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Abstract

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'DITTO': LAW, POP CULTURE AND HUMANITIES AND THE IMPACT OF INTERGENERATIONAL INTERPRETATIVE DISSONANCE

*Marett Leiboff**

Abstract. Building on Julius Stone's remark that jurisprudence is law's extroversion (or extraversion), this essay explores the consequences that flow from the loss of a shared humanities discourse by lawyers. In adapting the concept of extraversion to those things about us in the world, the essay considers the finding of an empirical study, *Law's Gens Project*, which revealed a profound, almost seismic shift in what different generational groupings of lawyers know, based in the humanities, placing this point of rupture squarely in the 1970s. Drawing on allusions and cultural references used in judgments, this project reveals how these cultural markers affect legal interpretation. Generational slippages arise when shared humanities discourses are lost. It is thus necessary to think about what happens when the texts of law can no longer be read when the arsenal needed to read them canonically disappears—that is, when it is no longer possible to read the texts as they were intended, not because of any change in legal knowledge in its barest sense, but when the humanities discourses needed to decode their meanings are lost.

1.0 LAWYERS DON'T DO MUCH HISTORY NOW

Our history is our group memory, without which we as a group are lost. If we live only in the present we suffer from memory impairment, a kind of social amnesia, not knowing whence we came or whither we are going.¹ Harold Berman

As Freud put it, the unconscious thinks in images, and lawyers, as dogmatists are experts in unconsciousness.² Peter Goodrich

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¹ Berman Harold *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* Harvard University Press 2003 p x

Lawyers don't do much history now Law, pure law, nomocon jurisprudence is in practice an erasure of legal history, of the artistic reason of law, and we find in its place an inculcation of a finely honed and infinitely abstracted training in virtual instrumentalities that pay no attention to philology, literature, or the interpretations that require attention to what is relayed *sub auditio* or through the text.³ Peter Goodrich

1.1 Dedicated Followers of Fashion

Despite decades or more of critical interventions into the practices of legal interpretation, lawyers of the practising kind, for the most part, remain resolutely, dogmatically, doggedly, positivist, holding to an intractable legal literality. Lawyers want to believe in and hold faithfully to the literal truths of law—nomocon or positivist, the description applies across jurisdictional divides. Lawyers want to simply apply the rules, and that extends to rules derived from the critical and contextual as much as it does to the literal rules of statute and case law—the texts of law—despite the challenges instigated through the work of Barthes, Derrida, Foucault, and the countless critical interventions since. Moreover, lawyers presume and assume that everyone with legal training will read those texts of law uniformly, vouchsafed by a shared legal training that extends to the *ellipses* contained in the texts of law. It is assumed that these are read uniformly or at least not read differently by themselves and their peers: that the social, cultural and historical *sub auditio* is uninflected by who 'we' are.⁴

When I refer to 'we' or 'us', I quite consciously and strategically mean to be vague, for as I will show in this essay, our imagined 'we' is generationally inflected and intergenerationally dissonant. We may, intellectually, assert that this would be expected, but this makes no difference, practically. We speak at cross-purposes when we think we simply read the texts of law uninflected. Take the title of this essay—it will mean one thing to some of you, something different to others of you, and nothing at all for the rest. If you are itching to know what I am talking about, then read ahead to the end. For the 'us' of whom I speak is a rhetorical tic: 'We all remember when ...', or 'We all danced to music xyz in the '80s'. We—there is again and it will keep on appearing in all its regal splendour—draw upon our own inventories, the soundtracks of our lives when we read, interpret and parse the texts of law.

My claim is that 'the little things'—the soundtrack of our lives—affect how we read and interpret law. An element of the sermon delivered by the Archbishop of Canterbury at the

² Goodrich Peter *An Instance of the Fingerpost: An Excursus on the Legal and the Digital*, abstract of 20th Anniversary Annual Lecture, School of Law Birkbeck University of London, 18 May 2012 <http://www.bbk.ac.uk/law/events/annual-lecture-professor-peter-goodrich-friday-18-may-2012>

³ Goodrich Peter 'The New Casuistry' (2007) 33 *Critical Inquiry* 673 at 682 and 707. I came across this article, belatedly, while in the process of writing this essay, having not appreciated earlier that it cut across the design of the *Law's Gens Project*. It has been invaluable in developing the essay.

⁴ I do not disregard here the long history of scholarship into the political, class, race, ethnicity, gender amongst others. This study asks a different question that crosses through those other interventions into the behaviours and practices of lawyers. For an excellent elucidation of the everyday and the popular: Loizidou Elena 'Romancing the Tomes: Popular Culture, Law and Feminism' (2005) 1 *International Journal of Law in Context* 210 at 210–212.

Queen's Diamond Jubilee Service illustrates the point nicely. You will, perhaps, read it very differently to me:

Those of us who belong to the same generation as Her Majesty's older children will recall a sixties song about a 'dedicated follower of fashion' ... [but the] background of the word [dedicated] is the way it is used in classical and biblical language.⁵

The Archbishop does not mention details—denotations are left hanging. The 1966 song by *The Kinks* was a major hit, but also a lampoon of what we would now call a fashion victim. Maybe the Archbishop was a little coy about mentioning the band's name within the hallowed walls of St Paul's Cathedral in the presence of Her Majesty, but his allusion did not seem to recognise that the lyrics seemed to be more apposite to his point about dedication that he appreciated (theologians perhaps not being connoisseurs of the nuances of the Cool Britannia of the 60s). The classical and theological allusions are something different again, of course, and in the second part of the passage, the Archbishop launched into his deep interpretative objective.

That the Archbishop of Canterbury chose to use a reference from the 1960s is apposite at another level. The 1960s, as this essay will show, was a tipping point for claims of 'we', to be able to read the texts of law more or less with similar denotations. Lawyers born up until the early 1960s and educated at a secondary level up until the mid-late 1970s, are more likely to share meanings (though not—necessarily—experiences) with lawyers of their *own and an earlier* generation or two or even longer. The Archbishop's second point about the classical and biblical conceptions of 'dedication' would have been known to large portions of those older generations. But the Archbishop's allusions—to the 60s, to the song, to the classical and biblical allusions—are friable and porous, open to creative reinscriptions for those born after the 1960s.

This short extract illustrates how generational inflections can spring from the most modest words, conjuring and interposing interpretative images and representations through which meaning is filtered and shaped. It is in the process of attempting to decode the denotational soup that generational slippages arise. In the reading of the texts of law, nothing is different. In short, you had to be there (even in the 1960s) to fully appreciate these words. Otherwise it is impossible to read the texts of law with 'us' or as 'us'. One person's Dido is very different to another person's Dido, as we will see later. One reading will, as we have known since Derrida, Barthes and perhaps Nietzsche, occlude and foreclose another, but what I am suggesting is that the fracturing of language results in intergenerational interpretative dissonance that affects the continuity and community of law. It is through language, history and more (those things read *sub auditio*) the back story grounded in and of the humanities that the changes are wrought.

That shared humanities discourse (in one form or another) began to break down at some time after the 1960s. It is a paradox that it actually allowed the legal imaginary to work within its positivist modes of engagement—that the pretence of positivism's limited interpretative register was supplemented by a shared language borne out of literature, history, philology. Those things would be read and deployed *sub auditio* when the imagined practice of the literality of positivism

⁵ Williams Rowan *Queen's Diamond Jubilee Thanksgiving Sermon* St Paul's Cathedral London 5 June 2012 : <http://diamondjubilee.hellomagazine.com/queens-jubilee/news/201206051055/thanksgiving-service-sermon-text/1/>

broke down (hence HLA Hart's core and penumbra). That shared discourse was monocultural and monotone, but what has been left behind now is a problematic legacy that this empirical research uncovered—the loss of these shared discourses has left a void that has resulted in a reading of law as technocratic and idiosyncratic. By and large, these younger generations have been educated to correct the deadening and stultifying educational experiences of their parents, but in the process, it appears that a generation of positivists has been created without (by and large) history, philology, literature—nomocon jurisprudence without shared interpretative verities. As Goodrich notes:

Separation of education from practice is also ineloquence in the sense of disciplinary ignorance. History links law ineluctably to the other arts, to philology, literature, and philosophy or the discourse of ends ... ineloquence, unjust speech, is at root the product of an institutional failure, a product of a pedagogy divorced from reality and estranged from the roots of the disciplines in the arts.⁶

The *Law's Gens Project*, conducted during 2010,⁷ substantiates these observations. The study collected responses from a geographically confined, cross-sectional group in Australia, of 90 lawyers and law students across the generational divide,⁸ which was followed up with interviews with 40 selected participants. All participants answered a pub-quiz style questionnaire, which took

⁶ Goodrich above note 3 at 698. Goodrich goes on to dissect the negative effects of a US law school education, but this could equally apply in the Anglo-Australian law school. He identifies 'a double antihumanism: [which] abandoned the art of law for a science of law, and it reduced the study of rules to the study of efficiency': Goodrich above n 3 at 699. Goodrich reminds us that Posner is the arch nomocon who instigated the latter (Goodrich above note 3 at 700 and 702). But Posner, a Builder (see note 8 below) can draw on the humanities if he chose, despite his denial of their value. Generations born after the 1960s who follow Posner or Hart or any other anti-humanist jurisprudential and interpretative practice does so (generally speaking) without a shared history, philology, literature. Lawyers do not do much history now—meaning general history and not legal history. My thanks to my Generation X reviewer whose reading of the points of emphasis in Peter Goodrich's argument provoked me into expanding this point.

⁷ *Talkin' 'Bout Law's Generations: An Empirical and Jurisprudential Investigation into the Reading of Legal Cases by Different Generations of Lawyers*

⁸ The generations used are as follows. They are not identical with the generations of demography as I have intervened with respect to educational and legal educational changes of emphasis:

1. The Builders (1925-1945) studied law in a highly positivistic framework, have had a general humanist secondary education, grew up in conventional Australia; includes lawyers trained through of articles of clerkship. Most of this group was retired or near retirement.
2. Older Baby Boomers (1946-1953) studied law in a highly positivistic framework, had a general humanist secondary education were at the forefront of the social changes of the 1960s and 1970s, and includes lawyers trained 'on the job'. The older members were retired or near retirement.
3. Generation Jones (1954-1965) studied law in a positivistic framework, had a lesser humanist secondary education, more likely to have had a uniform secondary education, experienced unemployment, benefited from free tertiary education and were the last group who could study law via articles of clerkship.
4. Generation X (1966-1975) studied law contextually, were more likely to have a technology focussed secondary education and were the first generation to have a HECS debt and to be technology driven.
5. X-Y (1976-1985) were less likely to have had a uniform secondary education, studied law contextually, were the first generation who studied full time and worked full time, adept technically and multi-taskers.
6. Gen Y – (1986 –) were finishing law school or were early career, semi digital or digital natives, who studied law contextually, technology focussed, multi-taskers and more likely to use social networking and rely on Google and Wikipedia for the acquisition of knowledge.

cultural 'radioactive isotopes' (including pop culture, literary and historical references—'the little things') from case law to find out whether cultural knowledge, broadly defined, affected how the lawyers read and interpreted the texts of law.⁹ The quiz included a series of general knowledge questions that could benchmark generational proclivities.¹⁰ The quiz was not designed to test legal knowledge *per se*, but through the deployment of the cultural, was able to deduce the role that cultural knowledge played in the construction and interpretation of the case extracts by individual lawyers and then by generational grouping. Cultural references make their way into judgments, as rhetorical tics, images, or allusions designed to underline or frame the reasoning used in the judgment.¹¹ They are usually overlooked by lawyers keen to find the ratio, but they are there all the same. While they may be discounted when reading judgments, they point to the inclinations contained in the reasoning—the things that can't be absorbed or recognised without the triggers needed to interpret the judgment as a whole. These are the things that are relayed *sub auditio*,¹² and created in much the same way. The judges deploy cultural, literary and historical nuggets—unconsciously, subconsciously, inadvertently or overtly. They do so expecting that they will be understood: judges preface these nuggets with phrases like: 'everyone knows that', or 'that is a well known extract', or 'no one misunderstands'. Barthes has not made much headway here. They do not expect that they need to explain what they have said; they will presume that the ellipses do not hinder interpretation, and that *everyone* will understand what they mean.¹³ But legal readers do exactly the same thing, and this is where intergenerational interpretative dissonance comes into play.

The *Law's Gens Project* revealed a profound, almost seismic shift in what different generational groupings know, and this point of rupture can be placed squarely in the 1970s. I will come back to this point a little later in this article. Younger generational groupings of lawyers and law students (X-Y: 1976—1985 and Generation Y: 1986—) share very little history, literature and culture with older generations of lawyers (a combined grouping of The Builders: 1925-1945 and Older Baby Boomers: 1946-1953 and Generation Jones: 1954—1965). Generation X (1966—

⁹ Questions 26–39 asked participants to respond to extracts from judgments with short answers or explanations. They were told that they were not expected to know anything about the cases concerned. The questions did not ask participants to explain the law, but to interpret non-legal matters contained within judgments, except in one instance. When I developed the questionnaire, I did not frame the questions in terms of those who did or did not have history—I have adopted this latterly as noted at note 3 above.

¹⁰ Questions 1–10 focussed on the participant's educational background, their employment, the year they were born and how they characterised themselves as a lawyer. One questions concerning gender and social group characterisation was optional. Most participants did not disclose enough information about their pre-tertiary and tertiary level study to be used in any meaningful way in analysing the data so this aspect of the study remains open for further study. Questions 11–25 asked general knowledge questions and questions seeking responses to statements. Question 40 asked participants to decode a series of abbreviations.

¹¹ The extracts and questions were generationally inflected and dealt with matters ranging from the classical era to rap. The oldest case included in the study dated from 1703 (with most clustered in the latter quarter of the 20th century) and the most recent case dated from 2008.

¹² Goodrich above note 3.

¹³ Elms Elwyn 'On the Use of Classical Allusions in Judgment Writing' (2008) 31 *UNSW Law Journal* 56 and Osborough WN *Literature, Judges and the Law* Four Courts Press Dublin 2008; but compare especially Threadgold Terry 'Lawyers Reading Law/Lore as Popular Culture: Conflicting Paradigms of Representation' in Thornton Margaret (ed) *Romancing The Tomes: Popular Culture, Law and Feminism* Cavendish London 2002 pp 23–46.

1975) shared traits with each of the other generational groupings. This lack of shared knowledge would be expected, of course. Times change, the old having to make way for the young. We no longer speak Middle English, or have a detailed knowledge of the Crimean War. No one can possibly keep all the knowledge that has ever existed in their heads. Losing knowledge, forgetting, losing cultural memory, is part and parcel of being.¹⁴ But this is not how we treat the texts of law. We presume that we can read statutes and cases without any interference across time, that we can pick up a case and read it without being troubled by the filters of contemporaneity that suffuse our reading. Case law can never be written time out of mind. But to attempt to *read* cases time out of mind is to countermand the interpretative function. The *Law's Gens Project* brought (some of) the consequences out into the open. I do not intend to use this essay to report on the detail of the *Law's Gens Project* and its findings. Instead, I pull out a couple of examples that reveal how much we interpret law beyond the text (as critical interventions into law had theorised) but it also shows that the younger generational groups will marshal meanings—aberrant and idiosyncratic—from existing and established textual resources. Lawyers don't do much history now.

1.2 *Extra/Overt*

I am struck by an incongruity: that this research into the law and the humanities is grounded in the social sciences, albeit as a variant of ethnography that Cassandra Sharp uses in connection with *empirical* cultural studies methodologies in law—in particular those of a qualitative nature such as interviews and focus groups—that provide a range of means for 'exploring cultural meaning and understanding'.¹⁵ Sharp's research looks outside the texts of law, its critical literature, its dogmas and doctrines, to talk to people to find out how lawyers are influenced by pop culture, among other things. This research moves beyond an internalised textuality, revealing more than can be achieved by looking inwards to the artefacts of law and literature, law and popular culture, and law and film. By moving outside law's (and legal theory's) interiority into the realm of the exterior, requires a step into a liminal space that is redolent of a literal social science methodology devoid of theory, and antithetical to the ethic of the humanities. My foray (like Sharp's) into what might be seen as a bare data collection activity aims to do precisely the opposite, in order to enrich what has long been theorised, by finding out what 'we' do as individual lawyers, and across legal generations. We can surmise intellectually and through a process of disinterest, but finding out what people actually do enriches the theory, and expands upon and perhaps corrects what we imagine about their practices of interpretation and engagement with the texts of law to some findings about what lawyers actually do. This question

¹⁴ Assmann Aleida 'Canon and Archive' in Erll Astrid and Ansgar Nünning *Cultural Memory Studies: An International and Interdisciplinary Handbook* Walter de Gruyter Berlin 2008 pp 97–107 at 97; Connerton Paul 'Seven types of forgetting' (2008) 59 *Memory Studies* 64; Sarat Austin and Thomas Kearns 'Writing History and Registering Memory In Legal Decisions and Legal Practices: An Introduction' in Sarat Austin and Thomas R Kearns (eds) *History, Memory and the Law (The Amberst Series in Law, Jurisprudence and Social Thought)* University of Michigan Press Ann Arbor 2002 pp 1–24 at 24.

¹⁵ Sharp Cassandra 'Let's See How Far We've Come: The Role of Empirical Methodology in Exploring Television Audiences' Robson Peter and Jessica Silbey (eds) *Law and Justice on the Small Screen* –Hart Publishing Oxford forthcoming 2012 p 110 at 121–122; see also Feenan Dermot 'Foreword: Socio-legal Studies and the Humanities' (2009) 5 *International Journal of Law in Context* 235

draws upon and mirrors Bourdieu's melding of theory with the sociological, and in its exploration of the pop cultural is grounded in Bourdieu's conception of cultural capital,¹⁶ the 'set of embodied capacities that is acquired as a socially transmitted inheritance',¹⁷ those things rendered *sub auditio*. In short, Bourdieu's research revealed that we acquire our cultural formation through acculturation, socially and through modes of education—and though not a part of Bourdieu's original project, new directions in research into cultural capital is now 'alert to different articulations ... [of cultural capital] ... across different generational cohorts'.¹⁸

But it is through the intervention of *Talkin' Bout your generation*,¹⁹ an Australian TV quiz program first broadcast in 2009, that this project was formed. In a sense it practically applies Bourdieu (with the addition of generational inflections) for entertainment purposes. The program, a blend of parlour game and trivial pursuit pits Baby Boomers, Gen X and Gen Y against each other in a series of tasks which tests pop culture (and more general) knowledge. The program exposes the speed with which knowledge, language and meaning is lost and misinterpreted across and between generations, how difficult it is to acquire knowledge before or after formative periods in time, and how marked and profound differences in knowledge exist between the different generations. So like Bourdieu, I used modes of aesthetics—especially pop cultural references,²⁰ some high culture references, some literature, some history, some rap, some movies, some musicals, from Charles Dickens to the Book of Common Prayer, from Procol Harum to Audrey Hepburn, the Mikado to Janis Joplin, to hogsheads of brandy, to 'shizzle my nizzle', the Ant'll Mob and the Heartless Crew and countless other references. The examples ranged from the subject matter of cases to the allusions used by the courts, representing a range of generations and their proclivities. Some of the older cultural references were deployed in contemporary judgments; others were borne of their own time and space. There was, in short, something for everyone.

But to contemplate this project as a mere pop quiz is to deny two related, and perhaps competing theoretical positionings that sit behind its seeming ersatz exterior. The first concerns the way that these pop culture references form part of the texts of law, and whether they function

¹⁶ Bourdieu Pierre *Distinction: A Social Critique of the Judgement of Taste* Trans R Nice Routledge London 1984; Bourdieu Pierre *The Rules of Art: Genesis and Structure of the Literary Field* Trans S Emanuel Polity Press Cambridge 1996 ; Bourdieu Pierre and Loïc Wacquant *An Invitation to Reflexive Sociology* University of Chicago Press Chicago 1992

¹⁷ Bennett Tony and Elizabeth Silva 'Introduction: Cultural Capital—Histories, Limits, Prospects' (2011) 39 *Poetics* 427 at 430

¹⁸ At 343; see 1.4 below in connection with the Norwegian study.

¹⁹ Channel 10, *Talkin' Bout Your Generation*: <http://ten.com.au/talkin-bout-your-generation.htm>; Ward Michael *Talkin' Bout Your Generation Book of Everything Ever* Hardie Grant Prahran 2011

²⁰ There is an enormous literature in the field. Some examples follow: MacNeil William *Lex Populi: The Jurisprudence of Popular Culture* Stanford University Press California 2007; Sharp Cassandra 'Changing the Channel: What to Do with the Critical Abilities of Law Students as Viewers?' (2004) 13 *Griffith Law Review* 185; Sharp Cassandra 'The Extreme Makeover Effect of Law School: Students Being Transformed by Stories' (2005) 12 *Texas Wesleyan Law Review* 233; Moran Leslie et al (eds) *Law's Moving Image* Cavendish London 2004; Greenfield S, G Osborne, P Robson (eds) *Film and the Law* 2nd Hart Oxford 2009. Desmond Manderson reminds us that popular culture is not limited to television and film and has much longer histories: Manderson Desmond 'Trust Us Justice: 24, Popular Culture and the Law' 2010 http://law.anu.edu.au/news/2010_College_Seminars/Manderson_paper.pdf

canonically or as archive—and what happens when that canon or archive is lost. As Costas Douzinas points out:

The past is always caught in the forgetfulness of memory and the impurities of the archive ... Memory amends as it repeats and every repetition is always repetitive and original according to the law of iteration.²¹

But I am struck by Aleida Assmann's reading of the archive that slightly displaces the notion of amendment and iteration.²² For her, the bits and pieces of knowledge and information, once lost, cannot be recaptured—any capturing will also be a new telling, a retelling in a given time and space. Aleida Assmann reconceives the concept of memory in two forms—‘actively circulated memory that keeps the past present as the *canon* and the passively stored memory that preserves the past as the *archive*’ (her emphasis).²³ The canon is continually fed and nurtured; once it is no longer fed or nurtured, it falls into the archive and is then lost until reclaimed. The canon *outlives* each generation, but it needs to be constantly iterated and reiterated to remain canonical—thus canonical texts of literature are taught and performed ‘from generation to generation’.²⁴ She (using my reading of the methods she uses) suggests we *redeploy* artefacts in order to determine whether they are or are not canon or archive.²⁵ But it is in her discussion of the historical archive of objects having ‘lost their original “place in life” (*Sitz im Leben*), and entered a new context, which gives them the chance of a second life that considerably prolongs their existence’.²⁶ But this second life is a different life, unlike canons that are transmitted across generations without interference (though this does not foreclose interpretative interventions). The archive is made up of those things that have lost their origins; once time out of mind, once transformed, the texts of law need to be reconsidered as having lost their ‘place in life’, their *Sitz im Leben*, too. It is this odd middle-ground that we should see law that has lost its cultural reference points across and between generations—it is law that is no longer living.²⁷ For it is necessary to think about what happens when the texts of law can no longer be read when the arsenal needed to read them canonically disappears—that is, when it is no longer possible to read the texts as they were intended not because of any change in legal knowledge in its barest sense, but when ‘philology, literature, or the interpretations that require attention to what is relayed *sub auditio*’ is lost.²⁸

And this leads to the second point about the use of a pop culture quiz to interrogate long-standing theoretical positions on the interpretative functions of law. In thinking about research and scholarship of this multidimensional type, it is useful to draw on Julius Stone's remark that

²¹ Douzinas Costas ‘Theses on Law, History and Time’ (2006) *Melbourne Journal of International Law* 13 <http://www.austlii.edu.au/au/journals/MelbJIL/2006/2.html>

²² Assmann above note 14; compare Derrida Jacques *Archive Fever* (Eric Prenowitz trans) University of Chicago Press Chicago 1995 p 84.

²³ Assmann above note 14 at 101

²⁴ Assmann above note 14 at 101

²⁵ Assmann above note 14 at 101-102

²⁶ Assmann above note 14 at 103

²⁷ Vismann Cornelia *Files: Law and Media Technology* Trans G Winthrop-Young Stanford University Press Stanford 2008

²⁸ Goodrich above note 3

jurisprudence is law's extroversion (or extraversion); that it obtains from 'knowledge in disciplines other than law'.²⁹ However, law and its jurisprudence tends towards the introvert,³⁰ interacting with other disciplines without inquiry into those other disciplines. Analytical jurisprudence is introvert *par excellence*, the external (particularly the social) treated as suspect.³¹ The analytical is law's preferred, valorised jurisprudence, giving comfort to law's overtly introvert, overtly positivist and overtly conservative practices, attitudes, and registers.

Extro/aversion—I have chosen to play with the two forms of the word in Stone's work (they can have different meanings)—looks outwards. Yet most jurisprudence functions with the internal, as noted earlier, using modes of enquiry that foreclose the external, even when exteriorising through the use of the texts of disciplines that exist outside law's own boundaries. So if scholarship functions at the edge of the discipline, traversing into the interdiscipline, whether it be law and literature, law and humanities, law and society, and the myriad philosophical and psychoanalytical modes of jurisprudence, but deploys the *practices of introversion*, that scholarship is introvert. Introversion works with what is there already. Even critical practices are introvert and not extra/overt if they do not look to the external. Extraverts look outside and beyond what is already there to find out what we do, how we do it, what we know. Introverted critical practices set up the modes of engagement while extraverted critical practices step outside and take a look. In short, they find out by asking, by looking, by talking. They conduct surveys and collect data.

The *Law's Gens Project* is extra/overt. It adopts a cultural legal studies stance as a jurisprudential practice that overtly questions the introversion by asking: 'What do lawyers do when they read and interpret legal texts?' But it cannot ask that question directly. If it did, lawyers will answer by repeating the mantra learnt: by finding the facts, by recalling principles, by finding the ratio. This won't explain what the lawyer actually does when reading the texts of law. So this study proceeded from 'the blindside', by asking something that seemingly has nothing to do with lawyering: 'What do you know of the pop culture that finds its way into judgments?' or 'What do you know of the historical references contained within judgments?'

1.3 The Radioactive Isotope

Studies of this kind are often criticised for their inability to posit an exact scientific rigour.³² I will position the research and its design in part as 'autoethnography', the study of culture that involves the self.³³ Though this needs to be clarified somewhat—that studies of this kind are bound to

²⁹ Stone Julius 'The Province of Jurisprudence Redetermined (Concluded)' (1943-1944) 7 *Modern Law Review* 177 at 178; Stone Julius *Legal System and Lawyers' Reasonings* Stanford University Press California 1964 p 16. Extroversion was used in the *Modern Law Review* article; extraversion was used in the 1964 book.

³⁰ Richard Larry 'The Lawyer Types' (1993) 79 *ABA Journal* 74; McCaulley Mary H and Martin Charles R 'Career Assessment and the Myers-Briggs Type Indicator' (1995) 3 *Journal of Career Assessment* 219 at 230, 231

³¹ Leiboff Marett 'Ghosts of Law and Humanities (Past, Present, Future)' (2012) 36 *Australian Feminist Law Journal* 3 at 9

³² Sharp Cassandra above note 15

³³ Smart Carol *Personal Life* Polity Press Cambridge 2007; Radstone Susannah 'Autobiographical Times' in Cosslett Tess, Lury Celia and Summerfield Penny (eds) *Feminism and Autobiography: Texts, Theories and Methods* Routledge London 2000 p 201

represent the position of the person designing it. And at a lesser level of scholarly intervention—pub quizzes and game shows reflect the hand of the person asking the question.³⁴ Let me acknowledge my own intrusion into its design. For though I am Generation Jones, I studied law with Generation X peers in a black letter law school, complete with a compulsory curriculum dictated by admitting authorities. And for those of you outside the Anglo-Australian context, this meant that I was studying with students who had just left secondary school, for the most part. Some of us were graduates with postgraduate degrees—like me—in other disciplines. We learnt our law in the early 1990s decontextualised and literal, rule-based and conservative. But all of those practices of literality and rules did not conceal the political agendas of those teaching us. I watched my classmates drink up a conservative rereading of the Whitlam dismissal here, a reframing of the Queensland political street march bans there, with absolutely no critical engagement. That I had lived those experiences in the 1970s made their inability to question what they were told an amazing experience, because anything I recounted to them about what actually happened (from my point of view at least) was discounted. But my classmates had not learnt history—literally. Secondary school history at a junior level had been largely replaced during the 1970s by social science, though it remained at upper secondary level. But to get into law school in Queensland at the time, it was necessary to take maths and science subjects to get ‘high enough’ scores. I won’t bore you with the details why, but secondary schools were directing their top students away from the humanities. And at this particular law school, it wasn’t possible to study humanities with law, but vocational courses like IT and accountancy studied with law were the norm—except for those undertaking a ‘straight’ law degree. It was training *par excellence* for the positivist and the nomocon who had no history.

This experience provided invaluable resources, not least of which was my own experience of intergenerational interpretative dissonance. I know vast amounts of detailed doctrine across a range of areas of law—the canonical in action. I saw how my classmates acquired attitudes through law in the absence of ‘history’. Over the years, I have been variously told by law students, for example, that baby boomers had fought in World War II in the 1950s and that 21st birthdays were celebrated for no particular reason—it was an American custom, perhaps, that a sentence I wrote (containing subordinate clauses) did not make sense (the commas were the problem). But examples and anecdotes are not enough, however rich they might be. So drawing on these experiences and more, I built a quiz. I was catholic in my choices, doing my best to cover the millennia in terms of culture, and 300 years of case law, with most examples residing in the later quarter of the 20th century and the decade of the 21st (from 1703—2008 to be precise). Despite this, a Generation X interviewee complained that I had chosen only archaic cases. I hadn’t.

But to return to the reasons for using pop culture in constructing the quiz. Pop culture references (of any era) act as something like the radioactive isotope, or carbon dating technique mentioned at the outset of this essay. Pop culture is unique in that it is simply absorbed into the consciousness of the individual and can never be shared in quite the same way *across* generations. You either know it or you don’t. It is extroversion internalised. Other generational markers (such as a war, the learning of a specific language that was not taught after a certain period, some types

³⁴ Bennett Tony ‘Culture, Choice, Necessity: A Political Critique of Bourdieu’s Aesthetic’ (2011) 39 *Poetics* 530 at 537

of literature, parts of speech, and religious texts and so on), can also help fix a generational proclivity. One example from the *Law's Gens Project* involving a portion of a judgment delivered by Lord Hoffman from a 1997 case about the terms of a lease illustrates:

No one ... has any difficulty in understanding Mrs Malaprop. When she says 'She is as obstinate as an allegory on the banks of the Nile', we reject the conventional or literal meaning of allegory as making nonsense of the sentence ...³⁵

Mrs Malaprop may be unknown to you. She is a character from the 1775 play *The Rivals* by Richard Brinsley Sheridan. Knowing who Mrs Malaprop is matters to an extent but it isn't necessary; the figure of speech—a malapropism—is reflected in the character's name. A malapropism is a badly used word, and Mrs Malaprop uses her words badly all the time. Lord Hoffman is telling us that 'allegory' does not make sense within the sentence. Some words make no sense within a contract either. But lawyers are literalists and the survey revealed when asked about the allegory to which Mrs Malaprop referred, most were unable to identify that there was no allegory—I had asked a question which required the decoding of the surrounding text. Even if you did not know the play, the idea that an allegory might sit on the banks of the Nile might seem odd. But what to put in its place? An alligator, of course.

71.5% of participants in the two oldest generations (a combined group of Builders and Older Baby Boomers),³⁶ knew what a malapropism was or who Mrs Malaprop was and 43% were able to decode 'alligator'. Amongst members of Generation Jones, the numbers who knew what a malapropism was had virtually halved to 38.5% while 23% could decode 'alligator'. There was little change in the Generation X group: 36.5% knew what a malapropism was, while 27% identified 'alligator'. A 0% response was received in the X-Y group, but while 7.5% of the Generation Y group knew what a malapropism was, only 2.4% could decode 'alligator'. Included in Generation Y responses was the suggestion that Mrs Malaprop was a witness in the case, or perhaps one of the barristers or solicitors, and it struck me after the event that the problem with the 'alligator' response was that this group may not have known what an allegory is.

Of course, this was a tiny extract and a reading of the complete case would reveal that she was neither a witness nor a legal representative. And indeed, for the purpose of the quiz, I chose a selective portion of the text, leaving out the final sentence of the paragraph, where Lord Hoffman concluded that you would '... substitute "alligator" by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like "allegory"'.³⁷ But then again, as the results revealed, Lord Hoffman's conclusion could not be vouchsafed, especially in connection with the two younger generations—that background knowledge could not be rendered *sub auditio* if that knowledge did not exist. This was not an archaic case, but Lord Hoffman chose to use a canonical literary allusion to highlight his reasoning in the case, which had been recirculated for generations, which had not lost its *Sitz im*

³⁵ *Mannai Investment Co Ltd v Eagle Star Life Assurance Co* [1997] AC 749 at 774

³⁶ See note 55 below.

³⁷ *Mannai Investment Co Ltd v Eagle Star Life Assurance Co* [1997] AC 749 at 774

Leben. The *Law's Gens Project* reveals that Mrs Malaprop's *Sitz im Leben* has been exhausted, a previously common figure of speech virtually lost.

This loss of meaning or the interpolation of a different reading matters in ways that reflect the importance of the 'little things'. Jeffrey Goldsworthy has recently suggested that forms of textual ellipse permit a text to omit details conveyed by context. One of his interpretative examples concerns the way we read 'everyone has gone to Paris'. He says we all understand this to mean 'everyone in some contextually defined group has gone to Paris', not 'everyone who has ever lived has gone to Paris'.³⁸ Hence, we do not need to include the ellipses, and we would be sure to understand the intent. But my interest was in his use of the noun, which I am sure was thought to be textually safe.³⁹ Sure enough, I would imagine most people would think of Paris the city in France. But there is not one Paris—there is Paris Hilton (the contexts in that situation would leave the mind to boggle), Paris Texas, and Paris in Romeo and Juliet,⁴⁰ as well as the Homeric Paris and the other variants from the classics. The presumed context is confounded by a mere noun. This would not matter except that lawyers are positivists who rely on the literality of their interpretative practices. In the hands of lawyers who share a common set of ideas about history, language, literature and the like—the canon—we can share meanings, and share critical interventions. We know that Goldsworthy means Paris, the capital of France. But 'we' cannot be sure, as Mrs Malaprop revealed.

While I do not know Jeffrey Goldsworthy well, I am aware that he is of a close generational grouping to me. I understand him when he uses his example. Though we work at very different ends of the jurisprudential spectrum, we share cores and penumbras of meaning because these were vouchsafed in the monotonous and the monotone educational world before the changes that rendered educational verities asunder. Such monotony was grounded in a schooling created in the image of the exclusive, class-based private and selective schooling that took shape in the 19th century. This model was grounded in the classical languages and academic subjects—the liberal arts.⁴¹ As at the beginning of the 21st century, it has virtually disappeared.⁴² After early 20th century interventions, it was replaced with a broad and comprehensive secondary education, which had taken hold by the 1960s and 1970s. But latterly, the time devoted to the humanities has diminished significantly, as my own anecdotal example illustrated. As at 2000, 60% of the lower secondary curriculum comprised language and literature, mathematics, sciences and computer/technology. But the *humanities*, broadly constructed, comprised only 13% of the

³⁸ Goldsworthy Jeffrey 'Constitutional implications revisited' (2011) 30 *University of Queensland Law Journal* 9 at 13

³⁹ An autoethnographic intrusion: My early primary schooling in the mid-1960s involved hours of derivation –this is what it was called (no prettying up for small children), parsing, decoding the clauses in sentences. Adjectives and adverbs, adverbial clauses were all in the bag by the age of eight. As a secondary school teacher of English and Drama in 1980, I was teaching early secondary school children nouns and verbs. Clauses and phrases barely came into it. I should have seen the change happening. In my own secondary schooling in the early 70s, grammar disappeared. I do not know the grammar that people three or four years my senior know. Gerunds are a complete mystery to me.

⁴⁰ I had explored the variants of Paris elsewhere, in the context of trademarks law: Leiboff Marett *Creative Practice and the Law* Thomson Law Book Co Sydney 2007

⁴¹ Benavot Aaron *The Diversification of Secondary Education: School Curricula in Comparative Perspective IBE Working Papers on Curriculum Issues N° 6* UNESCO International Bureau of Education Geneva Switzerland November 2006 p2

⁴² Benavot 'Table 10: Distribution of upper secondary programmes/tracks by type and historical period' as above at p 17

curriculum and even then were treated as a subset of the social sciences—social studies, history, geography, social sciences, environmental studies, civics and citizenship education. The arts—*aesthetic education* including art, music, dance, singing, handicrafts—comprised only 6%.⁴³ It is not surprising that lawyers do not know much history now.

HLA Hart could say with a degree of certainty that language has a core of certainty and a penumbra of uncertainty because it was assumed that lawyers shared a uniform and homogeneous course of study prior to studying law (not that this would have been a question for Hart to consider as there simply was no alternative). His lawyers shared an educational and social habitus. Thus passing references to Latin, Greek, the Classics, Shakespeare, the works of WS Gilbert, the 'Great War' could be used to elucidate a point, or provide a reference that would function as a conceptual shorthand for broader concepts. And they would be understood. Heterogeneity was not to be expected; the most radical of radical lawyers shared a language with the most conservative of conservative lawyers. The practices of positivism could work because its exponents and opponents shared a non-legal imaginary as well as a legal imaginary. In short, it could be vouchsafed that lawyers educated up until the 1970s had received an education of a rigid and narrow type and this had functioned, largely unchanged for long enough for its practitioners to be able to read with a reasonable degree of clarity the texts of law from the archive—in addition to the canon—with a degree of precision.

This practice does not accommodate the two or more generations habituated to a world of floating signifiers, without shared meanings, *overlaid* with a positivist nomocon temperament, without history and literature. Paris would work, *sub auditio*, for the oldies. For the Facebook and Twitter generation who are familiar with Paris Hilton—maybe, maybe not. Law without history means law, to an extent, without meaning.⁴⁴ To use an example from a passing conversation with a Generation Y lawyer: the youngest of Generation Y lawyers (those in their early-mid 20s) think negligence law is a 'very bad thing'. Moreover, *Donoghue v Stevenson* is a bad case, because it created a culture of suing. At a level of analysis, this is a fair enough conclusion, but that was not what was meant. It was assumed as a matter of fact that *Donoghue v Stevenson* invented negligence. I said that the case merely extended negligence beyond the contractual to third parties. Oh. *Donoghue v Stevenson* now functions as floating signifier, a case outside of time, a case verbalised. This reading suits a generation of young nomocons, without history and without, I daresay, having ever read the case. The description on Wikipedia, it seems, is enough these days.

This passing conversation confirms the existence of an 'intergenerational interpretative dissonance', in which the canonical texts of law are subjected to creative reinscriptions: look at what happened to poor *Donoghue v Stevenson*. I say problematic because 'we' imagine that the transmission of a canonical judgment will, as Aleida Assmann suggests, remain uninflected through time. Interpretation is one thing. What the case says is another thing altogether. The texts of law are compromised rather than invigorated when technocratic and idiosyncratic readings are interposed, in combination with a literality and a unshakable belief in the veracity of interpretations. The loss of a shared humanities discourse is implicated, and not just in Australia.

⁴³ Benavot as above p 19

⁴⁴ Goodrich above note 6

1.4 *The Norwegian study*

At the end of 2011, Tony Bennett and Elizabeth Silva produced an issue of *Poetics* that reported on a number of pieces of recent research into Bourdieu. Among the papers was one that provided me with some intriguing *ex post facto* revelations that marry with the results of the *Law's Gens Project*. The Norwegian media scholars Gripsrud, Hovden and Moe revealed a loss of canonical knowledge amongst higher education students over a ten-year period in Norway.⁴⁵ Their study revealed that canonical knowledge and appreciation declined dramatically between 1998 and 2008, indicating 'a marked decline in interest and use of almost every form of culture that is identified with traditional legitimate taste.'⁴⁶ Legitimate taste means Bourdieu's conception of the tastes of the elite, as well as literature and music. But 'cultural knowledge',⁴⁷ differed significantly according to the students' fields of study and occupational trajectory.⁴⁸ Significantly, the loss of canonical knowledge was greater for those in the *technical disciplines, including law students*,⁴⁹ than those studying the humanities and social sciences,⁵⁰ who were presumably acquiring this knowledge within their courses of study. Bourdieu had not anticipated the possibility of generational change and Gripsrud, Hovden and Moe observed that:

... knowledge of Bach and Kafka may be suspected also to have quite a bit of what Marx could have called use value: a real resource in attempts at understanding the world and one's role in it. Bourdieu's theory does not have space or tools for an understanding of a social loss associated with, say, Johann Sebastian Bach's music becoming increasingly forgotten and unheard. A key question for future research, then, is to try to answer how such losses are to be understood in sociological terms.⁵¹

What my research revealed was that this kind of social loss resulted in new ascriptions and interpretations, contrary to the expectations of law as a respecter of authority—of court, of judgement, of text. The two younger generations create unanchored interpretative verities of the kind described in connection with the idiosyncratic readings of *Donoghue v Stevenson*: a confident, self-determining, interpretative practice disconnected from history, literature, and the grounding of law in the humanities.

⁴⁵ Gripsrud Jostein, Jan Fredrik Hovden, Hallvard Moe 'Changing Relations: Class, Education and Cultural Capital (2011) 39 *Poetics* 507

⁴⁶ Gripsrud note 45 above at 522

⁴⁷ Gripsrud note 45 above 523

⁴⁸ Bennett and Silva above note 17 at 338

⁴⁹ Gripsrud note 45 above 514 and 526

⁵⁰ Gripsrud note 45 above 524

⁵¹ Gripsrud note 45 above 527

2.0 DITTO

2.1. Making It Up

As part of the *Law's Gens Project*, I conducted a series of interviews. One Generation Y interviewee told me that when being taught to read, the class was told that if they did not know the meaning of a word, they should just work it out. The provocation for this discussion was the result of a series of idiosyncratic responses to one particular quiz question by Generation X-Y and Generation Y participants. I recognised what the interviewee was talking about. As a graduate teacher trainee in 1979, one rare, but very clear memory stands out for me from my English teaching methods class. Clem, my lecturer indicated that research showed that adult interpreters tend to make sense of unknown words from their contexts. There was never a suggestion that this would also apply to children who did not yet have a fully formed vocabulary. Sometime between 1979 and the mid-late 1980s, something changed.

Generation X-Y and Generation Y participants, overall, displayed confident, self-determining, interpretative practices in their answers to the quiz questions. What for me were inventive and rather odd responses were surprising on two fronts. One was the confidence displayed, but the other was that I had instructed participants to leave questions they did not know the answer to. The older generations—respecting authority or at least the instruction—mostly complied, but the youngest generations—Generation Y in particular—generally *did not* comply. They made up meanings, putting the best light on the unknown. I have to accept that they said that they genuinely believed they were correct, and the meaning was the one they knew. But one thing is certain: they did not make up answers to cover over or to admit to a lack of cultural ignorance (despite the suggestion of an interviewee). They genuinely believed the answer they provided was the correct response.

2.2 Dido/Ditto?

I know, I have kept you waiting. I keep saying I will come to it. You have been wondering what 'Ditto' has to do with this essay. In one of the benchmarking questions, participants were given a word without any clues surrounding the word. The word was 'Dido'.⁵² The question was couched so as not to give any clues to the identity of Dido as a word. I expected that participants would recognise either a classical allusion (*Dido Queen of Carthage* or perhaps *Dido and Aeneas*), or the

⁵² Question 24 of the quiz was a benchmarking question. The question and its sub-questions were couched as follows: **Read the following word and answer the questions in the space or spaces below. 'Dido'.** Sub-question 1 immediately followed, which asked; 'Are you familiar with this word? Immediately to its right were two boxes, one marked 'Yes' and the other marked 'No'. The participant, on marking 'No' was then instructed: 'If you circled **No** please move to Q 25. The participants who marked 'Yes' were instructed: '**If you circled Yes, please answer the following.** Sub-Question 2 followed which asked 'What is Dido?'. A boxed space was left so that the participant could write their answer. This was followed with Sub-Question 3, which asked: 'In what context or contexts do you know the word Dido?'. As with Question 2, a boxed space was located to the right in which the answer could be placed

1990s pop singer called Dido, or perhaps both. The results indicated something very different a set out in Figure One.⁵³

*Figure One*⁵⁴

DIDO	1925-1953 ⁵⁵	1954-1965	1966-1975	1976-1985	1986-
	Builders/Older Baby Boomers	Generation Jones	Generation X	X-Y	Generation Y
Did not recognise the word	50%	50%	9.1%	20%	20%
Classical Allusion	16.7%	28.6%	9.1%	0%	3.6%
Singer	33.3%	21.4%	73.7%	40%	40%
Ditto	0%	0%	9.1%	50%	32.7%
Ghost	0%	0%	0%	20%	5.4%
<i>Ditto/Ghost combined</i>			9.1%	70%	38.1%
Additional responses		Classical+ Singer 7.7%	<i>Singer + Ditto</i> 9.1%	<i>Singer + Ditto</i> 9.1%	9.1% 2 x <i>Singer + Ditto</i> 1 x Singer, classical and WWII ship

The results revealed that 50% of the *older generations* did not recognise the word. On the other hand, the younger generations were far more confident identifying the word. In the oldest grouping, more identified the singer than the classical allusion, while Generation Jones participants knew the classical allusion better than the pop singer. Generation X responded most

⁵³ Data was analysed in terms of percentages, for statistical purposes, and for reporting purposes. The sizes of the groupings was nearly identical in the three oldest reported groupings, but the largest group surveyed was Generation Y, comprising nearly half of all questionnaires completed. Generation X-Y was the smallest reportable group permitted under the relevant Ethics Approval

⁵⁴ Results do not necessarily 'add up' as the percentages used reflect the responses to different questions and answers.

⁵⁵ This group was combined because the numbers for the Builders could not be reported under the relevant Ethics Approval because of a small sample size. They were merged with the Older Baby Boomers as a combined result.

confidently of all groups, with most knowing the word, and nearly all knowing the singer. For Generations X-Y and Y, 80% proffered a response, 40% of whom identified the singer. In the three youngest generations, knowledge of the classical allusion dropped dramatically: 9.1% of Generation X, none in X-Y, and an exceptional individual member of Generation Y, who knew Dido 'three ways': the classical allusion, the pop singer, and an additional piece of (correct) information—that Dido was the name of a World War II ship. Other than this individual, only participants from Generation Jones could identify both singer and classical allusion.

The predicted drop in knowledge of the classical allusion in the youngest generations was expected and borne out.⁵⁶ But you will have noticed some odd lines in *Figure One*: Ditto and *Ghost*. Ditto required decoding.⁵⁷ Dido is phonetically 'ditto'. In the 1990 film *Ghost*, one character never speaks other than to say 'ditto'.⁵⁸ It is an American film, and 'ditto' sounds like 'Diddo', the 't' becoming 'd'. Other clues were revealed in the responses of the participants: 'That is the word you use when you are repeating the thing that was already said'. Significant raw numbers in the Generation X-Y and Y groups answered 'ditto'.⁵⁹

But why is ditto/dido significant? The response reveals a marker of a change in the way that reading is carried out—reflecting the interpolation of adult reading practices by children who were told to work out the meaning of words.⁶⁰ The change from classical allusion to the normalisation of the pop singer as a primary identifier of the word marks a profound shift in the *sub auditio* of the classical on which law believed it could rely.⁶¹ The shift is generationally inflected, but what is particularly interesting is the shift in confidence from the oldest generations who conform to expressions of authority and the youngest who do not.⁶² A year or so after I conducted this survey, and started analysing results, I was describing this result to a legal theory class. I pronounced Dido as Dido and not diddo, having written it on the board. One member of

⁵⁶ I was surprised that so few of the oldest generations knew the classical allusion. In interviews, it became clear that some in this age group couldn't always remember details. The strong response for the singer occurred through the intergenerational transmission of knowledge; participants who were parents and grandparents straddled the generational divide with ease in a number of instances. There was no return on this though, except where interviewees in the youngest age groups identified that they knew things because their parents or grandparents knew—in those instances, the individuals in the youngest age groups were outliers.

⁵⁷ I have to acknowledge my research assistant Daniel Byers, a member of Generation Y, who after some considerable thinking, decoded Ditto for me. It was a masterful piece of detective work on Daniel's part.

⁵⁸ Sam: I love you Molly. I always have. Molly: Ditto

⁵⁹ Results have had to be expressed in percentages.

⁶⁰ One Generation Y interviewee explained that she had never seen the word written and assumed that this was how the word was spelt. I had suggested that if I had had to guess I would have thought it would have a double d, like 'daddy' or 'P Diddy', rather than one d, if that creative intervention were to be made. The interviewee who described how she was taught to read was not surprised that others of her generation would do this. But she also suggested that they would not want to look as if they didn't know. Another of this generation realised when I said Dido (not 'diddo') seemed abashed, remarking that her English teacher mother wouldn't be pleased as she should have known the spelling of the word.

⁶¹ Elms above note 13.

⁶² This result intrigued the older interviewees. One in the combined oldest generations suggested that the 'ditto' could only have been the result of the members of the group talking amongst themselves to try to pool resources to get the answer right. I wasn't sure if they had done this as the results had filtered through a number of different days when the survey was carried out. And as the results show, 'ditto' started in Generation X, was present in strong numbers of X-Y, as well as Generation Y. So 'ditto' seems to have been passed on in the same way that the loss of generational information reaches a point of no return once the information has been lost from consciousness,

the class wrinkled his nose and said—‘isn’t that diddo, the word you say when you are repeating something you have already said?’

As a benchmarking question, Dido could only be indicative of the relationship between cultural references and law. But its general thrust was confirmed in the only question in which an aspect of law was tested: Assumpsit.⁶³ Assumpsit is an archaic legal term that appears in most contract law texts. All participants had studied contract law. As the results in Figure Two show, knowledge of Assumpsit dropped exponentially from the oldest to the youngest generations. I chose Assumpsit for two reasons—one was its archaic character, and the second was its apparent similarity to the word ‘assume’. As it turns out, a greater percentage of the oldest age groups mistook the word for ‘assume’ than the youngest, but very few of the youngest knew what the word was at all.

Figure Two

ASSUMPSIT	1925-1953 ⁶⁴	1954-1965	1966-1975	1976-1985	1986-
	Builders/Older Baby Boomers	Generation Jones	Generation X	X-Y	Generation Y
Legal term	57%	23.1%	9.1%	10%	1.8%
Wrong/no answer/includes ‘assume’	42.9%	76.9%	90.9%	90%	98.2%
Assume	14.3%	7.7%	18.2%	20%	12.7%

This set of results is to be expected—once a word is lost, then as Aleida Assmann shows so clearly, the word slips out of the canon and into the archive. The 98.2% of the youngest generation did not just leave a blank space, even though they didn’t make the mistake of interpolating ‘assume’ for Assumpsit. But they tried other answers, confidently creating meanings, absent history, and absent the deeper structures of the law grounded in the past.

3.0 CONCLUSION

However much we may attempt to write absent generational inflections, we can never anticipate how texts will be read time out of mind. For dogmatic, dogged positivists, nomocons young and

⁶³ Question 30 was headed thus: ‘The headnote of *Coggs v Bernard* (1703) 91 Eng Rep 26 says: ‘Assumpsit to take a hogshead of brandy in one cellar and lay it down in another. Breach, that *tam negligenter*, he put it down in the latter, that I was staved, gist’. This was followed with this question. ‘What is meant by the following? Please answer in the space to the right of the words or phrases or if you don’t know, please leave the space blank’. Four words or phrases followed: ‘Assumpsit’, ‘Hogshead’, ‘Lay it down’, ‘Staved’..

⁶⁴ This group was combined because the numbers for the Builders could not be reported because of sample size. They were merged with the Older Baby Boomers as a result

old, what is imagined is a law that functions time out of mind, held in place by the literal truths of the law. The *Law's Gens Project* challenges that intractable legal literality, but its findings, such as they are, extroverted as they are, have the potential to be captured, to become a literal truth. That is the danger of extraversion, the dangers of data, that it too can be used in ways that were never intended. This was not a study in literality, but a set of images, a snapshot of the moment, indicating where we were in a particular time and space in 2010.

The past and the present, absent generations, is always like that. Have a look at an old movie that attempts some kind of historical accuracy. It will be easy to see which movie was created in the 1930s, the 1960s, the 2000s, but not one created in 2012—it will be obviously 'historically' accurate. Look again in 15 years. You will think again. My favourite example is the 1968 version of *Oliver!* Supposedly set in Dickensian East End London, look at that eye make-up straight out of Mary Quant and the swinging sixties. They thought they were getting the look right. They were—for that time. As a kid in the sixties, the eye-make up did not look out of place. Look at it now and it is dated—by that eye make-up. We read the films—and we read law—using the aesthetics of our own time. The only way to avoid the thrall of the present is to encounter law through a grounding—in the humanities. ●