see in legal research the classification of authority determines whether a source might be found but does not determine the way it might be interpreted or used. The essence of a decision, for example that it might be about negligence, will be common to a range of users but exactly what it might represent in relation to liability will be a matter of context. Advocates on opposite sides of a dispute, a judge and academic will all interpret a source differently. This plasticity or malleability in the use of information is something that Berring does not address. Classification in law is preliminary labelling but not determinative of use or meaning.

In law it could be argued that classification, whether it is subject matter or hierarchy of sources, is a conflation of the Bowker and Star analysis of classification and boundary objects. Bowker and Star are not writing about law but their text is helpful in understanding how law might operate.

In his articles Berring is illustrating the impact of bibliography on the sole researcher as an idealised or model researcher. However once a research is transferred to a community of

[257] Patrick Wilson *Two Kinds of Power* University of California Press (1968).

practice where the information is evaluated on a collaborative or communal basis then the power of the bibliography may be less significant. When it comes to the impact of online access to law and the circumvention of established bibliography the way the legal community operates may exert a stabilising influence.

When Berring refers to Bowker and Star in emphasising the importance of bibliography in law, it could be argued that he misses the point in two ways. One is Bowker and Star are critiquing the fact of classification as potentially being a barrier to knowledge rather than preserving it. The other is that they are arguing that knowledge should be open to different methods of classification. The assertion of a bibliographical or top-down system is a narrow one. However Bowker and Star also consider the operation of communities of practice. This classification process is far more flexible than a strict bibliographical approach. In viewing the Berring analysis a dichotomy needs to be established between the legal bibliography and the way lawyers do research. Bibliography may be a research tool which is incorporated into a community of practice but it is not the basis of knowledge about the law.

A specific case may mean one thing when it is presented as a result of editorial classification however this classification does not determine its ultimate use. The classification is not a necessary element of its utility. Cases may be found and may be found to be useful despite their classification. That Berring approach appears to assume that law is definitive rather than an objective or contextual. The classification process may simply encapsulate one aspect of the meaning of legal texts and disrupting the editorial mediation process through online technology may not necessarily make a big difference at all. Berring seems to be arguing that the classification of law has been imposed on the legal community of practice whereas it is arguable that the community of practice has created and has always maintained its own way of dealing with legal information.

Classification and information literacy

When looking over the literature it appears that there are assumptions regarding the power of legal bibliography which may be at odds with the way legal resources once found are used. This traditional view of classification and publishing structure can be seen to inform the way researchers are trained in online research. The focus has been on the interface, the search engine and the database directory layout. The limitation of a classification focused view of the organisation of law may also limit the way interrogating computers is perceived.

These assumptions of the power of legal bibliography correlate with traditional concepts of information literacy critiqued by Tuominen et al.[258] Meanings of texts may be determined by the context of the research. The evaluation of a resource or legal authority is not at the point of publication of the text, but the reception of the data by the community of practice within which the research was undertaken.

The Berring approach is to view the legal research process as being determined objectively by an editorial mediation process which conveys information in a way which is commonly understood or understood in a single way. If this is the case then the change of medium and the hiding or rearranging of legal classification or the disintermediation of law would have had an impact on the way law is understood. It could be argued that the stability and predictability in law is determined by the nature of the practice itself. The way the profession operates creates the context which is more important than the organisation of hard copy texts which the profession relies on as one of its tools. The profession as a whole is resilient enough to accommodate change in the structure of information. Law could be seen as a *socio-technical practice*, that is its use of information or knowledge is determined by the context created by professional interaction facilitated by the new technologies rather than by a rigid library classification represented in hard copy. When we look at literature from the information sciences discipline it reveals the analysis by law academics of the way legal information is used within the profession, could be criticised as being narrow or one dimensional.

The legal community and online access to law

This brief overview of these theories of information science, and the way they may apply to the legal professions assist in understanding how the impact of technology on law may manifest itself in different ways. While Berring and others were speculating about the impact online access to law on the profession at the same time there were information science scholars considering approaches to information literacy which would have assisted the discussion. It would have indicated that perhaps as researchers are not looking for objective facts, and that meaning can be found in contexts such as community their approaches may have been different.

[258] See article— Kimmo Tuominen, Reijo Savolainen, and Sanna Talja 'Information Literacy as a Sociotechnical Practice' 75(3) *Library Quarterly* 329 (2005) p 337.

In Chapter 3[259] I argued that the literature which raised concerns about online access to law lacked analysis of how information may be used in the legal profession. The literature also relied upon what could be seen as a rhetorical or idealised notion of authority which suits the way the common law operates, but prevents a considered analysis of the impact of the Internet. The literature suggested that in the absence of established classification and indexing the self-contained universe of the law would collapse. Also the ability to rely on a range of sources rather than the hierarchical legal canon would demonstrate inconsistencies in the law as well as encourage marginal causes.

But if we view the law, not from the perspective of a single researcher, but rather from the view of a community of practice then the role of classification and the notion of authority become transformed. This sets up an analysis which sits outside the conventional approach to this topic but enables us to understand how information may be dealt with within the profession.

For example Bowker and Star help us to understand how classification works especially in the context of computer access to information. Classification has already been defined above in their terms. Classification is a method of reconciling differences when categorising objects. Boundary objects have the quality of retaining a consistent essence in classification over a range of communities of practice. I have argued above that classification of sources in law could be seen to be a conflation of these concepts as way of acknowledging that classification in law is a starting point and researchers may use materials found in way which is more flexible than simply taking a thing at face value as a category or label.

Bowker and Star also make a useful contribution to analysing the impact of computer access to data. It is not simply a way of circumventing an established classification structure. But given that classification reconciles differences computer databases allow for the recognition of variations in classification leading to uncertainty or ambiguity. But, instead of seeing this as a negative, Bowker and Star identify the possibility of more discretion in the application of categories which may lead to more autonomy and professional legitimation.[260] This view is written in the context of classification of nurses' duties. However it does lend itself to other

[259] See Chapter 3 Collapse of the Legal Universe--Conclusions.

[260] Geoffrey C Bowker Susan Leigh Star *Sorting Things Out: Classification and its Consequences* MIT Press (1999) p 154.

context and could be seen as a more constructive take on the Berring view of the collapse of the legal universe.

What is being addressed here is the ability of the current legal bibliography to be challenged by cross referencing in the discovery of differences or variations which would lead to perhaps more creative responses to legal issues. We must also recognise that the community of practice may to some extent be doing this in any case. Bowker and Star consider the impact of the use of computer databases on the classification of disease. The same outcome could be analogously applied to law.

> The chief advantage that computing offers today...is the ability to maintain uncertainty at the level of closure on analysis. When the list involved a relative handful of categories arrayed along one dimensional, then a whole series of decisions were forced… Even when the maximal degree of ambiguity was kept, it was impossible to compare large bodies of data because the original wealth of material simply could not be maintained. Now that more numbers can be crunched and more axes added to the disease descriptions encoded by computers the time of diagnostic decision can be held off. This theoretically brings closer the prospect true comparability, although the range of practical and even ontological problems are unlikely to disappear even with the most advanced multivalent, object-oriented system.[261]

Uncertainty or ambiguity represent at worst a devaluation of authority or could be seen as devolution of authority to a community of practice which is better able to make a determination. When we look at the way the law deals with information as a community of practice it is possible to argue this is the way the authority is dealt with in any case. Legal realists accept that law is subject to ambiguity and uncertainty.

Below is a quotation from the case *Australian Crime Commission v Stoddart*.[262] It is a 2011 High Court decision which determines whether or not there is a common law right to not be compelled to give evidence against a spouse. The decision is as much about what the common law is, as it is about spousal immunity while the quotation reveals something specific about how lawyers operate. The description is of 19th century London barristers.

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[261] Ibid.

[262] *Australian Crime Commission v Stoddart* [2011] HCA 47; (2011) 244 CLR 554 [135].

> As authors and editors, they were likely to be keeping an eye on each other's work and on any decision likely to affect their work. As barristers they belonged to a tightly knit class centralised in a small part of London. It was in many ways a class ideally suited for the protection of liberty and the rule of law. It was a moody murmurous class. Its members were prone to gossip and asperity amongst themselves, conscious of the infirmities of each other and of the judiciary, in constant touch at breakfast, dinner, lunch and tea, or while moving to and from court, and eager to pass on any errors in law books or developments which might affect their accuracy.

Compare this with the Savolainen description of small worlds:

> Overall, small worlds are depicted as relatively closed places whose inhabitants are bound to live there for a longer time. Because of the dominant influence of insiders' views, the inhabitants are suspicious of information provided by outsiders. Spatial and social factors intertwine, and they produce a predominantly constraining context of information seeking and sharing. In the end, small world as a spatial and social context of information seeking and sharing is best rendered as meaningful if it is approached from the perspective of normative behaviour.[263]

Characterising the professional relationship of nineteenth century London barristers as a 'small world' in Savolainen terms is a non-contentious application of the theory. It can be argued that in practice the profession of law has always operated this way. The intervention of technology whether it is in the form of books or computers would facilitate the social interaction but not necessarily direct them.

The selection of the High Court quotation to support my argument can also be seen as an example of sense-making. For a lawyer who is carrying out research on compellability of a spouse to provide testimony against their partner this case represents a source of the relevant common law principles. To me the case is about the common law and a convenient illustration of law as a community of practice.

A strictly bibliographic approach to law which assumes the structure of texts are central to the notion of legal of authority will justify concerns regarding the change of the medium of legal resources. However an understanding of information science theories in relation to how

[263] Reijo Savolainen 'Small world and information grounds as contexts of information seeking and sharing' Library & Information Science Research 31 (2009) 38 p 43-44.

knowledge is discovered and understood; a recognition of how the legal profession is essentially social; as well as recognition of the subjective aspects of indexes in bibliographies assists in establishing how law can be seen as one step removed from the texts which inform it.

In Chapter 5 I will explain the results of empirical research comprising interviews with law librarians which reveals that in relation to the processes of legal research at a professional level not much has changed over the last 25 years. I will also look at parallel research done in the United States which has made the same observation. I will also look at case law which reveals that there have always been anxieties in regard to the use of authority in legal argument both pre and post Internet.

5 Discovering Legal Information in Context

Introduction

I have reviewed the scholarship which considered the impact online access to law will have on the way law is dealt with within the practice of law.[264] The general premise is that knowledge of legal rules has been constructed by texts and that online access to law will have an impact on the discipline because the structure represented by texts will be lost.

The explication of legal rules relies on the assumption that some resources are more authoritative than others. This authority can be based on the level of court which has delivered a judgment or reputation of the editorial process which has led to publication. In hard copy authority can be immediately ascertained by nature of the publication: for example the reputation of the published judgment series, the publisher itself or the absence of a hard copy version, meaning the judgment was not important enough to publish in the first place. In an online world the established hierarchies are no longer immediately identifiable.

The research objectives of this thesis are to discover:

- the degree to which technology developments may have led to changes which impact on the way law is understood or practiced
- whether the practice of law can be characterised as a community of practice; that is whether the informal sharing of information amongst the profession is as important as reliance on texts.

In this chapter I will be relating the research undertaken to explore these enquiries.

Librarian interviews

In Chapter 3 I discussed the arguments of Berring and Danner in detail. Both of these scholars have a library background. Their arguments are based on the centrality of bibliographical approaches to law. If online access to legal materials have caused a fundamental change in the way legal materials are being used and interpreted then perhaps an effective way to test the hypothesis is by interviewing law librarians who have been employed in the role over the period that the change had been expected to happen.

[264] See Chapter 3 Collapse of the Legal Universe.

Law librarians are useful subjects because they have a central role in the dealing with information in law firms. I proceeded on the assumption that librarian roles would have remained consistent over time so members of this profession would have been aware of any changes which may have occurred. Legal practitioners themselves have a range of research roles over a career. A junior solicitor may be required to do research but once a practitioner has reached partner stage then not only do they know the law and are less likely to need to do research but their role in any case may focus on bringing in clients rather than providing advice. A law firm partner will have their own junior solicitors to carry out research when necessary. And while, in the same way, a law librarian may in the course of a career move from a reference to a management role, the connection with the central purpose of the library may nevertheless be maintained. The value of the long term librarian as a subject is the assumed consistency of the library role in legal research and by extension, the librarian.

However while law librarians were chosen as interview subjects because they would have firsthand experience of the way legal research resources would be relied upon over the period, the outcomes will not necessarily be considered definitive. Librarians do not provide legal advice nor do they present arguments in court. Nevertheless they are an integral element of the legal profession. If the legal profession forms a community of practice one function of the library could be to facilitate the sharing of information within the community.

The outcome of the interviews should reveal the degree of change due to the technology as well as provide clues as to the operation of a community of practice in law.

There are two particular aspects of the change which may be tested by the librarian interviews:

- The first is whether as a result of online access to legal information lawyers are making a greater use of non-authoritative materials. This may include unreported judgments; secondary sources and extra-jurisdictional materials. These are the outcomes which have been discussed speculatively and anecdotally in the literature but have not been tested empirically.
- The second is whether in law practitioners operate as a community of practice, of which the library is a member. This may mean the authority of the sources practitioners rely on is not determined by text but by the community itself. As I have suggested earlier in this thesis if formal text publishing is not central then this may explain why online access to law has not had the predicted impact.

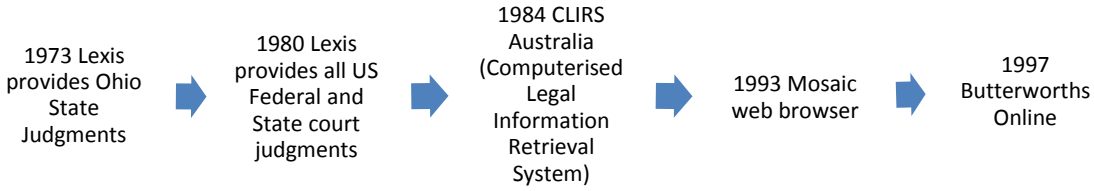
In order to determine the extent of any impact, five law librarians from a variety of practice organisations were interviewed. The institutions comprised a state appeals court, two large firms and two medium sized firms. This was to provide a range of research contexts which covered both institutions which provided advice as well as those where a decision would be finalised. The librarians were selected from a range of Australian state capital cities. The sample is limited but there is in any case a small pool of law librarians to draw from. A legal institution needs to be over a particular size to justify the employment of a law librarian.

It must also be emphasised that the information gathering is not meant to establish the statistical probability of an outcome. These are interviews which are drawing on the expertise of high level professionals whose explication of their roles represents the activities of scores of solicitors in their firms. The objective is to gather data which reveals the nature of any impact on the way lawyers deal with information as a result of technological change.

It should be noted that this was not an ethnographic exercise. These were not circumstances where it was necessary to come to understand the perspective or subjective outlook of the subjects. The subjects were not observed in practice. It was not a cultural enquiry. The objective was to elicit an account of the role of the participants and their experiences of the time period.

The sample size is also limited because they were also qualified by length of service. It was essential that the librarians had at least 15 years' experience. I have picked 1995-96 as the period when the WWW became a mature end user service for consumers and researchers. Prior to 1995 there were expensive time based dial-up services and CDs which only librarians were able or allowed to access. In Australia, AustLII was established in 1995, *Butterworths Online* was launched in early 1997. LexisNexis was made accessible through a web browser in 1997. While online databases had been available to specialist libraries since the late 70s they were reliant on proprietary software and lacked intuitive interfaces. So 1995-6 could be identified as the years when legal practitioners were commencing research from their desktops.

Figure 5-1



All the librarians interviewed had between 20 and 25 years' experience in law libraries at the time of the interviews. One of the law librarians had retired and her experience was valid up to 2005. In effect the methodology is partly a history of information legal professional practice over 20 years as a way of revealing what may have changed over the time period.

The subjects represented large and medium law firms, a state Supreme Court and three Australian capital cities.

Because I had worked in legal publishing and in business development all the subjects were known to me, which made selecting the subjects straightforward but I had not dealt with them professionally for almost ten years. Apart from personal familiarity there were no conflicts or prejudices.

There were ethical constraints to take into account. As the cohort of law librarians is from a small community who know each other professionally any published result might have had an impact on the library or firm if the subject was identified. The matters that law firms deal with involve client advice and litigation so any examples of searches might have identified ongoing disputes. So maintaining the anonymity of the subjects was a requirement. The librarians and their workplaces have been de-identified. Each subject's consent to the interviews was based on their anonymity being protected.[265]

Each of the librarians was interviewed either in person or over the phone. The interviews were recorded and transcribed. Simmons warns that telephone interviews have their disadvantages in comparison with face to face interview in that it may not be obvious that the subject has misunderstood a question or that the subject may not be able to concentrate for the duration

[265] Ethics approval was granted for this research: UTS HREC REF NO. 2009-386A.

of the interview.[266] However this warning is in the context of interviewing a wide range of subjects. Law librarians, when it comes to asking questions about library functions, are more of an homogenous cohort. As law librarians necessarily must be highly literate and work under time pressures inferences could be drawn that they were going to be more able to express their degree of comprehension of questions and be able to concentrate for an extended period of time. Also as law librarians are literate and articulate, and honesty or sincerity is not an issue in the process, observing body language was not going to be a critical element of the process.

The interview was loosely structured and the questions were derived from a number of source materials. The questions reflected law librarian activities and concerns based on a previous recently published law librarian survey.[267] There were also questions derived from an early legal research survey commissioned by the Law Foundation of New South Wales.[268] There were also questions which were selected as they acknowledged theoretical notions of knowledge and computer literacy.[269]

The interview would first establish an understanding of what the subject's responsibilities are today and then question them on how it might compare with what they were doing in the mid-nineties or earlier. My questionnaire combined some structured questioning (qualifying the librarian, asking about the current role of a law librarian), with questions which were calculated to reveal aspects of community of practice, for example, whether the library facilitated knowledge sharing amongst the practitioners; as well as open ended questions which would lead to data which may have only had significance when compared with the other interviews.

The questionnaire was not strictly followed. It represented an outline which would enable me to derive a range of responses from the interview subject. With the standardised early

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[266] Simmons, Rosemarie 'Questionnaires' from Nigel Gilbert [ed] *Researching Social Life* Sage 2005

[267] Ruth Talbot-Stokes "'Scuse me miss! What's an unreported judgment?': relating graduate attributes to legal research skills in the workplace" 16 (4) 2008 *Australian Law Librarian* 264.

[268] 'Legal Research and Information Needs of Legal Practitioners' Discussion Paper—Law Foundation of NSW July 1992.

[269] Tuominen, Kimmo Savolainen, Reijo Talja, Sanna 'Information Literacy as a Sociotechnical Practice' (2005) 75(3) *Library Quarterly* 329.

questions I was able to establish points of comparison for the subjects. However as the interview progressed the librarians would emphasise different aspects of their roles.

Having an unstructured element could be seen as containing an element of grounded theory approach. Grounded theory has a starting point of an unstructured interview with a subsequent analysis of the text which should then reveal comments which may prospectively reveal points of interest.[270] Other types of qualitative research may start with theories which may inform the questions or analysis.

Essentially the questionnaire was asking the librarian to discuss their current skills, duties and client requests and then asking them if they could remember what they were doing in the early nineties. Towards the end of the interview I would then reveal the purpose of the research and ask them for any comments or opinions. So while the objective of the interview was only revealed towards the end there was no deception. The aim was to avoid pre-empting answers if the context of the questioning had been revealed upfront.

Each of the interviews was around 50 minutes duration which was the time I had originally estimated, however I was not clock watching and the process unfolded naturally. I also discovered during the interviews that there was sufficient correlation between the subjects accounts to infer that the topic was exhausted within the sample. Charmaz recognises the value of small samples that provide rich data.[271] This research is a good illustration of that approach.

Coding the responses

Once the interviews were completed and transcribed they were reread and coded. Charmaz describes coding of interviews as part of the analysis of the data.[272] When reading the transcripts I was looking for both elements which reflected evidence supporting theoretical approaches to the way professional communities deal with information as well as touchstones suggested by the content of the transcripts themselves. There is some overlap between the codes and some responses were classified under more than one code. The codes are listed and explained below.

[270] See Kathy Charmaz, *Constructing Grounded Theory* Sage (2009).

[271] Ibid p 18.

[272] Ibid pp 46-7.

Note that the initial responses determined a librarian's current role in a law library. Once the contemporary function of the law librarian or library was established the questions focused on whether there had been any fundamental change over the last 25 years by asking the subject to think back about what they did (or the library did) day to day in the early nineties. Once the role of the librarian and library was established, and the question of change addressed, inferences about how legal information has been dealt with over this time could be drawn.

The key coding categories which were derived from an analysis of the responses are listed below. The list is immediately followed by a more expansive description of what the categories represent.

- Research context
    - Delegated
    - Discrete task
    - Added value: validation; training
    - Added value: interpretation
    - Added value: decentralisation; embedded research assistance
- Library as place
    - Centralised meeting place
    - Decentralised; virtual library
- Community of practice
    - Self regulating; self sustaining; informal information exchanges
- Information literacy
    - System literacy
    - Value of information literacy
- Technology
    - Fundamental change
    - No change: Technology independent of legal knowledge domain

Research context

It is important to establish an understanding of how research was generated and the purpose for which the research was to be used and also whether the librarian was expected to provide expert assistance in the selection, updating or interpretation of the results. It is simply demonstrating how a research task was generated and whether a librarian was responding

strictly with instructions in finding materials or exercising skills which filtered, classified or interpreted information.

- **Delegated:** The focus here was to determine from the responses the genesis of the research request. In this category the responses related to identifying the person or practice group who asked for the research; whether the research request was initiated and completed as part of a strictly hierarchical process: that is initiated by senior solicitors and carried out by juniors.
- **Discrete task:** This category classified responses which indicated the library's role was simply to follow instructions and find specific material without being expected to add any value apart from the skill in identifying the location of a source.

The next three categories were to identify how much of the library's role was to add value to the research process, further to applying the skill of tracking down materials. It helps in the understanding whether the purpose of the library is simply the implementation of a technical skill or if the role of the librarian was more expansive depending upon the context of the search.

- **Added value: validation, training:** Here I noted interview responses where the library showed they provided more than reference assistance. For example: whether the librarians were double checking resources found for accuracy or reliability; whether the tasks requested were seen as a way to develop the skills of the researcher solicitor; whether further to this the library had a formal training role; or whether the library was assumed to have a function where the legal researcher's results could be improved or filtered with guidance.
- **Added value: interpretation:** This is one step beyond assistance or training and the responses identify whether the library is considered to be in a position where it could make assumptions about the type of research being done or whether a librarian could suggest what else could be done or determine the value of a source found in relation to a legal issue.
- **Added value: Decentralisation; Embedded research assistance:** This category recognised that technology may allow the library to extend its reach. The responses listed here were those that indicated if library skills were extended throughout the firm rather than centred in one place; or if the library formed part of the general research process rather than relied upon for discrete tasks.

Library as place

This coding recognised that context includes not only the purpose for which the research is being done and the nature of the support provided but the physical situation of the research. The responses here were important because they revealed one way a library may have changed over twenty five years. Technology may have facilitated decentralisation of library processes but may not necessarily have changed the function of the library in relation to assisting with legal research. This may be a notable change to the way library personnel operate but is unrelated to the bibliographical approach to authority.

- **Centralised meeting place; service point:** The responses categorised here were those which confirmed that the library was a traditional space associated with texts and reference assistance.
- **Decentralised, virtual**: This category recognised that the technology can liberate library services from the confines of a physical library. The focus can be too often on the creation of the end user. But this does not necessarily mean that the end user has been isolated from library services. Even though most research may now be done at the desktop does it mean that the sense of the library is narrower, for example, being restricted to being a procurer or curator of the online information which is made available? Or is the library a provider of a service which simply complements end user access?

Community of practice

This code is identifying responses which indicate that rather than simply the identification and supply of requested materials that the library is part of a process which is integrated with the profession as a whole in the way that it effects the sharing of knowledge which includes attributes such as meaning and value.

- **Self-regulating, self-sustaining, information exchange**: The responses here may suggest that legal knowledge exists in a way that is not wholly reliant on what is represented by hard copy texts. An example here is the requests for unreported judgments. These judgments are identified as important because practitioners know about them through sharing knowledge amongst themselves. Another example could be the correction of errors which may be made by junior staff. Senior staff may prevent misuse of authority by junior staff which corrects their misapprehensions of how research should be done.

Information literacy

This classification is to distinguish between a conventional understanding of information literacy which means computer literacy; and the current understanding of information literacy which comprises an acknowledgment of the relative value of materials found in the context in which the search was done.[273] This code overlaps with *community of practice*.

- **System literacy:** Researcher is familiar with the content of a database and is also well versed in the search terms required by the system.
- **'Value of information' literacy**: Are libraries assisting in rating of the currency, reliability and authority of the respective databases.

Technology

The responses here represent a clear explication by the interviewee of the impact of technology on law libraries and are the point at which the objective of the research has been explained. So the interviewee is aware that research is being done to reveal what changes there have been if any in the role of the library of the previous generation. The distinction which might be revealed in the responses here is between there being a change in the way that research is done which may result in the way law is understood; and a change in library processes as a result of technology where the underlying hierarchy of information has remained the same.

- **Fundamental change:** This response suggests that there is evidence from experience that because the way research is done has changed the nature of the law will change.
- **No change: Technology independent of legal knowledge domain**: The responses here suggest that the nature of law is independent of the medium of authority; that is the structure and stability of the resources are separate from the form of the publications.

Interview responses

Below I have excerpted helpful observations from the interviews which assist in determining the impact of technology on law libraries dealing with legal information over the last twenty years. The thesis appendix has a list of the initial questions as well as the coding of responses.

[273] See for example Tuominen, Kimmo Savolainen, Reijo Talja, Sanna 'Information Literacy as a Sociotechnical Practice' (2005) 75(3) *Library Quarterly* 329.

Research context

Delegated

There were not many responses coded here. However the responses suggested that research tasks are not simply a matter of asking for a specific source or item. There is a level of expertise which is applied to determine exactly what needs to be discovered.

> '…it's delegated down to the particular level of experience that's required for the amount of interpretation required.' [Major law firm 1]

> '…there are occasions where we ask them to go back to the judge and clarify exactly what it is that they're looking for, because quite often they have no understanding of what the judge wants.' [Court 1]

Added value

Further to the above comments when we look beyond the initiation of the task there is a level of interaction that portrays an exchange of expertise rather than a bibliographical model of following instructions to find a specific item of authority. This can include discerning more about the context of the research task to find out exactly what was needed, or seeing the interaction as an opportunity for training or correcting errors.

> 'It's just like the research interview, they will come to you with a question and by the time you pursue them with a few more questions about what they've asked you, the whole request has turned around and you're actually helping them find something else…they equate us with being able to help them that we are positioned at that point in time to be able to spend time with them and make sure that they're following the right steps.' [Medium firm 2]

> '…then I've got other staff that have legal qualifications. Not all of us have information backgrounds, but they all work with their practice groups… depending on your experience and your understanding of the law, you can really take the research role as far as practising lawyers will let you.' [Major firm 1]

> '…you could have staff embedded … in practice groups for instance, and I know some law firms actually do that.' [Major firm 2]

> '…a number of staff here are embedded …they really are deep within the teams, so they get a level of requests, than in the past, when we were quite removed from the lawyers, sitting in the library. I think the expectations of you have changed, because

you sit in on their practice group meetings, you participate in their CLEs [Continuing Legal Education].' [Major law firm 1]

Library as place

The responses here revealed that the major change was the decentralisation of traditional library functions. The impact of technology may not necessarily remove the need for a library but created the potential to extend the library's reach throughout a firm. One difference was the court library. This may be connected with the generation that judges belong to or perhaps that courts have a limited number of staff and libraries have always had a social role. This was not explored.

'We've got a virtual research desk in that we've got helplines, but you can be answered by someone in any centre. So it's not necessarily that you ring, and you'll get the library in your centre.' [Major firm 1]

'We have satellite libraries now, so while we have the main collection we also have group libraries' [Medium firm 1]

'…it's probably a meeting place. We have regular functions in the library.' [Court 1]

Community of practice

These comments were highlighted because they illustrate the exchange of knowledge within the legal community of which the library is a member. References to the use of unreported judgments are important because they reveal that the reputation of judgments arise within the community rather than created by a publishing hierarchy. This could be seen as evidence of community knowledge complementing the bibliography rather than being driven or supported by it.

'…lawyers tend to have their specific practice areas, … they tend to be more aware of the resources in their particular area, and they'll use those ones repeatedly.' [Major firm 1]

'Authorised law reports … don't necessarily address the way people need to research. … they've been designed to fit a certain niche 200 years ago, and it doesn't really support the industry, and it collects only a certain subset of judgements, … without necessarily reflecting the full range of the law.' [Major firm 1]

'…learnt on the job…the people who they're giving the research to are senior lawyers and partners who will often point out the deficiency in their research and send them

back… I think that they're often directed to go back and use a particular text, even though they wouldn't necessarily want to…I think a huge amount is corrected by partners and senior lawyers.' [Medium firm 1]

Well we still get lists that contain a significant number of unreported judgments, but is it more? I don't really think so. I don't have a sense that it's more. It's difficult to say, because in the old days when they wanted an unreported judgement a librarian had to go up to the law courts library and photocopy an unreported judgement. And we would do that nearly every day, and get large lists of unreported judgements, even 17 years ago. [Medium firm 1]

Information literacy

The responses tended to acknowledge the difference between a technical knowledge of online searching and the value of information discovered.

…it is hard when you're looking at something like AustLII or the other online resources for case law, to get a sense of the value of the judgements. You can search on the facts and the law, but you can't really get a good sense of the precedent value of a judgement, because it's just not there in the judgment itself. [Major firm 1]

…there was always this presumption in a sense that because it was online, it was in some magic way true…There's this feeling that this particular fact which I have acquired through searching turns out to be incorrect, but never mind, I'll find another one because it's all free. [Major firm 2]

…training lawyers to be… to be more discerning in their use of information sources. [Major firm 2]

Technology

The responses here are coded under technology because they relate directly to the media which is used in the research process. But they could also be classified under community of practice because the comments reveal it is the nature of the legal community which provides stability in law rather than the way it is published.

We had our own unreported judgements collection that we had indexed. … no, all this furphy about because it's online, people are just pulling up crap. It's rubbish. [re unreporteds] We used to do it, everyone used to do it…No, I mean, the law is the law…[structure] wasn't there before, so it was the publishers that were pulling bits

together. So there was a third party without any liability, so all care and no responsibility. Here's your loose-leaf service, but if you rely upon it and you get it wrong, well that's not my problem. But no, it hasn't changed at all. I think they're speaking rubbish…No, it's packaged, and made accessible to a certain few in a particular way. It doesn't change the law, and it doesn't necessarily change the understanding… it's very ad-hoc, very piecemeal. It's not at all systematic or rigorous in the way that the law is tested or explained. [Major firm 1]

I don't think that the requests really have changed that much…[searching other jurisdictions] I don't think so, unless they need to. .. I don't think it's changed, I don't think it's happening more often…we still get lists that contain a significant number of unreported judgments, but is it more? I don't really think so. I don't have a sense that it's more. It's difficult to say, because in the old days when they wanted an unreported judgement a librarian had to go up to the law courts library and photocopy an unreported judgement. And we would do that nearly every day, and get large lists of unreported judgements, even 17 years ago. [Medium firm 1]

The lawyers still talk about the library and librarians…the landscape has changed in terms of how people go about research. I think research back then would have been a whole lot more ineffective than it is now. It would have taken far longer. [Medium firm 2]

I think we've always thought this way, but there just happened to be a text. [Court 1]

Interpreting the result

There were about five hours of interviews altogether which were transcribed and coded into 12 categories. The similarity of the subjects' responses suggested that the topics were exhaustively examined.

The interviews were at odds with the initial premise of this thesis, that is online access to law would be a challenge to the established notion of authority. It is interesting that there is 25 years of scholarship making assumptions about the impact of online research whereas it appears from the interviews that not much has changed in relation to the processes of research including the maintenance of a respect for hierarchical authority. However it is clear that the operation of law libraries has changed markedly. The use of technology has enabled decentralisation of library functions, but without a loss of library rigour.

The following general observations of the results of the interviews help in the understanding of the nature of any impact of online access to law.

The function of the libraries appear to be not exclusively bibliographic in nature: that is tasks are not limited to looking up a specific aspect or knowledge or fact. There is a constant interaction between the library and the researcher which suggests a process of filtering, weighing and valuing of information which is discovered. The text is or classification is not the sole determinant of weight of a source.

One of the objectives of libraries is to educate new practitioners in the dangers of online research. Not everything of value is online, and not everything found online has value. Misapprehensions about the value of online material is corrected in initial training and is also corrected by a mentoring process from senior staff or judges.

The librarians indicated that over the previous 15 to 20 years not much had changed in their roles as far as legal research was concerned. They were being asked the same sorts of queries. There were the usual technical research questions which involved specialised knowledge: is this legislation up to date? Has it been amended yet? What did the act say ten years ago? Has this act been proclaimed?

It is important to note for this cohort that unreported judgments were as much relied upon 15 years ago as they are at the time of writing. This is interesting because a key assumption has been that they would have been less relied upon in the past because they were harder to access because they were not available online and only available in major law libraries. However a common task 15 years ago was for the law firm librarian to go to a court library or university library to photocopy unreported judgments.

When it comes to requests for extra-jurisdictional materials librarians have always had to have access to comparative law resources. It may not be the case that there is a greater use of comparative law because it happens to be conveniently available online. The objective is always to find the most relevant and authoritative sources.

An example given of hard copy extra-jurisdictional research was the law court library which owned a copy of an Asian law of contracts text. This was not available online. The library makes its holding available for interlibrary loans and this particular text had been right around Australia. It represents the way research was always done pre-Internet and is still being done. Online access to law has not made reliance on these sources more likely. It is simply more convenient to find these materials when appropriate.

While the nature of research may not have changed, there have been substantial changes to the way libraries operate. A number of the librarians spoke of embedded research assistance in practice groups. Desktop access to law may arguably hide the structure and organisation of law as represented by texts, but the presence of an experienced (and sometimes legally qualified) library research assistant tended to impose a discipline on how research might be done so an approach is more likely to be structured.

This should not be seen solely as a direct impact of online access to legal information. One librarian said it was strategic. It was to raise the profile of library staff within the firm. Otherwise they were more likely to be seen as photocopiers and clerical staff. This strategic manoeuvre can be seen to be an opportunity created as a result of the disintermediation of the library and indicates how change can be harnessed rather than passively experienced. It also demonstrates, even if consciously not acknowledged, that librarians value their position as part of a community or practice rather than risking isolation. Solomon recognises that workplaces are not directed by the technology but work around the obligations or prohibitions or potential of technology to facilitate workplace objectives.[274]

Libraries in some examples have also ceased to become an identifiable specific space. They are beginning to operate virtually. A library phone query might be answered by someone outside the researcher's city. A library research assistant might be able to take over a client's computer and talk them through the research process while manipulating their screen.

One exception was the court library. This may be generational but the library in that case was still a meeting place. There were regular social functions held there. It might be that judges who are generally in their fifties and above are more comfortable with hard copy. Or it might be that they are conscious that the most valuable materials are still in hard copy and not easily available online. Or it could simply be that a court will have less personnel than a law firm, and sitting on the bench can be a solitary activity and the library represents a central place in the building where court members can congregate.

Findings

Conclusions from the research could be:

[274] Paul Solomon 'Discovering Information in Context' *Annual Review of Information Science and Technology* (2002) Vol 36 Issue 1 229-264 p 232. Relying on LD Introna *Management, Information and Power* London Macmillan (1997).

- Librarians observe that there has been no challenge to the concept of authority in law. In practice the hierarchy of judgments is still important.
- New solicitors may arrive with bad habits arising out of the convenience of online research but poor research practice is corrected by senior legal staff as well as library staff.
- Sources which were predicted to be used without justification based on their apparent authority simply because they were easily available such as unreported judgments and extra-jurisdictional sources, are not currently being used indiscriminately but only where necessary. These sources have always been a part of a research strategy.
- Librarians operate as part of the legal information community in providing value added research to a firm which includes filtering and vetting materials, and including training when necessary.
- There have been major changes in the way a library functions where technology has facilitated decentralisation but the processes of the library, or the role of a library within a firm has not changed.

It could be argued that the connection between legal knowledge and authority and texts may have been exaggerated. In the practice of law knowledge is not exclusively drawn from texts. There is a community of practice in the practice of law, which includes librarians, which inculcates good research practice which necessitates a respect for the hierarchy of authorities.

The absence of a reliance on a central hard copy repository may be replaced by embedded research assistance in practice groups or virtual library assistance. Confusion about the authoritative status of sources found online will be corrected by librarians or senior staff or judges. The absence of a clear library topography has been replaced by more rigorous training when a solicitor commences.

If law was exclusively positivist then the change in medium may have made more of an impact. However if legal decisions are made in way which parallels the texts or is only guided by them rather than directly relying on them, then hard copy legal reference texts may be less important than assumed.

One of the librarians said something quite perceptive in this context:

> One of the problems I've always had is you've got your legislation, and that applies, but it only gets tested when there's a particular factual situation and when people are willing to go to court to test it. So it all depends on the facts, and then whether or not

> you've got an argumentative pair of parties that want to really push it through the court system. So it's very ad-hoc, very piecemeal. It's not at all systematic or rigorous in the way that the law is tested or explained. So it's very, very piecemeal and very, very specific to certain facts at the time. So when we've got a piece of legislation which may not have been tested, particularly in Australia, or in a particular way in Australia, we have to then go and look at, for very similar situations in other Common Law jurisdictions. So we've got some examples at the moment where we're trying to look at every Common Law jurisdiction in the world for similar pieces of legislation, and then looking to see how they've been treated. We're not a code country, we don't have something like the American re-statement of the law, which has tried to encapsulate and – not quite codify, but at least, systematise particular black letter law areas, or Common Law areas, as very ad-hoc. Very frustrating. [Major firm 1]

What the librarian is saying is in practice legal disputes which lead to litigation are quite rare. And if there is litigation then it is going to be based on uncertainty in the law. The focus then in research is on determining the approaches to reasoning in analogous circumstances whether it is by looking at Australian cases or further afield. In a common law country, law is not necessarily logical or at any point knowable. It is always being tested. This is consonant with a legal realist approach. It is a counterpoint to the Berring argument that texts in a sense create the law or tie it all together.[275]

The library research indicates that when it comes to the way knowledge is dealt with in law libraries there has been limited change over the last 25 years. There has been change in the reach of the library and the use of technology to extend the library services to the desktop or practice group. However the nature of queries, the monitoring of new staff, the interaction between library staff and professional staff seems to have remained the same.

In the next chapter I will examine recent parallel research which comes to the same conclusions as my own research. I will also survey case law which acknowledges the sometimes amorphous nature of authority which demonstrates that the law has had difficulty with notions of authority since before the advent of online access to law. These further perspectives support the contentions raised in this thesis generally.

[275] See Chapter 3 Collapse of the Legal Universe.

6 Convergence

Introduction

In Chapter 5 I argued that a survey of law librarians revealed that the impacts predicted on legal practice[276] as a result of online access was not borne out. In the practice of law there is an ongoing respect for the hierarchy of authority. Further the research supports the proposition that law operates as a community of practice[277] and information is shared amongst the profession in a way which obviates a sole reliance on the structure of texts.

In this chapter I am going to examine research done in the US which involved interviewing attorneys which has come to a similar conclusion regarding the impact of change. However the research does not consider theories of information science to explain why. I am also going to survey case law which discusses the use and misuse of authority both pre and post Internet to argue that there has always been challenges in relation to authority and it is the nature of a common law jurisdiction to have these debates. The case authority will be also be used to support the argument that law is a community of practice.

Reference to these materials can be seen as a method of triangulation to support the conclusions which arise out of the library research. This convergence of views regarding the use of authority in law reveals that whether we are looking at libraries, practitioners or observations of judges that the dealing with authority within the profession is self-regulating rather than directed by the way the law is published and classified.

US attorney survey

While planning my own methodological approach I came across similar research done in the United Stated but relying on a different approach. Nevertheless the conclusions support my own.

In 2009 Lihosit[278] implemented an ethnographic research study into the research practices of United States attorneys to determine if the literature predicting a crisis in legal research could

[276] See Chapter 3 Collapse of the Legal Universe.

[277] See Chapter 4 Law as a Community of Practice.

[278] Judith Lihosit 'Research in the Wild: CALR and the Role of Informal Apprenticeship in Attorney Training' *Law Library Journal* Vol. 101:2 [2009-10] p 158.

be supported. Her article first examines the literature and lists the predictions which included a move towards fact based research limiting creativity and the weakening of precedent.

Because computer databases allow searches on facts of cases the concern is researchers will focus on facts rather than general legal principles.[279] Searching by facts and arguing by fact analogy is poor legal method because the lawyer is not arguing from basic principles. Any argument may not be drawn from legal rules but an assumption that an outcome in one case should be mirrored in another where there are parallel facts. And if a researcher's starting point is at the level of detail of specific facts then there is a limited opportunity to use the essential principles to find liability in novel situations, meaning creativity may be stifled.[280]

The overabundance of precedent will enable advocates to cherry pick amongst a greater range of authority which will devalue the existing hierarchy.[281] However despite greater access to judgments the hierarchy in the courts remain the same so it would still be possible to choose the most authoritative judgments.

For the purposes of this thesis it is interesting that the outcomes Lihosit identifies appear to conflict. For example wider range of authority and the ability to cross reference authority may lead to more creativity rather than less. Nevertheless it is useful to take this speculation at face value, Lihosit is after all drawing from a range of sources and not presenting these concerns as her own. The point of Lihosit's research is not to test the veracity of these predictions but to use empirical research to test whether any of them are supportable.

Lihosit organised a series of interviews with 15 San Diego attorneys from a range of practices to determine how they researched.

Of the sample none of them would commence research by doing free text Boolean searching unless they were already familiar with the law. They tended to either consult secondary sources first or colleagues. As their experience developed they became less reliant on these sources. The attorneys did not research the way they were taught in law school which is what legal publishers assume.

[279] Ibid p 159.

[280] Ibid p 161.

[281] Ibid p 162.

> Instead, the model I discovered in my study is one where attorneys develop their knowledge base from distributed social networks, what I call the present-day manifestation of the apprenticeship system, rather than from any individual and controlled textual source such as the digest.[282]

The Lihosit article is an empirical test of the speculation regarding the impact of online access to law on legal practice. It demonstrates that the assumptions of Berring and others may not be correct. It suggests that the practice of law is one step removed from the medium used to record the law. If the controlling method for sharing information amongst legal professional is social networks rather than the texts a change of format in the distribution of legal information will not have a significant impact on the profession.

In Chapter 3 indicated that the key texts largely comprise untested speculation so the Lihosit article is a valuable contribution to the debate. However apart from the observation that law is an apprenticeship it advances no theoretical position as to the nature of information transactions amongst lawyers or the nature of law itself. The Lihosit conclusion that 'attorneys develop their knowledge base from distributed social networks'[283] suggests a community of practice even if it is not explicitly acknowledged. The contribution of this thesis is the recognition that theories of information science can explicate the reason why there has been limited change.

Revisiting the legal perspective

The research would not be complete without including observations regarding what law itself states about the use of authority over the last twenty five years. A review of common law judgments reveals that there has always been concern about the nature of authority in law. The advent of online law databases has thrown apprehensions into relief but is not the genesis of anxiety regarding the respective status of decisions.

In terms of method this could be regarded as historical or documentary research. The judgments as sources are primary sources, that is they are documented contemporary observations concerning the use of legal authority. Also the expression of an opinion in a common law appellate court judgment is carefully considered because of the expectation that

[282] Ibid p 158.

[283] Ibid p 158.

the judgment will be published and may be relied upon in subsequent decisions. Common law appellate court judgments have authority in law simply because of the level of court which has handed down the decision[284] but they are also authoritative as a reliable historical record of legal practice.

In an 1898 case the House of Lords, the then highest appellate court in the UK, declared that they were absolutely bound by their own decisions.

> Under these circumstances it appears to me that your Lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle, namely, that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House.[285]

So if the court had come to an arguably incorrect decision then it would have been up to Parliament to legislate to correct it. This is a strict formalist approach. However in 1966 the House of Lords issued a practice note in which they declared they would no longer be bound by their own decisions.[286]

Stone explores the logical inconsistency of the English House of Lords *Practice Statement*. For the *Practice Statement* to have been legitimate there would have had to have been an assumption that the court was not bound by its own decisions in the first place, because the *Practice Statement* was overruling its own rule. Stone uses the article to discuss a rhetorical difference between so called *descriptive* rules of practice and *prescriptive* rules of law.[287] If the *Practice Statement* is simply amending a descriptive rule of practice then it is not a significant change. However apparently this rule of practice in effect changes rules of law, that is, the ability of the appeals court to depart from what otherwise would have been binding precedent.

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[284] See Chapter 2 What is Law? for further discussion of authority.

[285] See also *London Tramways Co v London County Council* [1898] AC 375 at 381 per Earl of Halsbury LC. This is the same Halsbury whose name is attached to the various black letter law common law encyclopaedias.

[286] *Practice Statement* [1966] 3 All ER 77. See also *London Tramways Co v London County Council* [1898] AC 375

[287] Julius Stone '1966 and all that! Loosing the Chains of Precedent' (1969) 69 *Columbia Law Review* 1162 p 1164.

The way Stone resolves the paradox by arguing there were limits to the notion of a strict application of precedent in any case. Because rules expressed in decisions are so closely tied to the facts, there always remains the ability to qualify the extent to which a rule might be applied. Ironically, instead of the 1966 statement representing a watershed in the status of precedent it simply acknowledges the nature of appellate judicial reasoning.[288]

> …this acknowledgement, focused by the 1966 Statement on what it is 'right' to do, must tend 'to bring to fuller' and less embarrassed judicial awareness the power and duty of the- appellate court to mould the law to what it ought to be, that is, towards norms of justice. The creative techniques of judicial working with precedent may thus be much the same before and after the 1966 Statement; and yet that Statement may still be playing a vital new role in sharpening awareness of the creativity of appellate judgment, and a more overt concern with the search for the more just rule.[289]
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>
> If, therefore, the 1966 Statement is put forward as symbolizing some epoch-making relaxation of the bonds of precedent, some new readiness of the House of Lords to overrule its prior 'binding decisions,' it must be recognized as a false symbol.[290]

The Stone analysis illustrates that the notion of authority in common law has always been interpreted pragmatically.

In 1978, which is pre World Wide Web and even pre-Lexis, Munday laments the tendency to over citation of authority in cases and the use of unreported judgments.[291] His concerns include the increasing publication of specialised reports series; the publication of non-precedent value tribunal reports;[292] the publication of multi-jurisdiction so called omnibus

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[288] Ibid p 1201.

[289] Ibid p 1202.

[290] Ibid p 1202.

[291] Roderick Munday 'New Dimensions of Precedent' (1978) XIV *Journal of the Society of Public Teachers of Law* (New Series) 201.

[292] Tribunals usually focus on the merits of a case (ie aim for a just outcome) rather than the strict application of precedent. Rules of evidence do not always apply and often there is no legal representation. However the publication of tribunal decisions may create a convention that tribunals also must aim for consistency and follow precedent.

report series;[293] an increasing reliance on unreported judgments; and the use of digests and text books as research short cuts. As a result of the Munday refers to

> …the malaise within the profession over the uncertainty which is coming to infect our law. These problems are far from resolving themselves at present and our increasing willingness to examine and adopt overseas solutions contributes further to the dilemma.[294]

The concerns expressed by Munday could be said to parallel concerns expressed by scholars in regard to access to online decisions. Munday was not unaware of the potential of computer research and considered technology would make the situation even worse.

> Whatever other uses the computer may have in the legal context, as a means of storing and disgorging all judgments delivered on any given theme its introduction would be totally undesirable.[295]

It is possible that difficulties with authority may simply be an unavoidable consequence of the common law system in an era where there is greater complexity in the law, globalisation and specialisation.

R v Erskine[296] a comparative recent case lists authorities which have adverted to difficulties with over citation which have arisen pre and post Internet including cases which explicitly blame online databases for the problems.

> …a plethora of authorities which do no more than illustrate the application to particular facts of a well-established principle of law that has been clearly stated…[297] [1982]

[293] For example *Lloyd's Law Reports* (shipping and insurance) and *Building Law Reports* which have cases from a range of common law countries.

[294] Roderick Munday 'New Dimensions of Precedent' (1978) XIV *Journal of the Society of Public Teachers of Law* (New Series) 201 p 206.

[295] Ibid p 215.

[296] *R v Erskine* [2010] 1 All ER 1196 [63-76]

[297] *Lambert v Lewis* [1982] AC 225 at 274-275.

> …massive citation of authority in cases where the relevant legal principles have been clearly and authoritatively determined is of little or no assistance and should be firmly discouraged.[298] [1982]
>
> Now there is no pre-selection. Large numbers of decisions, good and bad, reserved and unreserved, can be accessed. Lawyers frequently feel that they have an obligation to search this material. Anything which supports their clients' case must be drawn to the attention of the court. This is so even when it is likely that the court which gave rise to the judgment probably never intended it to be taken as creating a new legal principle.[299] [2000]
>
> There is no doubting the problem…We must do more than complain. Even if, long term, this issue must be examined again and the various differing views considered, there can be little doubt that firm measures are immediately required, at least in this court, to ensure that appeals can be heard without an excessive citation of or reference to many of its earlier, largely factual decisions.[300] [2010]

These excerpts and the general discussion in *R v Erskine* illustrate that there has been a continuity in the difficulties in dealing with authority. The 'firm measures' referred to immediately above would be practice directions which for example would mandate the citation of reported decision only, or set a limit to the number of citations. This sort of response Munday despite his concerns has referred to as 'draconian'.[301] One Australian response by a leading jurist is more pragmatic. It exhibits faith in the nature of the profession to moderate citation of authority in litigation aside from restrictive practice rules.

> From an Australian point of view, the problem seems to be overstated…on the whole, Australian judges are not met with tonnes of unreported material. Most specialist courts in any event have already mastered the bank of unreported material that

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[298] *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 751.

[299] *Michaels v Taylor-Woodrow Developments Ltd* [2000] 4 All ER 645

[300] *R v Erskine* [2010] 1 All ER 1196.

[301] Roderick Munday is quoted in *Current Topics* (1984) 58 ALJ 243 in response to a practice direction that Court of Appeal judgments can only be cited in the House of Lords with leave as characterising the move as 'draconian'. Roderick Munday 'The Limits of Citation Determined' (1983) *Law Society's Gazette* 1337 p 1338.

> applies to their specialty…The difficulties with Laddie J's approach are at least twofold. First, counsel and solicitors are possibly open to an action in negligence in not delving properly into authority reported and unreported. Both types of case have equal authority. Secondly, *the community is not prepared to let law reporters be the judge as to what is good law and what is not*. History has demonstrated that from time to time the editors of certain series of law reports have had a particular bias as to what is reported. Thirdly, there should not be bad decisions hidden away: if they are wrong they should be properly interred by being the subject of reasoned criticism or be overruled.[302] [Italics mine]

The reference to the community deciding what is authoritative rather than publishers in this observation supports the inference that law operates as a community of practice. It is also useful in this context to acknowledge an observation in a Queensland Court of Appeal judgment which also adverts to the *R v Erskine* principles.

> The applicant's representatives filed a list of authorities extending to 17 cases in respect of this appeal, many of which…served only to state uncontentious principles which appellate courts apply on a daily basis. The temptation towards excessive citation should be resisted. Some useful guidance can be obtained from the recent decision…*R v Erskine*.[2] *It should, however, be said that counsel in his oral submissions confined himself, in the main, to citing passages from authorities which were directly relevant*.[303] [Italics mine]

While the instructing solicitor in the submissions may have cited unnecessary authority, the barrister in argument confined themselves to only those cases which were directly relevant. The two quotations above are examples of the operation of a legal community of practice. Young has faith in the standards of the profession as a whole to overcome the temptation to over cite authority and the Queensland decision is an example of these standards being applied in practice.

Concern about authority in common law reasoning has always been a source of contention yet the attenuating factor appears to be the operation of law as a community of practice.

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[302] Justice Peter W Young *Current Issues* (2001) 75 ALJ 69 at 72.

[303] *R v Collins* [2009] QCA 387 [3].

Summary

My library research outcomes correlate with the ethnographic research of Lihosit which is that the inherent discipline of the profession has attenuated the impact. However Lihosit does not rely on theories of information science to explain why the predicted impact of online access to law has not eventuated.

The case law overview suggests that there have always been concerns about authority and over citation. It is an inevitable element of a common law legal system. However the case law and related commentary reveals that the legal community itself manages difficulties which might arise out of misuse of authority by formally exhorting the profession to exercise discretion in citing law in argument.

The Chapter 5 library research, the Lihosit study and the overview of case law helps in exposing the premise that there is a direct connection between law and the structure of texts as merely an untested assumption. I would suggest that accepting notions of sense making, small worlds and communities of practice helps us to see that information in law is not necessarily bibliographically centred but is governed by a range of formal and informal exchanges within the profession.

7 The Expanding Legal Universe

Introduction

In Chapter 5 I reported on the results of law librarian interviews which revealed there has been little change in the way legal researchers rely on authority. The technology developments may have enabled the library to extend its functional reach into practice groups within a firm but the hierarchies of legal information have remained the same. The interviews also illustrated how a library might fit into the legal community of practice through training and filtering of research tasks. The research is an indication that nineties concerns about the impact of online access to law on the legal concept of authority may have been unfounded. This thesis overall argues that there is no direct nexus between hard copy legal bibliographies and how law is understood.

In Chapter 6 I identified parallel research done in the US which supports the contention that there has been little change. The overview of case law in the same chapter revealed that there have always been difficulties with the use of authority. We are in a position to infer that the nineties predictions have not eventuated, so then need to think in terms of how in fact the legal profession deals with information.

The Social Bibliography

Stone argues that every generation has a different view of the law and, when it comes to judicial decision-making, the range of choices develop over time.

> For the universe of problems raised for judicial choices at the growing points of law is an expanding universe. The area brought under control by the accumulation of past judicial choices is, of course, large; but that does not prevent the area newly presented for still further choices by the changing social, economic and technological conditions from being also considerable.[304]

This comment was not made in the context the impact of online legal research but is simply an observation on the dynamism of law: the interpretation and application of rules evolve in response to social change. But the analogy of the expanding universe of law can also be applied more broadly to current legal research.

[304] Julius Stone 'The Ratio of the Ratio Decidendi' (1959) 22 *Modern Law Review* 597 p 616.

This thesis has discussed a number of aspects of law. The starting point was the assumption that law was enshrined in texts which were navigated using indexes and digests which classified the most important authority. A move to online access to law would bypass the use of established indexes and hide the hierarchy represented by texts. Without the traditional topography of the hard copy library the traditional way law is understood would be undermined.

However my own and parallel research has demonstrated the changes predicted have not come about. Law appears to have retained its stability. There may be a greater variety of ways to navigate through a legal database but that does not necessarily lead to uncertainty or instability in law.

Law does not rely on a clique of bibliographers. The nature of the profession and the way it is commercially published necessitates a bibliographic process from a number of sources. But the hierarchy is also determined by the selection of disputes to be heard on appeal and the level of the court deciding the outcome as well as the way judgments are selected to be published whether it is by a counsel of law reporters or a commercial legal publisher.

There may be law resources which are directed by an editorial input such as encyclopaedias, case digests, specialist reports series and journals. However when it comes to the selection and publishing of cases it is the hierarchy of the court which hands down the judgment which will be an immediate indication of the weight of a case. A judgment of a full bench of an appeals court is going to represent authority. Authorised decisions are borne out of a bibliographic process but one which is determined by statutorily established criteria. In the constant conversations amongst legal professionals a sense of how rules might be applied constantly evolves. Legal bibliographies and indexes have not solely determined hierarchies and relevancies in law. Authority has for the most part been established communally within the hierarchies of the profession rather than unilaterally by publishers.

Berring makes reference to the Google search algorithm being a substitute for librarians.

> Early in my career, I would shake my head in wonder when researchers exclaimed that they had gone into the stacks looking for one book and, by incredible good fortune, had found an even better book. I wanted to tell them that generations of the best minds in the field had laboured to design a shelving pattern that would achieve just

this end. This function is now filled by Google's algorithms, in a process even more mysterious to the user.[305]

Is what Berring is missing specifically the demise of the function of the scholar librarian rather than a structure which will always be there? Perhaps the collapse of the universe is the collapse in a profession which at least in law has been central but not necessarily critical to the bibliographic organisation of materials.

Wilson identifies a problem with the classification of versions of particular texts to determine the most reliable: there may be revisions, translations, new editions, or annotations of the original. [306] Law does have that difficulty. There will be multiple iterations of a case but the hierarchy of provenance for the key cases is readily available. The authorised editions will always be the most valued source. The concern about online access to law is that the distinctions which may be readily observed in hard copy are not obvious online which means over time a researcher is going to be less discerning and not have a clear idea of what is being overlooked.[307] But we have seen from the research that the arrangement of texts do not necessarily determine authority. Authority is recognised by the community of practice.

The structure of online legal resources

There is another element in the discussion which should be addressed. The assumption that online access to legal information leads to unstructured research in amorphous collections should not go unchallenged. While Berring warns that the ability to traverse unfiltered, unedited, 'undigested', resources puts legal researchers in the position of researchers at the turn of the 20th who were overwhelmed by comprehensive publishing it should be acknowledge that online publishing provides its own structures.[308]

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[305] Robert C Berring 'The End of Scholarly Bibliography: Reconceptualizing Law Librarianship' 104 Law Libr. J. 69 (2012) p 71.

[306] Patrick Wilson Two Kinds of Power: An Essay on Bibliographical Control University of California Press 1978 p 10. See also p 22 'the more important bibliographical control is this: to have the power to procure the best textual means to one's ends'.

[307] Robert C Berring 'Chaos Cyberspace and Tradition: Legal Information Transmogrified' 12 *Berkeley Tech. L.J.* 210 (1997).

[308] Robert Berring 'Legal Research and Legal Concepts: Where Form Molds Substance', (1987) 75 Cal L Rev 15, 21-23. See also discussion of Berring generally above.

Solomons makes the observation that digital publishing provides assistance in navigation, reading and comprehension but with the additional benefit of user's annotations.

> There is something about the shape and structure of texts that people learnt to employ as an aid in focusing attention on critical elements as they use a text…Cues provided by the headings and other markers in texts aid readers in discovering information…Digital formats allow a variety of formatting possibilities, including adaptive texts that can be formatted at the command of their users…and possibly annotation and feedback to authors to gain some of the benefits of more interactive oral communication formats.[309]

The ability of technology to facilitate communities of practice may be the area of technological development which has a far greater impact on law than a change in the medium.[310]

While it might be accurate to argue that the World Wide Web is going to allow access to legal resources from anywhere, with authority from any jurisdiction at a researcher's fingertips, this is not the way an effective researcher is going to operate. The formally published materials now available online are as highly structured as hard copy materials were, and arguably enable more effective navigation than hard copy materials, thus obviating random browsing.

An example of an online innovation which is superior to the hard copy equivalent and does not present the difficulties of Boolean logic is the case citator. As already discussed[311] citators are an essential tool especially if a research is relying on older appeals court authority. A citator will indicate to a researcher the relative value or weight of the rule the researcher wants to rely on. Online citators with the benefit of regular updating; field searching; the ability to focus on specific jurisdictions or hierarchies; the ability to sort by subsequent treatment (ie positive or negative); and the ability to link from citation directly to the full text of a decision; create a far more accessible and easy to use mechanism for establishing case hierarchy or discovering judicial treatment of a statute.

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[309] Paul Solomon 'Discovering Information in Context' *Annual Review of Information Science and Technology* Volume 36, Issue 1, pages 229–264, 2002 p 240

[310] See for example *Jade*, the initiative of the NSW Bar Association which enables private and public annotations of online cases: jade.barnet.com.au.

[311] See discussion of citators in Chapter 2 What is Law?.

In terms of currency and easy navigation legal encyclopaedias also have greater utility online. There is the option to navigate via either a cascading table of contents or free text searching. There is also no need for unwieldy handling of multiple volumes. And online legal encyclopaedias preserve the benefit of the traditional bibliographic model which has been argued to preserve law's stability.

It is not only the functionality of the content which offers a structured approach in legal research, but the content itself is highly structured. The predictions of Berring et al fail to discuss the importance of metadata in online publishing. The major publishers make a significant investment in coding their content in such a way to enable cross referencing through hypertext linking and automatic generation of tables. The extract below is taken from an actual coded file.

```
<carf><case>Stoneman v Lyons</case> <cit>(1975) 133 CLR
550</cit>; <cit>33 LGRA 156</cit>; <cit>8 ALR 173</cit>;
<cit>50 ALJR 370</cit></carf>. Compare <carf><case>Nikolic
v Commonwealth Accommodation &amp;amp; Catering Services
Ltd</case> <cit>(1992) 106 FLR 413</cit> at
<atpg>418</atpg></carf> per Miles CJ, SC(ACT).
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Each element is easy to guess: case reference; case party names; citation and at references. What the excerpt illustrates is how labour intensive but rich legal meta-tagging can be. Concern regarding the apparently unstructured nature of online resources fails to acknowledge that embedded within online texts may be information which enables a far more effective basis for navigation then would have been available in hard copy. While the physical library may no longer be the central research hub with the resource hierarchy made visible by the arrangement on shelf, the online library is no less structured.

From a practical point of view, twenty five years after the Berring predictions we have reached a stage where online databases are mature enough to not only replicate hard copy structures in online resources but some of the resources operate more effectively in an online environment. And the metadata, even though not obvious to the user, represents a level of functionality which may be more significant than the topography of the hard copy library.

To be fair, in the late eighties and early nineties the first resources made available to the end users were primary materials in the form of unreported judgments. Berring et al may not have foreseen the potential of interlinked primary and secondary sources. LexisNexis in the eighties

had rudimentary coding which enabled field searching but did not embed the complete structure of a document.

Authority

When I commenced this paper the premise was fairly straightforward. Law is a hierarchical discipline which relies on the application of rules, the sources of which must be credible or verifiable. These rules or statements of law are discoverable within publications that legal researchers filter according to their respective authority. This authority may be bestowed by the level of court which delivers a judgment or by its selection through an established editorial process. In hard copy published texts hierarchy is visible and tangible within the arrangement of the volumes, their imprint and their livery.

A standard legal education included developing the ability to navigate through this hierarchical landscape of legal texts by knowing which paths to go down as well as identify the obvious landmarks. An assumption in the literature discussed above is this map determined how law would be interrogated and discovered.

However, once legal materials became available online, law resources would no longer be tactile or their provenance visually apparent, meaning researchers would be reliant on a body of published law which had no established ways of navigation. The nature of legal research was seen to be so invested in the hard copy that online access represented a threat to the way legal information could be understood. A consequence might be the hierarchy would break down and the notion of authority would be undermined.

Berring[312] was the most prominent scholar expressing these concerns regarding the impact of online access to law. He was focused on the way law was classified because legal researchers were so dependent on the hard copy structure whether it was the arrangement of report series or the third party research tools such as indexes, digests and encyclopaedias which assisted in navigating the sources. Berring set the parameters for discussing these concerns, so Berring is the starting point.

This was the genesis of my enquiry: *Online access to legal information and the challenge to the legal concept of authority*. If the navigation of legal information is no longer guided by pathways which identify authority what impact will this have on the way law is understood?

[312] See discussion of the literature in Chapter 3 The Collapse of the Legal Universe.

Assuming that Berring's analysis was percipient then 25 years after he first started raising these concerns the timing was right to consider ways of evaluating the impact. So the initial approach was to establish the context of the enquiry by an analysis of Berring's writings followed by empirical research, in this case interviews with longstanding law librarians, to assess any impact. This sounds apparently straightforward but was more complicated than was first assumed. That the Berring scholarship has been seen to set the parameters for the discussion tended to narrow the perspective of subsequent research: especially as it is possible that Berring has been misread.

First I would argue that Berring's writings are more a warning than a prediction. His articles contain appeals to legal researchers to adopt a systematic methodology in their research, to maintain an awareness of the settled hierarchies in the dissemination of authority and to make demands of the online publishers so that the online version of the law would have the qualities and added value of the hard copy. As both a trained librarian and law academic Berring was writing from the perspective of a scholar familiar with the scholarship of information science. Berring needs to be read with an understanding of this background to have a complete sense of the arguments he was developing. In effect he was operating as member of a community of practice should. There was a challenge facing legal research which practitioners needed to be aware of and Berring's articles exist to establish the challenge and to exhort readers to overcome it.

In his articles Berring alludes to the works of Wilson as well as Bower and Star. This provides a clue as to why Berring was focused on indexes, digests and bibliography. Essentially Berring is arguing, as with any discipline, bibliographical classification is essential in order to winnow the most reliable sources which cover that discipline. Without this process of evaluation and selection then the universe of structure information will collapse. This is also the case in law. In the absence of mediated access to law through the products of bibliography—indexes and digests—what will take their place online?

Readers of Berring in the legal profession, that is those without an information science background, will miss the allusions and have an exaggerated sense of what Berring was writing about. Kuh in her overview of the scholarship in this area discusses cognitive authority in the context of psychology. Danner criticises Berring because he was not able to demonstrate that practitioners relied upon indexes in their research. This in a way is also missing the point. The power of bibliography or classification is already operating within the profession whether or not in each act of research an index is consulted. So over time Berring's observations about the

importance of bibliography and classification in law has come to represent a prediction of a looming threat to the stability of law.

Berring also cannot be read without an understanding of theories of law which were prevalent at the time he was discussing the importance of third party resources. Berring refers to legal realism in his writings but does not make legal realism an issue in his papers. But classification and bibliography in a way are central to arguments about authority, judicial reasoning and the application of rules as considered by the legal realism movement.

Bibliography or classification provides structure and coherence in law. If research is done and decisions based on established assumptions regarding relevancy and respective authority of cases then law will be stable and predictable. The significance of legal realism issue in this paper is it provides a competing perspective on the role of classification in law which is parallel to the Berring concerns with structure and organisation and it helps us to understand the nature of law and exigencies of legal research.

To address the impact of online access to legal resources on the way law is understood required more than looking at law and authority from a bibliographic perspective because the effective bibliography is out of the hands of any single entity. Authority, and this is cognitive authority in Wilson's terms, arises from the hierarchy of the court which hands down the decision, the reputation of the judge, and the decision's subsequent treatment in other cases, as well as the editorial selection, indexing and digesting processes.

Cognitive authority is also only one aspect of what is regarded as 'authority' in law. In the Wilson concept of cognitive authority the emphasis is on reliability, quality and ability to persuade and influence. In law authority must also mean the capacity to bind or create or declare an obligation.[313] In order to understand authority completely it was important in this paper to address the relationship between rules and obligations to comply as well as more broadly conceptual notions of authority. While Berring focused on structure imposed by publishing bibliography, however the structure needed to be considered as something innate in the profession.

[313] See Chapter 4 Law as a Community of Practice: Indexing, Classification and Authority.

Law as a sociotechnical practice

The traditional scholarship related to the impact of online access to law could be seen as grounded in the perspective of conventional information technology assumptions, and by information technology I mean books and as well as computers. The assumption is that authoritative information is findable by use of technology literacies: that is bibliographic approaches to texts, and interface and search engine awareness in relation to computers. However the contemporary view of information literacy is that meaning is constructed and dependent upon the context in which the research is done. For law this context is the way the profession shares information which is not specifically technology dependent.

> …literacies cannot be separated from the domain specific sociotechnical practices that give rise to them. Information literacy is embedded in the activities of particular groups and communities; that is, information skills evolve in disciplinary and other contexts, and they are practiced by communities using appropriate technologies.[314]

What this illustrates is the importance of an understanding of current information sciences analysis on an understanding of law, and how it relies on technology. A point that I have been making throughout this paper is that at the time Berring et al were making predictions about the impact of online access to law on law, there was parallel scholarship in the information sciences discipline which was overlooked and may have helped not only in the understanding of how the legal profession dealt with information but would have assisted in qualifying the predictions that were being made.

My argument is that while undergraduates are taught law as objectively verifiable discoverable rules, in practice meaning is more elusive. If law was solely a bibliographic discipline then a disruptive change in the technology which hides the established structure of these resources would have had an impact. My research has helped confirm there has been little change. This could suggest that law operates in a different way than assumed. Published texts are perhaps not the sole determinant of authority in law but the legal community as a whole constructs this sense of authority.

The difference between undergraduate law assumptions and a more nuanced approach to how rules are interpreted in the workplace correlates with the Lloyd information literacy

[314] Kimmo Tuominen, Reijo Svolainen, Sanna Talja 'Information Literacy as a Sociotechnical Practice' *Library Quarterly* vol 75 no 3 329-345 (2005) p 341.

distinction between a profession being a textual practice and a social practice.[315] Law is a social practice where authority is asserted and maintained as much by the community as it is recorded in texts whether they are online or in hard copy.

This critique of a strictly bibliographic perspective of authority and law is the first to juxtapose nineties speculation regarding the impact of technology on authority and the eighties and nineties developments in information science. Law has been characterised as a social practice in previous research[316] however the achievement of this thesis is to rely on this approach to the legal professions to argue that there may be a disjunction between texts and legal practice.

Earlier in this thesis I considered the Wilson characterisation of the power of bibliography.

> Bibliographical control is a form of power, and if knowledge itself is a form of power, as the familiar slogan claims, bibliographical control is in a certain sense power over power, power to obtain the knowledge recorded in written form.[317]

This may be the case for some disciplines but it could be argued that law operates slightly differently. When it comes to the hierarchy of cases if the question is asked about who has control the response might be not a single individual or institution. The canon of law is decentralised. It is a product of the profession as a whole.

Summary

Implications for practice

If authority, that is the hierarchy of legal information, in law is maintained by a community of practice rather than the published form of law then an inference could be drawn that law is not the strictly positivist discipline to which law undergraduates are introduced. An information science perspective of law correlates with a legal realist analysis which recognises that law can be pragmatic and flexible and responsive to community expectations.

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[315] Annemaree Lloyd 'Information literacy as a socially enacted practice: Sensitising themes for an emerging perspective of people-in-practice' 68(6) *Journal of Documentation* 772-783 (2012) p 776.

[316] See Noriko Hara Rob Kling 'IT Supports for Communities of Practice: An Empirically-based Framework' Center for Social Informatics Working Paper No WP-02-02 https://scholarworks.iu.edu/dspace/bitstream/handle/2022/1022/WP02-02B.html?sequence=1

[317] Patrick Wilson *Two Kinds of Power: An Essay on Bibliographical Control* University of California Press (1978) p 4.

Technology, instead of representing a threat to the legal universe, could instead be seen as facilitating the legal community of practice by enabling more effective communication, or in Wilson's terms 'conversations' amongst its members.

Implications for legal education

The Lloyd analysis of a two-step process in workplace education, which is initially based on text and then takes into account socially constructed knowledge, might also be applicable in the context of legal education. While Goodrich might explode the myth of authority, and legal realism may undermine the notion of absolute rules, the notion of a legal community of practice is an alternate iteration of explaining stability in law rather than a reliance on an artificial strict black letter law approach.

An understanding of how lawyers share information in practice may better prepare students for their careers rather than a constrained formalist conception of law.

Further research

While there has been research done on how lawyers research,[318] there appears to be limited investigation of how a legal community of practice might operate. Information sharing in the profession is not simply a research exercise but a constant conversation about the nature of law. An ethnographic study of how information is shared amongst legal professionals could be a next step in developing this area of enquiry.

Final observation

In the introduction to this thesis I referred to a quotation by Borgman characterising the nature of change:

> …rarely is anything a complete break with the past. Old ideas and new, old cultures and new, old artefacts and new, all co-exist. It is necessary to recognize the

[318] See for example Hara, Noriko Kling, Rob 'IT Supports for Communities of Practice: An Empirically-based Framework' Center for Social Informatics Working Paper No WP-02-02 https://scholarworks.iu.edu/dspace/bitstream/handle/2022/1022/WP02-02B.html?sequence=1

> relationships and artefacts around us, while at the same time being able to critique them.[319]

The technology changes enable us to re-examine how law operates. The impact is incremental rather than dramatic. The inherent nature of law as a community of practice is what provides the profession stability in the face of change. A contribution this thesis may make to legal scholarship is in the recognition of the value of information science theories in understanding the enduring cohesion of the common law.

[319] Christine L Borgman *Scholarship in the digital age: information, infrastructure, and the Internet* Cambridge, MA : MIT Press, (2007) p 31 (With reference to Bruno Latour *We Have Never Been Modern*).

Appendix

Library Questionnaire

Name

Current role

Years of experience

Librarian's role

- Management (HR, budget/costs, training)
- Procurement
- Research assistance
- Do librarians facilitate informal communication between professionals?

Clients' requests

Expectations

Types of materials requested

Research skills

New staff

Established staff

Research hierarchy (ie who does the research?)

Training requirements

- Training priorities
- Sources—ie sources of legal information
- Sources—technical skills—specific databases, commercial/government/free

Library role

What does the library represent?

- Reference centre?
- Meeting place?
- Help centre?
- Resources
- What are the key reference resources (ie most used and/or most valuable)

    - Hardcopy
    - Online: Commercial/Government/Free
- Research categories
    - Secondary
    - Cases
    - Legislation

What research does a library do?

- Finding and providing of information
- Legal research (judging value and relevance of information found; applying information found)

Describe a librarian's typical day currently (perhaps a reference librarian—not necessarily a senior managing librarian)

Can you describe a day in the early nineties

Setting the scene

- InfoOne
- CLIRS
- Early CD ROM publications
- Key looseleaf services
- Reliance on external libraries (Law Courts, Universities, colleagues)

What are the key differences between then and today?

Research coding

The resource overleaf is a record of responses to prompts in the librarian interviews arranged under categories which assist in analysing the data. For an explanation of how the categories were derived and what they represent see Chapter 5 Discovering Information in Context: Coding the Responses.

Response category	**Research context**					**Library as place**		**Community of practice**	**Information literacy**		**Technology**	
Subject	Delegated	Discrete task	Added value: Validation Training	Added value: Interpretation	Added value: Decentralisation, embedded research assistance	Centralised Meeting place Service point	Decentralised Virtual	Self regulating Self sustaining Informal information exchange	System literacy	'Value of information' literacy.	Fundamental change	No change: Technology independent of legal knowledge domain
Major firm 1	<200> but it's delegated down to the particular level of experience that's required for the amount of interpretation required.		<13>[Role] Research, Intranet, training, wiki work, sort of anything required to getting information to people. Not precedents so much, that goes to a different space, but managing information, packaging information, a bit of a variety. <19> And I spend a lot of time working with the publishers on product developments, that it's given me experience	<46> then I've got other staff that have legal qualifications. Not all of us have information backgrounds, but they all work with their practice groups… depending on your experience and your understanding of the law, you can really take the research role as far as practising lawyers will let you <62> I mean, for us it's all about adding the value, because if	<43>I've got some staff that have just library qualifications, and then I've got other staff that have legal qualifications. Not all of us have information backgrounds, but they all work with their practice groups, and we all work in providing research support roles to varying degrees. And really, depending on your experience and your understanding of the law, you can really take the research role as far as practising lawyers will let		<221> We've got a virtual research desk in that we've got helplines, but you can be answered by someone in any centre. So it's not necessarily that you ring, and you'll get the library in your centre.	<133> We wanted to understand the team's business, so we could then give them more targeted current awareness, we could make sure that all of our training fitted the actual type of work that they did, so that we really understood the people. And that's why the staff were relocated out to the floors.<153> lawyers tend to have their specific		<332>…it is hard when you're looking at something like Austlii or the other online resources for case law, to get a sense of the value of the judgements. You can search on the facts and the law, but you can't really get a good sense of the precedent value of a judgement, because it's just not there in the judgement itself. <384> No, it's packaged, and made accessible to a certain few in a particular way. It doesn't change the law,	<296> we had less staff then. Well, we had more staff dedicated to admin, less staff dedicated to reference and research	<321>We had our own unreported judgements collection that we had indexed. … no, all this furphy about because it's online, people are just pulling up crap. It's rubbish. [re unreporteds] We used to do it, everyone used to do it. <352> No, I mean, the law is the law. <355> [structure] wasn't there before, so it

			in a wide range of resources and issues, and dealing with a number of different people within the different publishers' organisations.	we're not adding value, then a paralegal or a secretary can largely do the fetch and photocopy work. So for us, it's all about how we can support the firm <83> But a recent example is where we were asked to mock up comparative tables for the changes to the consumer law legislation. We're asked to mark up those sorts of documents. Or in the past, staff have been asked to write up summaries of case law developments and things like that, so a bit more analytical work. <306> But really	you. <105> we're getting more and more complex stuff. I mean, to be honest, sometimes I see requests come through that I don't understand how to get. I have to really sit down and look at it, because it's quite legalistic. It's not "Find something" or "Find me everything on this topic." It's really "I've been asked this question. What do I do?" Or we had one the other day "Is this an abuse of process?" So you've got to really dig into things in a lot of detail. And the expectation of our ability is increasing. <121> a number of staff here are embedded …they really are deep			practice areas, … they tend to be more aware of the resources in their particular area, and they'll use those ones repeatedly <302> We also used to spend a lot of time getting things like photocopies from unreported judgements from the court. So we used to spend a lot of time going and fetching stuff, whereas now we can get it so much more from our desktops <416> Authorised law reports … don't necessarily address the way people		and it doesn't necessarily change the understanding. I'll give you an example. One of the problems I've always had is you've got your legislation, and that applies, but it only gets tested when there's a particular factual situation and when people are willing to go to court to test it. So it all depends on the facts, and then whether or not you've got an argumentative pair of parties that want to really push it through the court system. So it's very ad-hoc, very piecemeal. It's not at all systematic or rigorous in the way that the law is tested or explained. So it's very, very		was the publishers that were pulling bits together. So there was a third party without any liability, so all care and no responsibility. Here's your loose-leaf service, but if you rely upon it and you get it wrong, well that's not my problem. But no, it hasn't changed at all. I think they're speaking rubbish. <384> No, it's packaged, and made accessible to a certain few in a particular way. It doesn't change the law, and it doesn't necessarily

				now, our focus is not so much on getting the materials, but adding value to the materials. So either more complex research or more analytical work done with the results that we find, and more packaging of current awareness, so really trying to get the right information to people at the time, more effectively supporting the lawyers on the floor.	within the teams, so they get a level of requests, than in the past, when we were quite removed from the lawyers, sitting in the library. I think the expectations of you have changed, because you sit in on their practice group meetings, you participate in their CLEs			need to research. … they've been designed to fit a certain niche 200 years ago, and it doesn't really support the industry, and it collects only a certain subset of judgements, … without necessarily reflecting the full range of the law.		piecemeal and very, very specific to certain facts at the time. So when we've got a piece of legislation which may not have been tested, particularly in Australia, or in a particular way in Australia, we have to then go and look at, for very similar situations in other Common Law jurisdictions. So we've got some examples at the moment where we're trying to look at every Common Law jurisdiction in the world for similar pieces of legislation, and then looking to see how they've been treated. We're not a code country, we don't have something like the American re-statement of		change the understandin g… it's very ad-hoc, very piecemeal. It's not at all systematic or rigorous in the way that the law is tested or explained.

										the law, which has tried to encapsulated and – not quite codify, but at least, systematise particular black letter law areas, or Common Law areas, as very ad-hoc. Very frustrating. And then you've got the publishers leaping in and capitalising on those areas where there is a certain amount of litigation, to try and pull together those bits, those popular areas.		
Major firm 2		<27>using … the detective skills of a librarian to assist with the uncovering of legal information	<27> Well, I suppose I always saw it as using the specific skills of a librarian, that is, the research, if you like, the detective skills of a librarian to assist with the uncovering of legal		<151> you could have staff embedded … in practice groups for instance, and I know some law firms actually do that.	<137> I don't think the physical space of the library is particularly important. <141>It's the librarians that are the important thing.	<151> you could have staff embedded … in practice groups for instance, and I know some law firms actually do that.	<51>We weren't told to find the latest. That was implied. <57> I suppose when they came to us we were never sure how much information they had	<357> there was always this presumption in a sense that because it was online, it was in	<32>training lawyers to be… to be more discerning in their use of information sources <119> And because on the whole, partners don't do their own research, and they also	<201> you had much greater control of what they were doing, because they were doing them under your eye, as it were.	<268> being able to find precedents and cases from jurisdictions like Canada and the US and to a lesser extent, Asia, I suppose. It didn't change

			information. That's always been my view of it. It may not be everybody else's. And I just think librarians on the whole have a better handle on how to find information than lawyers do, even with the access they have now to vast quantities of online legal information. And the other side of it is training lawyers to be, what should I say, to be more discerning in their use of information sources. That's the other side of it.<45>they were there to uncover and validate what they'd find <75> people just don't know					already gathered. It's a difficult thing to judge. Quite often, they would do quite a lot of legal research. It depended very much on the lawyer themselves. Quite often they would have done quite a lot of legal research and came to us because they couldn't find what they thought was there. They were getting nowhere, so they came to us because they felt there was something that they weren't finding, or alternatively they would have done all of their own legal research,	some magic way true <396> There's this feeling that this particular fact which I have acquired through searching turns out to be incorrect, but never mind, I'll find another one because it's all free.	don't on the whole – well, they may now but they didn't then – come to reader education classes, so we couldn't instruct them on how to use the things properly because they wouldn't turn up to a training class. There was always this danger that they were going to use material that was out of date. So in XXXX, it sounds ridiculous, but in XXXX, we solved this by actually putting a skull and crossbones on our intranet against the links that we felt were unreliable with a sort of warning, don't go here, unless you know what you're doing. <354> So it was interesting, but		things.

			which services are reliable <69> I think this is one of the big problems with mass availability of online information, and it's not just in the legal area, it's everywhere that people tend to – "I'll just Google it," and if they find something – or the first thing they find, which may contain the words they're looking for and just assume that's that. And so the librarian's role really again is this validation thing, and it's also in the training area, it's the information which is just lacking terribly I can see anyway					and they came to us to say have I looked everywhere? Is there anywhere else that I should go? Or is what I have found all there is? So in a sense, it's that sort of validity thing again. It's the validation. It's saying to them, "Yes, you've done a good job. You've looked everywhere," and again, that stamp of approval. <89> It used to be basically the article clerks, in my experience, that came to the library. But quite often they would come to the library because the partners had said,		XXXX from very early on had this intranet in which the library had a major presence, and through that intranet linked on to outside sources and things like that. So we were always fairly well up there, and I think our lawyers were fairly savvy, but there was always this presumption in a sense that because it was online, it was in some magic way true. I mean that all prevails.		

			in my limited experience at the moment. The people just don't know which services are reliable and which sources of information are reliable, and they tend to just take what they've got. And I think it's particularly a problem in the law and also in medicine.					"Have you checked with the library?" It was an edict that was coming from the partner to the article clerk to use the library to make sure they had done a good job.				
Medium firm 1 (TV)		<87> A lot of it is "Do we have this?" We get a lot of legislation requests	<102> They come to us when they need help doing something smarter, better				<71> each of the practice groups has a Professional Support Lawyer attached to them. So that would probably take some of the burden off us. <161> We have satellite libraries now, so while we have the	<14> Learnt on the job <269> the people who they're giving the research to are senior lawyers and partners who will often point out the deficiency in their research and send them back… I think that they're often directed to go back and use a				<234> I don't think that the requests really have changed that much <368> [searching other jurisdictions] I don't think so, unless they need to. .. I don't think it's changed, I don't think it's happening

							main collection we also have group libraries	particular text, even though they wouldn't necessarily want to. <287> I think a huge amount is corrected by partners and senior lawyers. <392> Well we still get lists that contain a significant number of unreported judgments, but is it more? I don't really think so. I don't have a sense that it's more. It's difficult to say, because in the old days when they wanted an unreported judgement a librarian had to go up to the law courts library and photocopy an unreported judgement. And we would				more often we still get lists that contain a significant number of unreported judgments, but is it more? I don't really think so. I don't have a sense that it's more. It's difficult to say, because in the old days when they wanted an unreported judgement a librarian had to go up to the law courts library and photocopy an unreported judgement. And we would do that nearly every day, and get large lists of unreported

								do that nearly every day, and get large lists of unreported judgements, even 17 years ago.				judgements, even 17 years ago.
Medium firm 2 (MK)			<121> It's just like the research interview, they will come to you with a question and by the time you pursue them with a few more questions about what they've asked you, the whole request has turned around and you're actually helping them find something else. <264> they equate us with being able to help them that we are positioned at that point in time to be able to spend time with them and		<179> it's about…what value does the library provide and I think what it provides is ability to save people time.		<19> we've certainly been pushing out to our lawyers for the past couple of years is that we want to up skill them as much as is practicable so to be encouraging our lawyers to develop independent research skills <362> In a lawyer's life and a lawyer's mind what the library can do for them is ...miniscule.	<301> You become a law librarian after working in a legal environment for a period of time.		<70> The most common misconceptions that everything is available online.		<147> The lawyers still talk about the library and librarians. <224> the landscape has changed in terms of how people go about research. I think research back then would have been a whole lot more ineffective than it is now. It would have taken far longer.

			make sure that they're following the right steps ...									
Court 1 (GL)	<99>there are occasions where we ask them to go back to the judge and clarify exactly what it is that they're looking for, because quite often they have no understanding of what the judge wants	<48> we can do in-depth research or just general questions <81>We don't tend to make assumptions, when we ask them specifically what they want				<293> it's probably a meeting place. We have regular functions in the library.		<18> it was all training on the job <204> they're called judge's panels, and they're the specialists in particular areas <388> They know their area of work. They don't tend to ask for as much as they used to,		<107>"Well, I can't find this electronically, so it obviously never existed."	<389> we don't spend days searching for something using the hard-copy resources. Having them electronically available has shortened the period in being able to find answers for them.	<492> I think we've always thought this way, but there just happens to be a text.

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