

# Judges and Academics - Dialogue of the Hard of Hearing

## Inaugural Patron's Lecture

### Australian Academy of Law

Chief Justice Robert French AC  
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#### Introduction

In rather purple prose which verged on the raunchy Karl Llewellyn told his students at Columbia University in 1930 why he would criticise judicial decisions in his lectures and why they would be expected to join in:

So we must strip the courts; so must we test them. The stripping is a tribute. An institution we could not honour naked we should not dare to strip. You are to remember too, the dignity and measure of a critic: they lie in that he sees the record whole; in that his judgment and his tone of judgment weigh the accomplishment against the difficulty, weigh partial flaws against the fullness of what has been done. Seen thus, judged as you would judge a man upon his life, law and the courts stand up.<sup>1</sup>

There for all his extravagant language was a scholarly critic who even a judge stripped bare could like and respect and take seriously. That scholarly critic saw his work and that of the courts he criticised as part of a common enterprise. That view was not and is not universal. There is an exchange between the legal academy and the courts which in most cases is mutually respectful. There are however, differences of purpose, perspective and methodology between judicial reasoning and legal scholarship. The differences should be acknowledged and the points of engagement identified so that each may hear the other more clearly. That is the general theme of this lecture.

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<sup>1</sup> *Llewellyn on Legal Realism* (Legal Classics Library, 1986) 128-129.

## The Australian Academy of Law - Bridging the Gulf

*The Oxford Companion to the High Court*,<sup>2</sup> which was published in 2002, contains essays contributed to by two hundred and twenty five different authors including legal academics, practitioners and judges. In launching the book former Chief Justice Murray Gleeson remarked upon the differing approaches of academic and practitioner contributors to the same or overlapping topics indicative of what he described as:

the gulf that exists between the view of legal institutions and of the Court from within the Universities, and the view from within the practising legal profession.<sup>3</sup>

The perception of a tension between the purpose and methods of legal scholarship emanating from universities on one hand and the purposes and methods of judicial reasoning and professional practice on the other, is not new. Nor is it a perception confined to Australia. To a degree it is bound up with tensions between differing ideas about the purposes and methods of legal education.

That connection was illustrated by an influential article written by Judge Henry Edwards in the *Michigan Law Review* in 1992.<sup>4</sup> He complained about what he saw as the growing disjuncture between legal education and the legal profession. He said:

The schools should be ... producing scholarship that judges, legislators and practitioners can use...but many law schools - especially the so called "elite" ones have abandoned their proper place by emphasising abstract theory at the expense of practical scholarship and pedagogy.<sup>5</sup>

An important report commissioned by the American Bar Association and prepared by Robert MaCrate in the same year set out similar complaints from the practising profession. The academy defended itself against those criticisms on the

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<sup>2</sup> Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

<sup>3</sup> The Hon Murray Gleeson, 'The Oxford Companion to the High Court of Australia Launch' (Speech delivered at the launch of *The Oxford Companion to the High Court of Australia*, Canberra), 13 February 2002. <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj\\_offord.htm#\\_ftn1](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_offord.htm#_ftn1)>

<sup>4</sup> Harry Edwards, 'The Growing Disjunction Between Legal Education and the Legal Profession' (1992) 91 *Michigan Law Review* 34.

<sup>5</sup> Ibid 34.

critics' own ground arguing that legal theory had instrumental value for better lawyering and intrinsic value for better understanding of the law. In Australia, Dr Dennis Pearce had already given his name to a report published in 1987 which reached similar conclusions to those of the MaCrate Report about a tension between the role of law schools in encouraging critical thought and the provision of professional education.

A gauntlet had been flung down in 1983 by the late Roddy Meagher QC who wrote:

There are, to be sure, multitudes of academic homunculi who scribble and prattle relentlessly about such non-subjects as criminology, bail, poverty, consumerism, computers and racism. These may be dismissed from calculation: they possess neither practical skills nor legal learning. They are failed sociologists.<sup>6</sup>

Responding forcefully some fifteen years later in the *Journal of Law and Society*, Christine Parker and Andrew Goldsmith claimed:

[B]y the late 1980's...the "failed sociologists" of the law faculty helped create the climate for social movements of law graduates and have assisted in transforming the legal profession through a variety of specific contributions - community legal centres, clinical legal education, feminist legal scholarship and new and innovative law faculties.<sup>7</sup>

So the battle was joined and to a degree continues in relation to law school curricula, the Priestly XI and the duration of law courses. New issues will no doubt arise out of the Threshold Learning Outcomes formulated for the LLB degree for the purpose of the Tertiary Education Quality Standards Authority and Threshold Learning Outcomes proposed for the JD degree. It is upon this field of engagement that the Australian Academy of Law ("the Academy") enters.

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<sup>6</sup> Roderick Meagher, 'Now You Can Learn Practice in Theory' (Paper delivered at Seventh Law Conference Hong Kong 20 September 1983) 175.

<sup>7</sup> Christine Parker and Andrew Goldsmith 'Failed Sociologists' in the Market Place: Law Schools in Australia' (1998) 25 *Journal of Law and Society* 33, 39.

## **The Australian Academy of Law and the Legal Community**

The Australian Academy of Law seeks to bring together elements of what its constitution refers to as "the legal community". Broadly speaking that is a reference to the practising profession, legal scholars and the judiciary. The purpose of the Academy is the promotion of excellence in legal scholarship, research, education, practice, the administration of justice, law reform, ethical conduct and professional responsibility and the enhancement of the understanding and observance of the Rule of Law.

The Academy owes its existence to a report entitled "Managing Justice" published in 2000 by the Australian Law Reform Commission. In that report the ALRC expressed concern about fragmentation of the legal community for lack of sufficient positive interaction between its elements. It recommended that the Federal Attorney-General facilitate a process which would bring together major stakeholders including the Council of Chief Justices, the Law Council of Australia, the Council of Australian Law Deans, the Australian Professional Legal Education Council and the Australian Law Students Association to establish an Australian Academy of Law. The Academy was established to give effect to that recommendation in 2007.

The Academy is still developing ways of advancing its Mission. It has held, over the past few years, symposia and round table meetings dealing with legal education, the organisation of the profession and the interaction between legal scholarship, legal practice and judging. It has established contact with the American Law Institute which produces important Restatements in various areas of common law as well as Model Codes and draft Guidelines applicable to a range of legal issues including, most recently of interest to the Academy and the Council of Chief Justices, the question of cooperation between Courts dealing with Transnational Insolvencies.

In this presentation I should like to reflect a little upon the positive interactions that are possible between the judiciary and legal scholars. First some reference is necessary to the nature of what is called in the Academy's Constitution the "legal community".

It goes without saying that mine is a judicial perspective and not a comprehensive thesis upon a topic of considerable complexity and upon which much has been written. That disclaimer is offered in the hope of averting a common academic criticism of judges and courts that in delivering judgment on a particular matter the judge or the court has "missed an opportunity" to simplify complexity, clarify confusion, discard out-dated doctrine or boldly go where no judge has gone before. I will return to that criticism later because it points up the difference between judicial decision-making and legal scholarship.

## The Nature of the Legal Community

What useful meaning can be given to the term "legal community"? In discourses about the law definition of terms is not everything, but is frequently the gateway to identification of assumptions and premises. The term is used in the Constitution of the Academy. I will take it to embrace at least:

- Legal practitioners;
- Members of the judiciary;
- Legal scholars;
- Law students.

In the MaCrate Report commissioned by the American Bar Association in 1993 the bold claim was made of legal academics and legal practitioners that:

Both communities are part of the one profession ... legal educators of practising lawyers should stop viewing themselves as separated by a 'gap' and recognise that they are engaged in a common enterprise - the education and development of members of a great profession.<sup>8</sup>

Such an approach would rightly be rejected today as expressing too narrow a view of legal scholarship. On the other hand, as Professor Margaret Thornton has argued in a recently published book entitled *Privatising the Public University - The Case of Law* there is a case that market driven commodification of legal education in Australia is at

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<sup>8</sup> American Bar Association, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992).

the present time undesirably narrowing focus of legal scholarship. Professor Thornton argues that:

not only is the legal academy being radically altered as a result of contraction in the funding of universities from the public purse, but the cartography of legal knowledge itself is changing. The ultimate impact on the legal profession and democratic institutions is likely to be profound as social, critical and contextual knowledge is sloughed off in favour of the technocratic and the instrumental - knowledge most highly valued by the market.<sup>9</sup>

The working definition of the legal community does not rest upon any assumption about the convergent interests or the existence of some kind of collegiality between the groups of people who make it up. It can be accepted as sufficient for the moment simply on the basis that the academics, practitioners and judges are all concerned in one way or another, albeit from different perspectives about:

- the law in its various manifestations, its nature, interpretation and application;
- the functions of the three branches of government in making laws, in executing them, and in determining disputes about their application in particular cases;
- the legal consequences attached to the conduct of and dealings between people, corporations and governments;
- the relationship between the law and the political, social and economic conditions of the society it serves;
- concepts of justice according to law.

The groups which I have identified as components of the legal community are not homogenous. They are complex in their diversity. Legal practitioners may be subcategorised into barristers and solicitors and in the latter category, which is numerically the great bulk of the profession, there are large international and national law firms, medium to small law firms, sole practitioners, firms offering a range of legal services and specialist firms, firms offering legal services in the cities, some working in the suburbs, and others in regional and remote areas. There is an extensive array of not-for-profit legal service providers including hundreds of community legal centres around the country. Corporate counsel and government

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<sup>9</sup> Margaret Thornton, *Privatising the Public University The Case of Law* (Routledge, 2012) xii.

lawyers are two other distinct groups of legal practitioners that make up the legal community. The diversity of the profession rather stretches the concept of it as a community or as part of a community. The life and work and perspectives of the suburban solicitor in a small practice are very different from the life and work and perspectives of a solicitor in a global law firm with hundreds of partners and legal professionals engaged in multi-jurisdictional practice. Yet it is this profession in its range and diversity that the Academy aspires properly to embrace as part of the legal community.

The judiciary encompasses the members of a variety of courts created by Commonwealth, State and Territory laws with a range of jurisdictions. Some are exclusively trial courts, some are exclusively appellate and some are both. Some judicial officers, predominantly magistrates, are engaged day-by-day with a very high volume of civil disputes and criminal offences which I venture to say are dominated by factual disputes rather than debates about what the law is. Those officers bear the numerical bulk of judicial work in Australian courts. Their work affects the greatest number of people. At the other end of the spectrum appellate courts must deal with contested questions of law and of the application of the law and disputed findings of fact. Most courts are properly described as generalist, but some are said to be "specialist" in character. That is a term which I treat with some reserve. There is a caveat to be attached to it whenever it is used in reference to the judiciary, the profession, or the legal academy. There is no area of law that can be regarded entirely as an island unto itself. Intermediate appellate courts carry the greatest load nationally of appellate work in both civil and criminal matters and have to function in a way that enables them to get through that work in a timely manner. The High Court, as the final appellate court and constitutional court, has its own special role. In a sense it could be said that it is atypical of the rest of the Australia judicial system. I should add that the concept of the judiciary, if not constrained by strict constitutional boundaries of separation of powers, can extend, to some administrative appeals tribunals endowed with curial characteristics. The diversity of the judiciary so described indicates that its interactions with the legal academy will differ according to the part of the judiciary that is the subject of the interaction. Those members of the judiciary largely concerned with the application of settled law and the finding of facts will interact principally through the field of continuing judicial education.

The legal academy is located predominantly in the thirty two or so law schools around Australia. I say "or so" because the count keeps changing. Within it there are scholars who mix in varying degrees the functions of legal education, publication of legal scholarship in books and articles and empirical research. There are different kinds of legal scholarship.

Judge Richard Posner of the Seventh Circuit Court of Appeal in the United States proposed that legal scholarship falls into one of three categories.<sup>10</sup> Those categories may not fit precisely into the Australian scene, but are nevertheless suggestive of similar classifications in this country:<sup>11</sup>

- *Traditional doctrinal scholarship* which Posner describes as typified by treatises and restatements. The term "doctrinal" is probably more fitted in Australian discourse to churches and the armed services. But the kind of scholarship which Posner classifies in that way would encompass, in this country, legal text books and Law Journal or Review articles concerned with the description, critical analysis, synthesis and extrapolation of developments in particular areas of the law. Posner suggests, and he is not the only one, that in the United States traditional scholarship of that kind no longer engages the interest of many academics at elite law schools.
- *Non-doctrinal scholarship* which draws on social sciences. This includes the economic analysis of law which, according to Posner, is the only branch of such scholarship that has obtained a secure footing in legal practice in fields such as competition law, intellectual property, industry regulation and finance. On the other hand, Thomas Ulen, writing in 2004, observed that the "scientific" method of examining the law, exemplified by the law and economics movement, had created a distance between legal academics and legal practitioners. A doctrinal scholar might strive to have an impact on judges and lawyers and ultimately to reform the law. However, scholars

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<sup>10</sup> Richard Posner, 'The Judiciary and the Academy: A Fraught Relationship' (2010) 29 *University of Queensland Law Journal* 13, 14-15.

<sup>11</sup> Ibid.



applying a non-doctrinal social science approach were more likely to be writing for one another. He suggested that in the United States citations of a scholar's work by other scholars figure more prominently in faculty evaluations, than citation of the work by the courts.<sup>12</sup>

- *Legal theory.* This field of scholarship as described by Posner deals with abstract issues including the nature of law and justice and the judicial role particularly in interpreting constitutions. He describes it as "jurisprudence crossed with politics".<sup>13</sup>

To Posner's categories I would add empirical research by legal academics concerning a range of matters which include the practical operation of the law and the legal system, judicial administration, the effect of judicial review on primary decision making, attitudes of the public towards the courts, the incidence of legal problems within the Australian population and the ways in which people deal with them, and the attitudes of legal academics to the changing landscape of legal education in universities.

Legal scholars today carry out their work within what is a rapidly changing higher education system with its own institutional diversity and increasingly international dimensions, and in which there is an ongoing debate about the proper content and purposes of legal education.

I should also refer to students in their capacity as consumers of legal education. It is sufficient for the present to say that their relationship to the law schools, their expectations and demands have significantly changed the way in which legal education is delivered in this country.

The legal community in Australia presents a complex and dynamic picture. Attempts at definition of its components and their relationships are necessarily incomplete and in any event are changing. Without at least recognition of that

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<sup>12</sup> Thomas S Ulen, 'The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines and the Future of Legal Scholarship' (2004) 79 *Chicago-Kent Law Review* 403, 414.

<sup>13</sup> Posner, above n 10, 13-14.

complexity and its dynamics, discussion about creating opportunities for beneficial interactions must necessarily be hampered.

Definitional difficulties, having been at least identified, it is necessary in considering interactions between the judiciary and the legal academy to reflect briefly on the nature and purpose of the judicial function and the function of legal scholarship.

## **The Judicial Function**

There is an enormous literature on the judicial function. Some of it seems to overcomplicate a function which at least to a judge is not as complex as depicted. Perhaps however that is just blissful ignorance at work.

The core function of the judiciary expressed simply is the determination of justiciable disputes in a process which involves:

- The reception of evidence relevant to the issues in the dispute and findings of fact based on that evidence;
- Identification of the rules of law whether they be common law, statutory or constitutional rules applicable to the facts as found;
- Application of the rules of law to the facts as found in order to determine rights and liabilities;
- The award or refusal of relief.

Some of the judgments involved in applying the law to the facts are evaluative and in a sense normative. Obvious examples are the application of criteria such as "reasonable", "good faith", "dangerous" and "reckless" to a person's acts or omissions. Such judgments may arise in the application of the common law or of statute law. In the field of intellectual property the question whether a claimed invention involved an inventive step having regard to prior art is another example of an evaluative factual judgment. It is an evaluative judgment made in a purposive setting in which the law seeks to strike a balance between appropriate limits on the boundaries of monopoly rights and appropriate rewards for innovation. Some judgments require characterisation of facts as falling within or outside a statutory category. An example

arises in competition law when a court is asked to decide whether a field of commercial competitive activity defined by reference to function, product and geography constitutes a market. This is an example of the law embedding an economic concept to be applied having regard to the statutory purpose of protecting competition.

The judge having found the facts and applied the law to the facts may have discretion to grant or withhold relief according to criteria which are expressed or implied in the statute or developed by a succession of judicial decisions over time. These are the everyday features of the core judicial function. There are other functions carried out by judges which, although not strictly involving determination of disputes, fall within the scope of judicial power because of their historical status.

It is an important feature of the judicial process that its focus is always upon the determination of the matter before the court. Where a judge writes reasons for decision he or she writes them by way of explanation for the decision in the particular case. A judge is not required to travel further than is necessary in order to determine the case. The journey to that end may involve analysis of the history of a legal rule, its evolution, its underlying policy and its contemporary enunciation. If the case involves a novel application or development of a pre-existing rule the law may have to be stated, in order to dispose of the case at hand, at a level of generality that has implications for future cases.

It is important for understanding between judges and legal scholars to highlight the distinction between reasons for judgment and a scholarly paper. Reasons for judgment are explanatory of the decision. In the end however they are part of a decision-making process. There are cognitive elements but the end point is volitional, a principled act of will.

In thinking about the judicial function one might ask whether it matters that Australian judges are appointed for the most part from the ranks of practising lawyers and predominantly from the ranks of practising barristers. There have been a small number of appointments directly from the ranks of legal academics at universities. There are of course practising lawyers appointed as judges who before entering legal

practice, or concurrently with their legal practice or both, have had significant careers in legal education and scholarship. In a paper published in the *University of Queensland Law Journal* in 2010, Lord Rodger of Earlsferry observed what appeared to be a lack of any correlation between the academic or non-academic background of judges appointed to the House of Lords and their readiness to have regard to legal scholarship.<sup>14</sup> After citing a number of examples he concluded that the United Kingdom had reached a stage where there was no remaining institutional bias against the use of academic materials in judgments. Judicial application of such materials depended in individual preference and whether any of the material was useful for solving the issue before the judge.<sup>15</sup> I think it fair to say that there is no institutional bias against use of academic material in judgments in Australia and that it is common place albeit for a variety of purposes.

The varieties of legal scholarship have already been referred to. That class of scholarship which is most directly relevant to judicial reasoning is Posner's "traditional doctrinal scholarship". Such scholarship, not limited to treatises and restatements will offer analysis and synthesis of case law including cases turning on questions of statutory interpretation and may take a critical approach to judicial reasoning in a particular area by reference to weakness in logic, inconsistently with prior authority or unintended and undesirable results flowing from a particular case or line of cases. Such criticism may suggest ways in which an allegedly erroneous line of reasoning can be corrected.

That kind of scholarship which is thorough and thoughtful can be influential.

Within the spectrum of doctrinal scholarship there may be criticisms of particular judicial decisions which verge on the strident and are embedded with catchy epithets such as "myopic", "astonishing", "unsatisfactory", "aberrant" or the more polite and restrained "problematic", "puzzling" or "novel". The latter is the legal scholar's equivalent of Sir Humphrey's "courageous". The stridency of the epithets is

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<sup>14</sup> Lord Rodger of Earlsferry, 'Judges and Academics in the United Kingdom' (2010) 29 *University of Queensland Law Review* 29.

<sup>15</sup> Ibid 29-30.

generally in inverse proportion to the substance of the criticism and the attention which is given to it.

A term of opprobrium which is sometimes used as a criticism of particular judicial decisions is "missed opportunity". That term, however, generally reflects an insufficient appreciation of the nature and limits of the judicial function. The court's first task is always to decide the case before it. The courts, including final appellate courts, must be conscious that the future is an unknown country populated by cases which are unimagined and sometimes unimaginable. The proclamation of new general principles, the unnecessary extension of existing principle or the construction of theories of everything for a particular class of case, are high risk exercises. In relation to constitutional interpretation Justice Gummow and I observed in *Wong v Commonwealth* that:

diverse and complex questions of construction of the *Constitution* are not answered by adoption and application of any particular, all-embracing and revelatory theory or doctrine.<sup>16</sup> (footnote omitted)

In that context, Daniel Farber, in an article in the *Ohio State Law Journal*, quoted by Blackshield and Williams in *Australian Constitutional Law and Theory*, observed of constitutional interpretation:

we might do better to abandon the attempt to create a theory of constitutional interpretation, and get on with the business of actually interpreting the Constitution. Perhaps, in other words, constitutional interpretation is best thought of as an activity that one can do well or poorly, rather than as an application of some explicit general theory.<sup>17</sup>

That is a perspective with which I suspect many judges would agree and in fields beyond that of constitutional interpretation.

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<sup>16</sup> (2009) 236 CLR 573, 582.

<sup>17</sup> Daniel Farber, 'The Originalism Debate: A Guide for the Perplexed' (1989) 49 *Ohio State Law Journal* 1085, 1103, cited in Blackshield and Williams, *Australian Constitutional Law and Theory: Law and Theory Commentary and Materials* (The Federation Press, 5<sup>th</sup> ed, (2010) 287-8.

## Judicial Decision-Making and Legal Scholarship - The Interaction

A key question for the legal scholar is what if any effect legal scholarship has on judicial decision-making. What Posner called "non-doctrinal scholarship" which offers economic and other social science perspectives on the law and judicial processes, is unlikely to have a direct effect upon judicial reasoning. I would not on that account dismiss it from consideration. Such scholarship provides judges and the practising profession with a wider perspective on the processes of which they are part and the social, economic and political science dimensions of particular areas of the law and legal process. To be indifferent to these things is to be indifferent to the legal community's societal environment. Such unawareness can lead to failure to anticipate or take seriously social or political trends which may have a significant impact upon the legal system or elements of it.

In the end however social and economic judgments relevant to legal change are matters best left to elected legislatures where, at least in theory, the inevitable contests of contending interests can be played out and compromises reached. If such compromises result in laws based on policies or purposes which are in tension and which annoy scholars and lawyers for their lack of conceptual coherence that is a price we pay for democracy. Sir Owen Dixon speaking to the Medico-Legal Society of Victoria in 1933 spoke of "the methods of a modern representative legislature and its pre-occupations" as an obstacle to "scientific or philosophical reconstruction of the legal system".<sup>18</sup> Purists in the academy, the practising profession or the judiciary may lament but in the end must accept and work with the law as it is. Law reform is to be pursued outside the courts.

The preceding does not of course exclude consideration of economics and other so called "non-doctrinal legal scholarship" in fields where it informs a better appreciation of the substantive law. One example already mentioned is in the field of competition law where the court has to construe and apply a statute which uses economic terminology. Terms such as "market" and "competition" and "substantial

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<sup>18</sup> Owen Dixon, 'Science and Judicial Proceedings' in Woinarski (ed), *Jesting Pilate* (William S Hein & Co, 1997) 11.

lessening of competition" and "likely effect" must be understood in the context of the economic purposes to which the statute gives effect. In the field of intellectual property law scholarly discussion of the history, nature and social purpose of such laws is of value. Is the underlying philosophy of intellectual property law proprietary or instrumental or both? How is the balance to be struck between those characters in the application of such laws and approaches to the property rights which they create?

What might be called "non-doctrinal scholarship" found its place in the development of native title law in *Members of the Yorta Yorta Aboriginal Community v Victoria*.<sup>19</sup> In the joint judgment of Gleeson CJ, Gummow and Hayne JJ their Honours equated the statutory concept of rights and interests possessed under an identified body of laws and customs with rights and interests that are the creation of the laws and customs of a particular society. They drew upon the jurisprudential writings of Professor Julius Stone and Professor Honore quoting the latter for the proposition that "all laws are laws of a society or group".

In the field of doctrinal scholarship the legal scholar may carry out a variety of functions relevant to judicial reasoning:

- Historical accounts of the development of a common law rule;
- An historical view of the purpose and history of a particular statute or statutory provision and if it be a statute found in a number of jurisdictions an overview of its application in those jurisdictions;
- Common features of a particular line of cases and organising or classificatory approaches to them;
- Criticism of particular judicial decisions or lines of development;
- Extrapolation, based on existing judicial decisions, of a principled development of the common law or of an approach to statutory or constitutional interpretation;
- Damage control - suggesting approaches to the development of the law designed to mitigate what the scholar regards as a wrong turning by the court.

Judicial use of academic writing is not an essential part of judicial decision making. As John Gava pointed out in his article in the *Melbourne University Law*

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<sup>19</sup> (2002) 214 CLR 422, 445 [45].

*Review* in 2002 about the use of law review articles the High Court under Sir Owen Dixon made little reference to academic writing.<sup>20</sup> That is not to say however and he does not suggest, that it cannot be a legitimate tool in aid of judicial reasoning and accepted judicial method.

In my view it is quite appropriate and useful to refer to legal scholarship for a number of purposes. In some cases a piece of academic writing provides a convenient encapsulation of a matter of history or a line of judicial decision-making which it is not necessary to set out at length in the body of the judgment. Sometimes legal scholarship provides substantive support for a proposition with which the judge or court agrees and is prepared to apply. An academic article may have undertaken a useful analysis of what earlier cases have decided. An article or an opinion expressed in it may have been approved in an earlier judicial decision as containing a correct statement of the law.<sup>21</sup> It is also appropriate for a judge to refer to legal scholarship with which the judge does not necessarily agree. That is not merely out of respect for the work of particular authors but to make it clear that the judge has had regard to alternative approaches even if rejecting them in the end.

Historically judicial attitudes to the citation of academic work have varied. Russell Smyth who has written on this topic referred to an observation by Sir Garfield Barwick that citing academic opinion lessens the authority of the judgment.<sup>22</sup> On the other hand Sir Owen Dixon, Sir Frank Kitto and Sir Anthony Mason had all expressed opinions supportive of the use of academic authorities.<sup>23</sup>

Illegitimate use of academic work in judicial reasoning includes the purely ornamental and the thoughtless padding out of references without direct relevance to the proposition which they are said to support. Reliance upon academic opinions cannot be a substitute for direct consideration of the relevant authorities and statutory

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<sup>20</sup> John Gava, 'Law Reviews: Good for Judges, Bad for Law Schools?' (2002) 26 *Melbourne University Law Review* 560, 562.

<sup>21</sup> See generally, Russel Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court' (1998) 17 *University of Tasmania Law Review* 164.

<sup>22</sup> *Ibid* .

<sup>23</sup> *Ibid* 169.



provisions. Second order or derivative reasoning through the use of academic work does not discharge the judicial function.

Judges read legal scholarship, at least that scholarship whose object is to inform, criticise, suggest developmental approaches or simply clarify the law. On the other hand writing which consists of strident enunciations or clever put downs of judicial decisions of which the author disapproves will generally have little impact on the development of the law. Criticism can be rigorous and stringent but if thoughtful and courteous can also be influential.

There are two relatively recent phenomena about which I have some reservations. The first is the academic article produced with a view to influencing the development of the law in a pending case. I am not saying that this is improper but its value may be discounted to the extent that it smacks of advocacy. The second is the written post-mortem by legal advisers who have been involved in the case including sometimes academics who have participated on one side or other of the cause. It is difficult for people who have been involved in litigation to write dispassionately about it afterwards. Post-mortem recrimination or celebration should not really be classed as legal scholarship.

## **Conclusion - Some Proposals**

In 2008 I made a number of suggestions for projects which the Australian Academy of Law might consider to enliven engagement between members of the legal community. Among those suggestions were the following:

1. An empirical study of the extent of interaction and movement between each of the elements of the legal community and trends in that regard. I should add that this assumes a fairly broad definition of the concept of legal community not limited to academics, legal practitioners and judges, but extending to people engaged in law reform, regulatory work and in-house lawyers employed in corporations, public authorities and government departments.

2. Development of a national system for judges and senior practitioners to spend periods of time as visiting Academy Fellows at university law schools around Australia.

To those suggestions I would add the following:

1. Undertaking the development of an Australian version of the American Law Institute's Restatements adapted to Australian conditions. One such project might be a "Restatement of the Law of Contract".
2. The development of model statutory codes.
3. The development of a process and program for harmonisation of procedural law on a project by project basis throughout Australia.

All of these things provide opportunities for constructive interaction between the judiciary the profession and legal scholars. In such collaborations the broader perspective of the social economic and political sciences can be brought to bear. There are no doubt many other possibilities for the development of the Academy and with it a stronger sense of connection between the groups that make up its membership.