

LEGAL SCHOLARSHIP TODAY

I INTRODUCTION

On the surface, legal scholarship in Australia today is flourishing. Never before have we seen so much diversity nor have we seen so much being published in our law journals. But if we consider the nature of law and legal scholarship, it will become apparent that much of what is published is inappropriate, misguided, or unnecessary.

This paper proceeds as follows. First, I will argue that legal academics should not see their task as one of writing for judges and the legal profession because scholarship and professional writing are different things with different aims and different aspirations. Rather, they should write as scholarly outsiders, not as part of the legal profession. Secondly, I will argue that the pressure to publish that is imposed on legal academics in the contemporary, management-run university has blinded too many legal academics to the essential nature of the law — a nature which demands time, effort, and humility. To achieve some sense of mastery in the complex and often contradictory materials that make up the law, we need to recognise that prolific writing runs the danger of being superficial or repetitive. Law is akin to philosophy in that we are engaged in a conversation with the best of the past about problems and solutions that have been with us forever.

II LAW AND LEGAL SCHOLARSHIP

‘There cannot be too many law reviews ... [because] [t]here is a lot more law out there to review these days.’¹

It should not be controversial to suggest that for many legal academics and members of the legal profession the aim of legal scholarship is to help the profession better understand and deploy the ever-growing volume of law embodied in statute and case law.² In essence, this understanding of law treats law as similar to the sciences.

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¹ John Paul Jones, ‘In Praise of Student-Edited Law Reviews: A Reply to Professor Dekanal’ (1989) 57(2) *University of Missouri-Kansas Law Review* 241, 244.

² For example, from the profession: Harry T Edwards, ‘The Growing Disjunction between Legal Education and the Legal Profession’ (1992) 91(1) *Michigan Law Review* 34; Michael Kirby, ‘Welcome to Law Reviews’ (2002) 26(1) *Melbourne University Law Review* 1. From legal academia: Peter Birks, ‘“When Money is Paid in Pursuance of a Void Authority...” — A Duty to Repay?’ [1992] *Public Law* 580, 591, citing

There, much effort is devoted to the discovery, cataloguing and systematisation of vast and increasing amounts of data collected by scientists. Similarly, it is assumed that the vast body of decisions and statutes (which are increasing in number) requires legal scholars to discover, catalogue and systematise the law to make it useful for the legal profession.

Accordingly, on this view there cannot be too many law reviews. But is this way of thinking about law correct and does it do justice to what academic life should be? I think not, because it assumes that legal scholars and the profession do the same thing. They do not.

Pierre Schlag explains why in these terms:

the identity, the role, and the job tasks of the judge do not typically lead to asking questions in any intellectually sustained manner about the character of law — what it is, how it works, what it does, or how it should be.³

In Schlag's view, this is not an attack on the judiciary but rather a statement of the obvious — that judging is not a scholarly activity in pursuit of knowledge and the truth. Judges decide cases in accordance with the methodology and authoritative sources of the common law. From an *intellectual* point of view this will appear narrow and limited but this approach is perfectly satisfactory from a *legal* perspective. We have to accept that judging is not an intellectual pursuit. Once we recognise this we can also see that scholars and judges (and practitioners) do different things.

Meir Dan-Cohen makes the point even more strongly. He argues that the discourse of legal practitioners (including judges and bureaucrats given the task of implementing law) is bureaucratic, one-sided, strategic and authoritarian, while that of scholars is imaginative, truth seeking, open-ended and personal.⁴ Judges decide cases in ways that are consistent with the authoritative legal materials and are not trying to find the truth or ultimate answers. The incommensurability with the two types of discourse (or practice) makes communication between the two problematic. Dan-Cohen's argument makes it clear that if scholars write as researchers for the profession and law-makers, they are not acting as scholars.

In other words, we should examine the work and attitudes of the judiciary and the wider legal profession from the perspective of outsiders and not allow their working habits and beliefs to regulate the manner of our investigations. Articles designed to help the profession will not be additions to learning and scholarship, however helpful they might be for lawyers and judges. Richard Posner has put this well:

Lord Goff, 'The Search for Principle' (Maccabaeian Lecture, British Academy, 5 May 1983) to support the proposition that 'the modern common law is made in partnership between the university law schools and the courts'.

³ Pierre Schlag, 'Clerks in the Maze' (1993) 91(8) *Michigan Law Review* 2053, 2055.

⁴ Meir Dan-Cohen, 'Listeners and Eavesdroppers: Substantive Legal Theory and its Audience' (1992) 63(1) *University of Colorado Law Review* 569, 570–5.

It is constructive to compare traditional academic law with typical fields in the humanities, such as literature and philosophy, on the one hand, and typical scientific fields, such as biology and physics, on the other. The professor of literature or of philosophy is a student of texts created by some of the greatest minds in history, and some of the greatness rubs off on the student. The professor of biology or physics deploys, upon his or her rather less articulate subject matter, mathematical and experimental methods of great power and beauty. The professor of law is immersed in texts — primarily judicial opinions, statutes, rules and regulations — written by judges, law clerks, politicians, lobbyists, and civil servants. To these essentially, and perhaps increasingly, mediocre texts he applies analytical tools of no great power or beauty — unless they are tools borrowed from another field. *The force and reach of doctrinal legal scholarship are inherently limited.*⁵

It is true, of course, that judgments may contain evidence of ideological, philosophical or political controversies or that judges sometimes use and illustrate such bodies of thought in their decisions. One can, for example, discern in many common law contract cases a fidelity to liberal political theory. But what is contained in the judgments by various judges is not the best thought on the relationship of contract to this theory. What can be found is the reflection of such ideas or the development of doctrine which is based upon them, whether this is done consciously or not. Judgments are not written as scholarly investigations into the philosophical bases underpinning a particular area of doctrine. Who could claim that anyone wishing to read a considered treatment of contract law from a liberal perspective would get it from reading High Court contract decisions as opposed to reading Charles Fried?⁶ Or, if we look at another area of law, it is clear that an intimate knowledge of case law is required to master constitutional doctrine for the purposes of litigation before the High Court. If one wishes, on the other hand, to gain some insight into constitutionalism, the cases will contain, at best, echoes and hints about the values which, again, are consciously or unconsciously held. The best treatments of constitutionalism will be found in works of constitutional history and politics: modern, medieval and ancient. Here the ideas which are hinted at, relied upon or superficially treated in the courts, will be available in their best treatments.

To equate judging with scholarship is to profoundly misunderstand the nature and history of common law judging. Judges are not interested in giving illuminating discussions on anything other than case law and statutes, and judges have neither the training nor the knowledge to go beyond the cases and statutes even if they are so inclined. It is unrealistic to think that judges working in the common law

⁵ Richard A Posner, 'Legal Scholarship Today' (1993) 45(6) *Stanford Law Review* 1647, 1654 (emphasis added). Not only are the problems dealt with by law timeless but so are the criticisms. Cicero made a similar criticism of law over 2,000 years ago. See, Cicero, *De Legibus* 1.14, cited in James Gordley, *The Jurists: A Critical History* (Oxford University Press, 2013) 16.

⁶ Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981).

tradition want to, or can, create lasting works of scholarship. Their judgments might give evidence of philosophical, jurisprudential and political beliefs but they cannot provide scholarly treatments of these beliefs.

For practitioners, cases are very important. The analytical development of case law is the accepted method for resolving legal disputes in the common law. Posner has called this ‘debaters’ reasoning’.⁷ Now, there is nothing wrong with this method; one method is as good as another if the results are acceptable in that society. What cannot be argued in its favour is that it gives a *scholarly* understanding of the law. Classical apologists for the common law such as Llewellyn and Eisenberg are best understood as defending the common law method as a *practice* which gives tolerably predictable results and which fits the ethos, experience and expectations of the legal profession.⁸

Now, of course, neither of these thinkers argued that the common law method was a closed, logical system; indeed, they recognised the openness of the common law as a strength because it allows for the reasonably predictable and orderly development of the law. Common law judging is an art, as Llewellyn so brilliantly explained.⁹ It is a means of resolving disputes in a way which seems consistent, as the judges and legal profession see it, with the traditions of the common law *and* with changes in society — just as clearly, the common law does reflect the predominant views in our society and in the legal profession. While this calls for investigation — the judges’ received wisdom may not be to everyone’s taste — it does not demand *from scholars* a comprehensive catalogue and analysis of every judgment handed down.

There clearly is a need for much legal writing to be aimed at practitioners. But this is not scholarship. Scholars and practitioners do different things and we should be smart enough and brave enough to accept this.¹⁰ Nothing written here is designed to denigrate writing designed to be of practical use to judges and the legal profession. Indeed, I think that such writing is as valuable as what I have defined as legal scholarship. But this importance does not make it something that it is not.

Practice and scholarship are different, with disparate needs and duties. Law reviews should be seen as an integral vehicle for the work of legal scholars and not as sophisticated practice manuals for the legal profession.

In other words, legal scholars should investigate the law as *outsiders*, not as *insiders*. We should be writing about the law, not writing as participants within legal practice.

⁷ Posner (n 5) 1654.

⁸ See, eg, Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Company, 1960); Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988).

⁹ See Llewellyn (n 8).

¹⁰ Elsewhere I have discussed in detail what this differentiation between scholarship and legal practice entails for law schools and the profession. See John Gava, ‘Our Flawed and Failing Universities’, *Quadrant Online* (Article, 11 March 2014) <<https://quadrant.org.au/opinion/qed/2014/03/flawed-failing-universities/>>.

III BUT, AREN'T WE ALL OUTSIDERS NOW?

One response to the above will be that 'we are all outsiders now'. No doubt it is true that legal writing today is far more wide-ranging than in the past and that an overt desire to write for judges and the legal profession is less dominant than it used to be. Does this mean that more of today's legal writing fits into my description of what properly constitutes legal scholarship?

I do not think so and the reason for this belief becomes clear if we concentrate again on the nature of the common law and what judges are doing with it. In particular, we need to focus on both the messiness and complexity of the common law and the almost paradoxical timelessness of much of its doctrine.

One can only be sympathetic to a common law judge faced with the vast and unruly body of legal rules and principles that makes up the common law. Each area of law has an immense body of cases interspersed with statutes. The cases and statutes often fit uneasily together and it is quite common to find distinct lines of authority that are competing or even contradictory. Just to make things even harder, the various areas of law overlap and compete, meaning that much judicial effort is devoted to creating and policing demarcation lines between them. Such is the immensity of the materials, and the contradictions and complexities within them and between them that it is unrealistic to talk of mastery of these materials and their interrelationships. Over time, some command and comfort with this unruly mass of materials can be gained. But it will be gained only after much time and effort.

If a legal scholar is to write *about* the law from an *outsider's* perspective, he or she can only do so after devoting much time and effort to come to some sort of understanding of these materials. Writing about the law is not going to be the equivalent of the many papers that can be written from data provided by the latest space probe around Pluto or the voluminous data emanating from a particle accelerator. Writing about law takes time, effort and skill. Legal scholarship demands time of the researcher, both time to learn about the law and time to write about the law. The prodigious output of legal writing mandated by the management class that now runs our universities in Australia cannot and does not reflect the time, effort and skill required to achieve a deep understanding of the law. If we look at some examples of truly scholarly legal writing this will become clear.

Calabresi and Melamad's seminal article on the relationship between liability rules, property rules, and inalienable property is a wonderful example of a thoughtful piece of legal scholarship.¹¹ The authors make sense of what would otherwise appear to be arbitrarily chosen rules and remedies in close but competing areas of law. It is not the sort of article that can be produced from the production line mentality that infests our law schools today. Or, to take another example, consider Lawrence Friedman's masterly history of American contract law which explained the essentially static

¹¹ Guido Calabresi and A Douglas Melamad, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) *Harvard Law Review* 1089.

nature of contract doctrine during the 19th and 20th centuries. Friedman noted that contract law changed by initially increasing its coverage of legal activities but then shrank as labour relations, family law, corporate law, financial transactions and consumer protection were wholly or partially hived off from contract, leaving the latter largely concerned with commercial transacting.¹² Or, for an example closer to home, we can see how Geoffrey Sawer's pioneering studies of the High Court and Australian politics help one to understand the role of High Court decisions in our political and constitutional history.¹³ Edward Purcell's study of the *United States Constitution* is another example of truly thoughtful scholarship. The source illustrates the indeterminacy of the federal scheme between the states and the federal government, and of the similar indeterminacy in the separation of powers at the federal level, with all that those indeterminacies imply for notions of federalism and originalism as constitutional markers.¹⁴

All of these works are the products of time, thought and much reading. The ridiculous 'output' numbers required of all legal academics today would have hindered, not encouraged, the writers to devote so much time and thought to them. Why would they, when the time and effort needed to write them could have been spent more 'productively' writing several articles of lesser quality?

Not only is a mastery of the law a time-consuming endeavour because of the complexity of the materials; it is also time-consuming because law is more akin to philosophy than it is to the sciences. Rather than dealing in ever increasing knowledge, law is a dialogue with the past, dealing with essentially the same problems and solutions that lawyers have dealt with since the beginning of time. Truly, for law,

there is no new thing under the sun.¹⁵

While on the surface the proliferation of cases, statutes and regulations suggests change, indeed accelerating change, in the law, the reality is that there is much action but not much movement. One only has to read the work of legal historians such as John Baker and SFC Milsom to recognise that the history of the common law is one of movements of areas of law between jurisdictions and changes in procedure. Those changes and movements, however, have often masked an essential continuity in the law.¹⁶ Steve Hedley makes the point very clearly for contract:

¹² Lawrence M Friedman, *Contract Law in America: A Social and Economic Case Study* (University of Wisconsin Press, 1965).

¹³ Geoffrey Sawer, *Australian Federal Politics and Law* (Melbourne University Press, 1956–63).

¹⁴ Edward A Purcell Jr, *Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry* (Yale University Press, 2007).

¹⁵ *Ecclesiastes* 1:9 (Revised Version, Octopus Books, 1981).

¹⁶ See, eg, JH Baker, *An Introduction to Legal History* (Butterworths, 1971); JH Baker, 'The Law Merchant and the Common Law before 1700' (1979) 38(2) *Cambridge Law Journal* 295; JH Baker, *The Legal Profession and the Common Law: Historical Essays* (Hambledon Press, 1986); JH Baker, *The Common Law Tradition: Lawyers, Books,*

Take a book such as Gordley's fine *Philosophical History of Modern Contract Doctrine* tracing contract doctrine from its Roman origins, through the Digest, through scribes and glossators, through canon lawyers, civil lawyers and common lawyers, up to the present day. The central concerns of the theory described are much the same throughout ... Theorists discuss the same stock examples again and again, the same unchanging scenarios. The world changes, commerce changes, but contract doctrine does not.¹⁷

Brian Simpson has shown that much of the 'creativity' in 19th century contract law was the result of borrowing of civilian ideas of contract to aid the move of common law contract towards a previously non-existent, systematic, textbook tradition.¹⁸ In his words,

[a]t least in the Western European legal tradition of private law successful creative work consists in a combination between intelligent plagiarism and systematization of what is lifted from others. This is so partly because of the ramifications of the concept of authority; what the writer says appears more persuasive if it is the same as what others have said. Partly the explanation lies in the close connection between private law and certain moral ideas which have remained relatively static over long periods, thus generating similar principles and problems ...¹⁹

Alan Watson has argued that legal historians and sociologists have misread the history of law and its operation in society.²⁰ They have underestimated the cultural strength of law and they have failed to recognise the importance of legal borrowing in the development of law. Partly, this can be explained by the continuing lure of authority: Roman law, for example, was considered advanced in comparison to many indigenous legal systems. Partly, this copying was due to a natural economy of effort: why bother creating answers to complicated legal problems if others have done it before you?

For Watson, the development of legal rules is primarily influenced by legal culture. Lawyers have a vested interest, both financial and institutional, in the existing rules.

and the Law (Hambledon Press, 2000); SFC Milsom, *Historical Foundations of the Common Law* (Butterworths, 2nd ed, 1981); SFC Milsom, *Studies in the History of the Common Law* (Hambledon Press, 1985); SFC Milsom, *A Natural History of the Common Law* (Columbia University Press, 2003).

¹⁷ Steve Hedley, 'The "Needs of Commercial Litigants" in Nineteenth and Twentieth Century Contract Law' (1997) 18(1) *Journal of Legal History* 85, 91, citing James Gordley, *The Philosophical History of Modern Contract Doctrine* (Clarendon Press, 1991).

¹⁸ AWB Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91(2) *Law Quarterly Review* 247.

¹⁹ *Ibid* 254. For more detail see Gordley (n 5) 222–74.

²⁰ See, eg, Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd ed, 1993); Alan Watson, *The Evolution of Western Private Law* (Johns Hopkins University Press, rev ed, 2001).

They are, after all, the ones who can guide the rest of society through the maze that is the law. Greater simplicity is not necessarily in the interests of lawyers and neither does it guarantee their continued employment. In addition, lawyers have a craft perspective on the law. Logical consistency and the allure of technical mastery and virtuosity in the deployment and development of rules are strong forces operating on lawyers. Legalism is a recognisable force throughout history.²¹

Once understood in this way the similarities with, say for example, philosophy become evident. Just as philosophers argue about the same things that they were arguing about two and a half millennia ago, lawyers argue about the same sorts of problems that have faced our ancestors since we moved out of caves and started building towns. Scholarship in philosophy requires a solid grounding in the best of what has gone before and humility when adding to a rich literature put together by the best minds of our species. While, as I have argued above, legal practice is not a scholarly activity, scholarship in law does resemble philosophy in that great legal minds have also over the millennia struggled with recurring legal problems again and again. If we are going to write about the law in a scholarly fashion, we require a solid grounding in what has been attempted before and some humility in adding to the rich literature about the law.

Asking people to write two, three, or even more articles a year almost guarantees that their scholarship will neither evidence a solid grounding in the best of what has gone before nor humility in the face of great thinkers of the past.

But what of technological change? Do not the amazing technical achievements of the past 150 years require totally different thinking and writing about the law? I am not sure. Yes, people are now run over by cars instead of horse-drawn carriages and contracts today have many more zeroes than formerly. But are these really fundamental changes that necessitate vast amounts of scholarly writing? I do not think so. Technologies such as assisted reproduction or satellite communication on their face seem to engender fundamentally different legal problems to the ones that we are used to. But it is my impression that traditional legal reasoning within the traditional materials have incorporated them into the legal system without too much difficulty.

We must avoid the temptation to fetishise technologies. Just as there is no law of the hammer or plough (two great transformative technologies of the past) there is probably no need for a law of computers or mobile phones or any of the other great technologies of the future. It is true that, for example, advances in genetic engineering might generate problems that we have never seen before, with no easy analogues in our present practice or law. I suspect, however, that, just as in the past, philosophers and scientists and lawyers and, indeed, the general public, will argue about such new technologies and the law will gradually come to terms with them. It would surprise me if the legal system does not incorporate them, more or less successfully, as it has with technologies in the past.

²¹ See Judith N Shklar, *Legalism* (Harvard University Press, 1964).

IV CONCLUSION

The vast amount of legal writing that is published in journals and elsewhere is written because it must be written.

To get a job, to keep a job, to get promoted one must write at rates that would test Aristotle. Our law schools are full of fine, hard-working and intelligent academics but they are not full of Aristotles.

As legal academics we do not need to write for the profession. As legal academics we need to accept that scholarly writing about the law is difficult because the law is vast and confusing. Not only do we have to master the work of our predecessors, we also need the humility to accept that it is extraordinarily difficult to say anything new and worthwhile about the law.

The production line mentality that has been foisted on legal academics is costly in financial and psychological terms. We are wasting money on unnecessary writing and we make the lives of good people in our law schools more difficult than they need be because of the artificial and counter-productive rates of publication imposed upon them.

