

WHAT IS THE ROLE OF A LEGAL ACADEMIC? A RESPONSE TO LORD BURROWS

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Abstract

In his Lionel Cohen Lecture 2021 Justice of the Supreme Court Lord Burrows argued that the complementary role that academics and judges play is being threatened by a trend in legal scholarship away from practical (or doctrinal) legal scholarship towards one more concerned with ‘deep theory’ and with reasoning from disciplines other than law. This present article challenges some of the assumptions upon which Lord Burrows’ argument is based. In doing this, it asks why legal academics should see their role as one in which they are under a duty to aid the legal profession and the courts, especially given the present expectations about what amounts to good research, adequate methodologies and epistemological sensitivity. It also challenges the distinction between practical legal scholarship and ‘grand theory’. What is needed, the article suggests, is not less grand theory but a greater understanding both of the nature of disciplines and of some of the epistemological conundrums that attach to law as a body of knowledge.

Keywords: Burrows (Lord); epistemology; Frank (Jerome); hermeneutics; judges; legal scholarship; methodology; theory.

Justice of the Supreme Court Lord Burrows in a recent public lecture has examined what he sees as the complementary role that academics and judges play. He views this role as being threatened by the present trends in legal scholarship away from what he calls ‘practical legal scholarship’ towards a scholarship more concerned with ‘deep theory’. This latter kind of scholarship is unhelpful, he asserts, when it comes to

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what the courts find helpful in deciding cases. He is not the first judge, or indeed academic, to air such criticisms. Moreover, his implied defence of practical legal scholarship should be seen within the context of a wider debate about the role of law academics, about the epistemological and methodological foundations of legal scholarship, about the nature of reasoning in law, about legal education and about law as a discipline in itself. The purpose of this present article is, accordingly, to respond to Lord Burrows' lecture, but in a way that embraces more than just the content of the lecture itself. For there are assumptions and unexpressed implications in Lord Burrows' criticisms that need to be exposed and examined. What is the role of a legal academic? Is—and ought—an important part of this role to be one that is complementary to the role of the judge? Or is there much more to the discipline of law than just the judge-as-focal-point? Alternatively, is there much less to the discipline of law than perhaps one might think?

[A] INTRODUCTION: LORD BURROWS' CRITICISM

In his Lionel Cohen lecture Lord Burrows set out to explore three themes (Burrows 2021). These themes were the relationship between judges and academics; the work of academics and how it might help appellate judges; and how the work of a judge is different from that of an academic. There was, however, an overall contextual theme, namely the first of his three themes: that is the relationship between judges and academics. It is this overall theme that lies at the heart of the question that underpins this present response to Lord Burrows. What is the role of legal academics? Of course this is hardly a novel question. Yet what makes it once again pertinent is Lord Burrows' view of what he considers to be the present state of academic scholarship. Thus he said:

The sad truth is that the sort of practical legal scholarship that I am describing—that can directly help a judge in deciding a case—is now regarded by many in academia as old-fashioned and dull. The trend is towards providing deeper theories of the law, whether based on economic analysis, or sociology or philosophy. Plainly deep theory has a part to play in understanding the law. But it is a long way from what courts find helpful in deciding cases. It follows that, in my view, the pursuit of theory should not be at the expense of traditional doctrinal scholarship which can assist the law in action in its most direct form in the courts. The courts want the academic analysis of the law in language and at a level which they can understand and use in their judgments. They want legal reasoning—designed to produce practical justice—and not reasoning from another discipline (2021: 5).

There is, so to speak, much going on in this assertion. What is meant by ‘practical legal scholarship’? What is meant by ‘deep theory’ (and does that mean that there are ‘shallow theories’)? *Is* the role of the legal academic to assist judges in deciding cases? What is meant by the dichotomy between ‘legal reasoning’ and ‘reasoning from another discipline’? These are the sub-questions in need of some examination, although there are other issues as well that might well attract attention (‘practical justice’ for example).

However, before turning to these questions, it might be useful to recall an earlier lecture by Lord Burrows where he discussed the work of the late Sir Gunther Treitel (Burrows 2021a). This lecture is important because it developed in more depth his view of practical legal scholarship. It would be untrue to say that he had nothing but praise for Treitel’s work—Lord Burrows discussed what he considered some of its shortcomings—but on the whole he had mostly admiration. In particular he noted:

His scholarship falls squarely within what one may describe as ‘black letter law’ or ‘practical legal scholarship’ (also often referred to as ‘doctrinal legal scholarship’). It examines in great depth and detail what the judges have laid down in past cases and what precisely are the effect of statutes. His work engages hardly at all with other academic writing. And, in particular, he showed no interest in grand overarching theories, such as moral rights reasoning or economic analysis. Working out, and explaining as clearly and succinctly as possible, the sophisticated patterns of the common law were what inspired him. Perhaps not surprisingly therefore even his writing aimed at students appealed to practitioners and judges. Indeed, as successive editions of his textbook on Contract became longer and more detailed, it may be that judges and practitioners became his primary readership and admired his work the most (2021a: 7).

Lord Burrows also noted that Treitel’s lack of interest in grand theory led him to stop lecturing at one particular American university. He quoted Treitel’s own words on this matter:

[B]ecause at that time the Law and Economics movement held sway in the Law School there with an almost religious fervour; and my apostacy in that regard did not go down well with its high priests. ... I began to be perturbed at the lack of tolerance which was increasingly evident in some leading American Law schools of failure to adhere to this or that theory which was perceived as being the only one in which academic discourse was to be conducted ... I was also perturbed by the criticism, from adherents of such schools of thought, of so-called ‘black letter law’. This concept seemed to me to be a sort of Aunt Sally—an invention of the critics which was easy enough to demolish but which bore no relation to reality. I had long been convinced that the common law was a highly sophisticated instrument which, in its

practical application, was totally different from the ‘black letter law’ invented by such critics (2021a: 8-9; Treitel 2019: 168).

A further sub-question—or at least a question that is associated with the practical legal scholarship one—is, then, this notion of black-letter law (or practical or doctrinal legal scholarship). What is its status vis-à-vis other disciplines such as economics and (or) sociology? Is it somehow ‘theory-less’ and thus stands in opposition to ‘grand theory’? Indeed is there a distinction to be made between ‘theory’ (or ‘shallow theory’) and ‘grand theory’? What, equally, is its methodology? These sub-questions arise out of some of the observations and assertions made by Lord Burrows in his Cohen, and his Treitel, lectures.

[B] ASSISTING THE COURTS

Lord Burrows early on in his Cohen lecture referred to the late Peter Birks who asserted ‘the view that legal academia was a third branch of the legal profession alongside solicitors and barristers’ (2021: 3). Birks had, during the final decade of the last century, instituted a series of seminars and publications on the role of the law schools and on the law curricula. On the former, Birks was of the view that there was a definitional connection between law schools and the courts since ‘everything done in the law schools bears ultimately on decision making in the courts’. Indeed, he continued, a law school which professed to have no interest in decision making in the courts ‘would have defined itself out of existence as a law school’ (Birks 1996a: ix). In the same volume, the late Professor Gareth Jones also defended ‘traditional legal scholarship’ (Jones: 1996). This professor did, however, think that law schools should be pluralistic, but that ‘traditionalists’ should not have to apologize for their own scholarship.

Just what is traditional legal scholarship is in need of detailed examination. However, as such an examination has been carried out elsewhere and in some depth it will not be pursued here, save to say, in agreement perhaps with Treitel, that the reasoning models, schemes of intelligibility and range of acceptable arguments employed by common lawyers are more various and complex than one might at first think (see Samuel 2016; 2018). The problem, as will be seen, is the authority paradigm. For the moment, then, it might be useful to reflect on the question whether the role of a law school is primarily one of assisting the law courts.

There are several questions that might be considered here. Why might the courts need such help given that the common law seemed to develop and to operate over many centuries without any such assistance? Why

should underpaid law academics (in relation to what many practitioners and even judges earn) be obliged to assist a profession which does not itself make any serious financial contribution to university legal education? Indeed it makes no serious financial contribution to the issue of access to justice with the result that few people can ever afford to go to court, or even consult a lawyer? Why should university academics provide free advice to highly paid barristers? Why should a university academic be under a duty to a particular sectional interest (judges and practitioners) rather than owing a general and overriding duty to the public at large with regard to the pursuit of knowledge and to higher education? Lord Burrows in his Cohen and Treitel lectures gives no consideration to these questions. Instead, what we get by nearly all those who assert a Birks, Gareth Jones and Burrows line, is reference to an article published 30 years ago by an American judge in which the judge laments a growing distinction between legal education and the legal profession as reflected in the (American) law journals (Edwards 1992). To quote Lord Burrows:

Unfortunately, the disjunction that Edwards described in the USA is in danger of also becoming an accurate description of the relationship between law schools and the courts in England and Wales. We are hovering on the brink. From what I have already said, it can be seen that this turnabout has been remarkably swift. From having had relatively little influence on the courts until the late 1960s, legal academia appears to have enjoyed a golden age of influence for some 40 years but now looks as if it may be intent on throwing away the baby with the bathwater by giving the impression that what goes on in the courts, as a matter of legal reasoning and argument, is rather too dull and straightforward for high academic minds (2021: 6).

There are, in fairness to Lord Burrows, several responses that one might offer in respect of the critical questions set out above. The first is historical. It may be that the common law was able to develop without the help of law faculties, but in the civil law tradition the history of universities in Europe is almost synonymous, in the medieval period at least, with the history of law teaching and juristic commentary. It was the doctors and the professors who were the primary source of the law—at least the law of the *ius commune*—in the sense that it was these teachers and professionals who interpreted the Roman law texts and whose commentaries on them made Roman law, as interpreted by them, the living law of Europe (Brundage 2008). In other words, if one takes a European rather than just an English view of legal knowledge that knowledge is historically very closely associated with professors, with jurists, more than judges (Van Caenegem 1987). Given that legal education in England and Wales was to come in for some pretty devastating criticism by a Parliamentary Commission, which reported in 1846, and which recommended that

England adopt a ‘scientific’ approach to legal knowledge (Parliamentary Select Committee on Legal Education 1846) , it could well be argued that the European model was one that came to find official favour in England and Wales (see also Stein 1980: 78-92). Put another way, law in practice, as well as in books, needs its jurists. Against this argument, however, is the fact—as indeed recounted by Lord Burrows in his Cohen lecture—that judges never appeared to welcome this juristic input until the end of the last century. Some judges and practitioners were—and some still are—of the view that a law degree was (is) a waste of time and that law academics themselves are, at least if Megarry J was to be believed (as recounted by Lord Burrows), of rather feeble character (2021: 2). No doubt Megarry had in mind the robust character of a judge such as Lawton LJ, who had in his earlier days had been an admirer of Sir Oswald Mosely and whose tolerant views were sometimes displayed in his quoted remarks.

Another response is what might be termed an epistemological one. This is a response that sees legal knowledge as being a matter of rules and principles with the role of the appellate judge being twofold. He or she is to apply rules to particular factual situations while at the same time trying to develop a principled approach; and it is in this role that the judge could do with serious help. This is one of the key justifications employed by Lord Burrows. As he explained:

In understanding the complementary role that academics and judges play, it is clear that, crucially, the writings of academics can help to place a particular dispute into a larger context and can thereby assist the proper judicial development of principle. Practitioners and judges, by training, have had to deal with cases by spending a great deal of time focussing on the facts. In contrast, academics generally take the facts as a given and are primarily interested in the law and its application to the given facts (2021: 4-5).

And he continued:

The academic therefore approaches a case not bottom-up from the facts but top-down from the law. In simple terms, what the academic can bring to the appellate judge is the big picture of the law. He or she can provide the judge with how it is that the particular case fits or may fit within the larger coherent whole that comprises the common law. The academic is also well-placed to explain relevant policies and to offer critiques of past decisions (2021: 5).

This may be a justification that has some resonance, at least with some academics (Cownie 2004: 197-199). Yet there are a number of epistemological assumptions that other academics might find debatable.

[C] LEGAL ONTOLOGY

Is knowledge of law a matter of knowing rules and principles? One of the benefits of studying Roman law, which was once a core element in the university law curriculum, is that such an epistemological thesis is not that easy to apply to apply to the *Corpus Iuris Civilis*. That rules (*regulae*) and principles (*regulae iuris*) were a feature of the law cannot be doubted (Stein: 1966). Yet, equally, it cannot be doubted, either, that there was more to legal knowledge than just rules and principles. Indeed, the jurist Paulus specifically disclaimed rules as a source of legal knowledge; they are simply brief summaries (Dig 50.17.1). The notion that legal knowledge is knowledge of rules and principles is a much later idea associated with the jurists such as Jean Domat (1625–1696) and Joham Heineccius (1681–1741), although the roots are to be found in the work of the Post-Glossators (see generally Gordley 2013). Knowledge of law was as much about factual situations and their resonance in legal thinking as about learning a set of normative propositions. The Roman jurists were not top-down operators. They could certainly see the bigger picture as their *institutiones* demonstrate, but they equally operated within sets of facts using their concepts as a means of organizing a social reality so that they conformed with their legal reality (see further Samuel 2018: 33-56; Schiavone 2017).

Another assumption is this. Is knowledge of law a matter of fit and coherence? Such notions—fit and coherence—imply that there is something ‘out there’ which is separate from the mind of those observing it. Yet this assumption is not as solid as it might traditionally appear. What is supposedly ‘out there’ can only be accessed by the mind which in turn means that anyone attempting to describe the law is actually, at the same time, writing it (Forray & Pimont 2017). Each subjective description is nothing more than a subjective interpretation of what is supposedly ‘out there’. There are of course solid texts. Is there a text in English law dealing with the restitutionary issues arising out of a frustrated contract? Here one can say there is something ‘out there’, that is to say the printed Act of Parliament (Law Reform (Frustrated Contracts) Act 1943). But its words are meaningless until processed and interpreted by a subjective mind and such an interpretation is something that lodges only in the subjective mind. Now one might of course argue that with regard to a particular text a majority of lawyers—the ‘view of the profession’—all agree on the same interpretation and thus, one might conclude, there is an objective, ‘out there’ interpretation. Yet care must be taken here. One could point to a church full of people and declare that they all subjectively believe in the existence of the same God. However, this does not mean

that God is objectively ‘out there’. Fit and coherence are, then, simply notions used seemingly to organize something ‘out there’ which in reality is only out there as a mass of texts full of words. It is more subjective as a so-called science than astrology, this latter at least having an objective universe whose movements and conjunctions are observable (even if the observations derived from these movements are drivel).

Fit and coherence can, accordingly, be seen as a ‘map’ trying to make sense of a ‘territory’ (Mathieu 2014). The problem is that there is no territory; there is only the map. Black-letter law textbooks are nothing more than maps trying to chart a territory that is defined not in itself but by the map. The late Tony Weir—someone who admittedly detested ‘grand theory’ (1992: 1616)—came very close to recognizing this when he announced that ‘tort’ is what is in the ‘tort textbooks’ and that the only thing holding tort together is the binding of the book (Weir 2006: ix). Three centuries before the publication of Weir’s book there was no tort. There were cases that subjectively—that is to say in the minds of a group of later lawyers and jurists in awe of Roman law learning—came to be regarded as ‘tort’ but that is all (see generally Ibbetson 1999). Tort is just an invented map of a territory that tomorrow could be charted by a totally different map which of course would result in a completely different territory. Again, astrology, as has been seen, has a firmer base in that the map—as ludicrous as it may be—at least has an objective territory, namely the stars and the planetary system.

Two immediate questions arise. Cannot judgments be seen as an objective territory to be mapped? And, anyway, does it matter whether or not law is ‘out there’? With regard to the first question, Lord Burrows quotes from Professor Jane Stapleton:

A core feature of this type of [doctrinal] scholarship is that it takes the judicial role very seriously. It places at centre stage what judges do, how they understand their role, the reasons they give in justification of their decisions, and the vital constitutional responsibility they bear to identify and articulate developments in the common law. ... It is because of its tight focus on judicial reasoning that reflexive tort scholarship is so well placed to assist judges, and indeed to collaborate with them in the process of the identification and articulation of the common law ... [T]his is at least as thrilling a prospect for a young legal scholar as any offered by grand ... theories (2021: 6; Stapleton 2021: xvii).

That the judicial role should be taken seriously, few would doubt given the vital constitutional role that judges hold. They are very valid subjects of research. Yet doctrinal legal scholarship often only permits a certain kind of research. Thus the moment an Oxford undergraduate analyses a

string of precedents in terms of a sociological and (or) political programme of research—she analyses the cases in terms of the judges’ social and educational backgrounds or she treats all judges as expounding a political theory—the student is putting at risk her exam mark. She might have an extraordinarily good knowledge of the social science literature devoted to judges and their empirical role in society, yet this could well count for nothing. She might have an extensive knowledge of a range of cases and judgments dealing with causation in law, but if she argues that most of the judicial reasoning is little more than Latin-infested twaddle and what really seems to decide cases are the social, political and (or) economic ideologies of the judiciary she might well fail (one has to discuss notions such as ‘but for’ or ‘last opportunity’). If she discusses carefully, and on the basis of a solid feminist academic literature, the misogyny in play in the judgments in the case of *Miller v Jackson* (1977) or she focuses on the right-wing political and economic ideology seemingly approved by Lord Reed in the case of *R v Secretary for Work and Pensions* (2018: paragraph 66) she might well fail. This is not ‘legal science’, she might be told.

The second immediate question is this: does any of this matter? Arguably it does because fit and coherence are fictional devices. In saying this one is not intending a pejorative comment. Fiction is used here in the sense attributed to it by Hans Vaihinger who argued that all concepts in all the sciences are nothing but fictional devices whose value is to be judged only by their pragmatic utility (1924; and see Bouriau 2013). If Vaihinger is right, and that what is really in play is that doctrinal lawyers are acting ‘as if’ legal notions and concepts are true, then the only way in which they can be epistemologically validated is through pragmatic functionalism (otherwise law is difficult to distinguish from other fictional systems such as astrology). Are fit and coherence useful ‘as if’ notions? Much of course depends on the constructed model within which fit and coherence are to be assessed. In the civil law tradition this model, as Alan Watson has shown, is the institutional model as set out in the *Institutes of Justinian*; it was this model that got received into modern Europe (Watson 1994). In the nineteenth century it even influenced aspects of the common law, although the complete model itself can be made to fit the common law, if at all, only with great difficulty (Hackney 1997). The taxonomy of this model is too well-known to need repeating here, but the categories that have been adopted into the common law—contract, delict (tort), property and public law—are far more ambiguous than textbooks might like one to think. Are they repositories for rules, for principles, for rights, for duties, for remedies, for interests or for some other ontological focal point?

[D] THE CASE OF THE DEFECTIVE SWIMMING POOL

This question is important because each focal point can act as the basis for a ‘theory’. C (a very tall man) contracts with D for the latter to construct a swimming pool for an agreed price in C’s garden, the contract stipulating that the pool must be of a certain depth; on completion the pool is found to be nine inches short of the required depth. Does C have to pay for the pool? Can C claim damages for breach of contract and, if so, for what amount? How does the doctrinal lawyer approach these questions in terms of fit and coherence? The first approach is to focus on the textbook rules. One rule states this: a failure to conform to the stipulation amounts to a non-performance of the contract and in such a case the contracting party does not have to pay until there is full performance. However, there is another rule which states that where there is a substantial performance of the contract the contractor has to pay the contract price less an amount which represents the shortfall in performance. Yet another rule states that where there is a breach of contract the party in breach is liable in damages and that the amount of damages must be such so as to place the contractor in the position he would have been in had the contract been properly performed. Now this non-performance rule gives rise to a factual question. Has there been substantial performance? One difficulty here is that to make the pool conform to the stipulated depth it would have to be completely rebuilt from scratch so to speak. One cannot return with a few shovels and dig a bit deeper. So how is performance to be gauged? One could talk, as judges often do, in terms of reasonableness. Yet is a contractual item that does not conform to the contract a reasonable contractual item? If viewed in terms of the contract model (fit 1) it cannot be so by definition, for it is the contract that defines reasonableness. However, if one abandons the contract model and applies a definition using a model of assessment outside of the contractual one (fit 2), then it becomes possible to redefine the facts themselves.

As a result of this ambiguity, C might decide not to pursue the non-performance route given the clear alternative rule about damages (fit 3). There is a definite breach of contract and so, logically it would seem, he is entitled to an amount of money that will equip him to have a pool of the stipulated depth; in other words he is claiming damages that would amount more or less to the original contract price. The consequence of focusing on the rule, then, is that C has to pay D but D has to repay the money as damages. This solution is, seemingly, one that ‘fits’ a rule model

that is 'coherent' in its relationship between the measure of damages and the breach of a contractual term. C is advised, on the basis of this logic, by his lawyers to go to court and to claim damages. This he does, but he only gets a small fraction of the damages claimed and is landed with costs which, because the case has travelled all the way up to the top court, are enormous (*Ruxley Electronics Ltd v Forsyth* (1996)). He finds himself bankrupt, with no pool and no home and possibly no family. Well, one might say, so much for clear rules; so much for fit; and so much for coherence.

Why has C found himself in this position? The first reason is the finding of fact by the trial judge: C had received a 'reasonable' pool. But let us test this finding. Imagine that when the pool is completed C is unaware that the depth is less than the one stipulated in the contract. He dives into the pool and his head strikes the bottom so hard that he ends up paralysed for life. Expert evidence indicates that had the pool been nine inches deeper, C would have possibly hit his head but not in a way that would end with a catastrophic injury. Viewed in this light, can it really be said that the pool is reasonable? Would not the breach of contract be the cause of the catastrophic injury? The response might be that this is a hypothetical situation and that the actual case must be viewed within its own facts and with regard to the remedy being claimed. It is, it might be argued, unreasonable that C should have a reasonable pool for which he pays nothing. Indeed, if he pays nothing, then it is the constructor that might find itself bankrupt. So, as against the two parties, is it better from a remedies viewpoint that the consumer rather than the supplier is the one who goes bankrupt despite the clear breach of contract by the constructor? Against this question, the doctrinal lawyer will probably point out that the breach has not been ignored. C has been awarded some damages for his disappointment for not getting the pool for which he contracted (*Ruxley Electronics Ltd v Forsyth* (1996)). In other words there has been a subtle shift from the swimming pool to the mind of C; it is not the non-conforming pool that is the damage but the mental expectation of the consumer which has been harmed. In short the judges have moved from one fit-and-coherence model (rules) to another model (remedies) which permits them to see the whole of the case as one of reasonableness. Model-shifting allows courts to do what they wish. So much for doctrinal law and its fit and coherence.

Now it must be stressed that in itself there is not necessarily anything wrong with this model flexibility. What surely matters, from a Vaihinger epistemological viewpoint, is the result and what that result means in terms of its social, economic and (or) political consequences. So, why did

the judges decide for D rather than C? Simply focusing on the formal fit-and-coherence model might well be enough for some law academics, but it hardly tells the world very much in terms of knowledge. One might just as well focus on an astrological model and its fit-and-coherence characteristics. No doubt the academic lawyer can contribute something or other to this modelling. A comparative lawyer might write an article claiming that the swimming pool case is best seen from a rights model perspective; C had a right to a new pool but to enforce the right would have been unreasonable. It would have been an abuse of a right. Yet this does not really get one much further in terms of social science knowledge. In fact it begs a question. If the consumer in the swimming pool case was being unreasonable in enforcing his contractual right, why did the court find it reasonable in another case that a contractor could enforce what was clearly an abusive and absurd term in a leasehold contract (*Arnold v Britton* (2015: 36)? One law for the consumer and another for the commercial firm one might say.

One might add that the case illustrates how the individualistic model is inadequate because one important issue that is in play is the general consumer interest. Does this case advance the consumer interest or the commercial interest of suppliers? The doctrinal lawyer can of course point out this interest conflict, but how much further in this analysis can she go? As will be seen, one comes up against the authority paradigm which, for the doctrinal lawyer working within this paradigm, will mean that the investigation has to stop short of any ideological investigation as to why a particular group of men chose to favour the commercial corporation—and not it would seem a very competent one at that—over the individual consumer. The truth is that all this fit-and-coherence formal modelling is a smokescreen for something else that is going on. And it is this something else that is likely to attract those academic lawyers who see only a limited knowledge exercise in playing formalistic reasoning games. This is one reason, perhaps, why a proportion of those in law schools are moving away from traditional black-letter work.

[E] REALISM VERSUS FORMALISM

One way the doctrinal jurist can dismiss this critique is simply to write it off as realism—the ‘jurisprudence of despair’ as one Oxford law professor has described it (Häcker 2019: 61). The primary culprit here, at least for the late Peter Birks, was Jerome Frank (Birks 1996b: 4). This jurist and lawyer—he had a serious legal career—is best known for his particular view of realism, that of ‘skepticism’. There were, he said, two groups: the rule skeptics and the fact skeptics. Frank himself focused on fact skepticism

and argued that the ‘chief obstacle to prophesying a trial court decision is, then, the instability, thanks to inscrutable factors, to foresee what a particular trial judge or jury will believe to be the facts’ (Frank 1949: xi). He argued that ‘the major cause of legal uncertainty is fact uncertainty—the unknowability, before the decision, of what the trial court will “find” as the facts, and the unknowability after the decision of the way in which it “found” those facts’. If one returns to the finding of the trial judge in the swimming pool case, it is extremely difficult to escape Frank’s words: the finding of ‘fact’ that the swimming pool was ‘reasonable’ was surely one element that contributed to the final outcome of the case. And what of the judges themselves? Frank also had something to say on this. ‘What’, he said, ‘are the stimuli which make a judge feel that he should try to justify one conclusion rather than another?’ (1949: 104) Certainly, he conceded, the rules and principles of law are one such stimuli. ‘But’, he continued, ‘there are many others, concealed or unrevealed, not frequently considered in discussions of the character or nature of law.’ (1949: 104-105) Interestingly, while he noted that reflection by any open-minded person would lead to an appreciation that political, economic and moral prejudices must be operating in the mind of the judge, these categories, he said, are too gross, too crude and too wide (1949: 105). There are multitudinous other hidden factors in play, ‘depending often on peculiarly individual traits of the persons whose inferences and opinions are to be explained’ (1949: 106).

These hidden factors have been discussed by others over the decades and will not be revisited, as such, here. But to describe Frank’s social science analysis of judge and jury as the jurisprudence of despair would surely give rise to a certain puzzlement on the part of academics from outside law. Indeed it would be odd if professional lawyers did not on occasions take into account some of these hidden factors when deciding whether or not to take a case to an appellate court. So what encourages an Oxford academic to make such a remark about Frank? There are two possibilities worth examining in a little more detail, although this is by no means to assert that there are not other possibilities worthy of attention.

The first possibility is the authority paradigm. This is a paradigm, which has been discussed elsewhere, that applies to texts that in themselves have a complete authority which cannot be questioned (Samuel 2009). In religious studies one thinks of the Bible or the Qur’an where these texts have for their scholars an absolute authority. The same authority applies to official legal texts, primarily legislation, but also judgments rendered in particular by the appellate courts. These texts can be criticized in terms of their style, scope, understanding and application of the law and so on,

but they can never be dismissed. Moreover the paradigm places limits on the nature of criticism permitted to commentators on official legal texts. Arguments considered *ad hominum* would not be acceptable to doctrinal jurists operating within the authority paradigm, nor would criticisms that attacked the integrity of the judiciary, although things might be different if a judge clearly made a case his or her own (as the Roman lawyers used to say). Even sociological arguments have been criticized by the judiciary as unhelpful. For example Lord Goff (a judge much admired by Lord Burrows) said in one case that after he had consulted the relevant academic writing:

I feel driven to say that I found in the academic works which I consulted little more than an assertion of the desirability of extending the right of recovery in the manner favoured by the Court of Appeal in the present case. I have to say (though I say it in no spirit of criticism, because I know full well the limits within which writers of textbooks on major subjects must work) that I have found no analysis of the problem; and in circumstances such as this, a crumb of analysis is worth a loaf of opinion. Some writers have uncritically commended the decision of the Court of Appeal in *Khorasandjian v Bush* [1993] QB 727, without reference to the misunderstanding in *Motherwell v Motherwell*, 73 DLR (3d) 62, on which the Court of Appeal relied, or consideration of the undesirability of making a fundamental change to the tort of private nuisance to provide a partial remedy in cases of individual harassment. For these and other reasons, I did not, with all respect, find the stream of academic authority referred to by my noble and learned friend to be of assistance in the present case (*Hunter v Canary Wharf Ltd* (1997): 694).

One wonders whether those academics who wrote commentaries on *Khorasandjian* felt rather surprised by Lord Goff's comment since the decision itself seemed obviously the right one from a functional analysis. Indeed, in the same case, Lord Cooke appeared both to accept this justice view and to cast doubt on the kind of 'analysis' that so appealed to Lord Goff. As Lord Cooke said:

In logic more than one answer can be given. Logically it is possible to say that the right to sue for interference with the amenities of a home should be confined to those with proprietary interests and licensees with exclusive possession. No less logically the right can be accorded to all who live in the home. Which test should be adopted, that is to say which should be the governing principle, is a question of the policy of the law. It is a question not capable of being answered by analysis alone. All that analysis can do is expose the alternatives (*Hunter v Canary Wharf Ltd* (1997): 717).

One might think that Lord Cooke's comment is reasonable enough. Yet for some academics it would, it seems, be verging on the kind of heresy to be found in the pages of Jerome Frank's book. Thus in his examination

of philosophical foundations of doctrinal scholarship, Dan Priel describes a certain type of doctrinal scholar—one he calls a conceptualist—as being ‘hostile to discretion’ and who thinks ‘of policy (and politics) as the antithesis of Law’ (Priel 2019: 171). Priel himself soon disposes of this conceptualist thesis for the nonsense that it is, but at the beginning of his chapter he makes an interesting observation about doctrinal scholars in general:

They see themselves as ‘practical’ scholars who aim to help the courts reach better decisions, and they do that by a careful reading of the cases seeking to derive from them a coherent set of rules and principles already found in them, a task for which there is no need for any serious knowledge of history, economics, psychology, or philosophy (2019: 165).

This is interesting not just because he supports this statement with a reference both to Andrew (now Lord) Burrows and to Gareth Jones’ defence of traditional legal scholarship but also because the doctrinalists are united by a fundamental idea, namely ‘that law is in some important sense autonomous from other disciplines’ which ‘makes appeal to other disciplines at best unnecessary and possibly confusing’ (2019: 166-167; see also Burrows 1998: 113; Jones 1996). There is, in other words, a common enemy: ‘interdisciplinary approaches to the study of law’ (Priel: 2019: 167).’

This leads us to the second possibility behind the remark that Frank represents the jurisprudence of despair. Frank and his Realist colleagues threaten the formalist and independent nature of law. As Priel puts it, ‘other approaches, perspectives or disciplines may provide observations *about* law (that it tends to contribute economic growth, that it favours the rich and powerful), but they cannot contribute to the study *of* law’ (2019: 167). Again Priel is able without much difficulty to dispose of this Kantian-based idea that law is, and should remain, isolated from other disciplines. ‘Truths about the world’, he rightly points out, ‘are not themselves “legal”, “chemical”, “economic”, or “psychological”’: these are human categories imposed upon reality that itself does not contain them’ (2019: 180). This imposition means that disciplines are also a matter of consensus; it is a question of social choice. In order to understand this choice it is equally important to understand the tensions that underpin such choices. Many of these tensions are epistemological. What is it to have knowledge of the discipline in question? In the case of law, what is it to have knowledge of law? Here there are several unresolved tensions, some of which have already been exposed. In particular there is this tension between formalism and realism, but within this tension

there is another: does knowledge of law embrace or exclude the law-maker? Frank's work embraces the law-maker (judge and jurors) within his vision of legal epistemology whereas the conceptual doctrinalists do not; for the doctrinalist law is something 'out-there'—for example a system of principles, rules or rights—which is separate from the law-makers. As one conceptualist has put it, '[e]ven if we closed all the courts, and civil recourse were completely abolished, this would not alter the existence of private law and its duties' (Stevens 2019: 121). Yet there is a paradox. The doctrinalists do in part end up including judges within their epistemology because they imply a normative methodology that is centred around fit-and-coherence. This methodology was well articulated by the late Ronald Dworkin: the judge 'must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well' (Dworkin 1977: 116-117). And it is this construction that provides the model for his or her interpretative reasoning.

However, what the doctrinalist is asserting about the discipline of law must not be confused with the question of knowledge of law (Lenclud 2006: 91). The two are separate. Knowledge of law is not subject to consensus in the same way in that its validation is open to other factors that are independent of assertions by the doctrinalists or indeed by others. This said, while the separation between discipline and knowledge is evident in the natural sciences, it is not so evident in law because the distinction between science (map) and object of science (territory) is not just unclear but may not exist at all (see further Glanert & Ors 2021: 1-30). There is thus an epistemological tension between discipline and knowledge which permits some doctrinalists to assert that only a certain type of knowledge—for example only authoritative texts (legislation, judgments and doctrinal commentary)—is to be included within the discipline. In other words, the discipline is truly a matter of discipline, one which must be policed to exclude certain forms of knowledge that is deemed to belong to other disciplines. This is reminiscent of the problem of heresy in Christian dogma. In fairness to Lord Burrows, he does not appear to be asserting this quite extreme position and he may even be aligning himself against some of the conceptual doctrinalists who are advocating a 'grand theory' with regard to, say, tort or private law in general. But what he perhaps is not appreciating is the fact that traditional doctrinal law now finds itself caught between a significant shift in the tension between discipline and knowledge as a result of research-funding developments within the university world.

[F] RESEARCH AND METHODOLOGY

When Lord Burrows started his academic career in the early 1980s advancement largely depended upon one's record of publication. Such publications would be refereed by other jurists and doctrinal works would probably be judged by other doctrinalists. One or two leading publications had no blind refereeing procedure, decisions being made by the editor with perhaps some input by a colleague (Anonymous 2021). Over the decades that followed this position was gradually to change, stimulated largely by the shift in the financing of research which became based on research assessment exercises (Cownie 2004: 136-137). Today advancement depends not just on publications but equally on the ability to attract research funding from various different, often non-governmental, funding bodies and academies. Funding applications and proposals would usually be assessed by panels that contained academics from outside law and who had sophisticated expectations regarding research questions and methodology (Van Gestel & Lienhard 2019: 447).

As two continental jurists have pointed out, this has created something of a problem for traditional legal scholars in that 'they have great difficulties in explaining their scholarly methods and how they approach theory building to reviewers from other disciplines' (Van Gestel & Lienhard, 2019: 447). More generally these two authors note from their own edited book project, which evaluated legal research in Europe, the following conclusion:

Perhaps the most important thing we have learned from this book project is that legal scholars are not particularly good at reflecting on their own discipline. What is almost entirely absent is a transnational debate with regard to the quality, methodology and scientific relevance of legal research. As far as there is debate in the national context, legal scholars often seem to be convinced that 'law is different'. However, they fail to sufficiently explain how and why (2019: 449).

Professor Mark van Hoecke has also been critical of legal doctrine. He says that 'it is often too descriptive, too autopoeitic, without taking the context of law sufficiently into account'. It equally 'lacks a clear methodology and the methods of legal doctrine seem to be identical to those of legal practice'. He concludes that 'it is too parochial, limited to very small scientific communities, because of specialisation and geographical limits'. As for the quality of the scholarship, 'there is not much difference between publications of legal practitioners and of legal scholars' (2011: 3).

This is pretty damning. Lord Burrows goes somewhat in recognizing this funding issue in quoting from the Australian judge the Hon Chief Justice

Susan Kiefel who herself mentions how funding pressures may be diverting law academics from the kind of research that helps judges and professional lawyers (2021: 6). However, Lord Burrows does not seem to help his case when it comes to methodology. He admits that judges do not in general articulate nor, perhaps, seriously think about their own methodology but then goes on to explain the academic's method. This 'practical legal scholarship tends to employ what is generally referred to as an "interpretative" methodology which seeks to provide the best interpretation of the content of the law applying criteria such as fit, coherence, accessibility, practical workability, and normative validity' (2021: 10).

This is by no means a mindless statement, but if set out in the methodology section of a research grant application it would probably, for the non-lawyers on the panel, raise more questions than it answers. Lord Burrows seems to be emphasizing a hermeneutical scheme of intelligibility ('interpretative'), but then moves quickly into conceptual structuralism (fit and coherence) and after that into a kind of functionalism (practical workability). So, the social scientist might ask, what is going on here? Is this just some kind of lightweight engagements at the level of schemes of intelligibility (on which see Berthelot 1990: 62-85; Samuel 2018: 273-276)? If not, how do the different schemes relate to each other in this doctrinal method? Is one scheme, say structuralism (fit and coherence), to have priority over another scheme, say functionalism? In sum, what is the principal methodology in play here and how does it operate in the production of (new?) knowledge? Moreover, what is meant by 'best' in this scheme? How is 'best' to be judged?

A film studies and literature professor might say that anyone who claimed to provide the 'best' interpretation of Alfred Hitchcock's *Vertigo* (1958) would surely be suffering under some kind of epistemological delusion, unless 'best' was clearly underpinned by a pre-articulated set of criteria. A specialist in hermeneutics on the panel is likely to pose questions about how one is going to engage with the texts in issue. Is it a text in which the author's intention seems evident or is it one in which the interpreter will bring her own world view into the text? What kind of pre-judgement or pre-understanding will the interpreter bring to her interpretation? Is she projecting meaning onto the text or is the text projecting onto her its own meaning? How will the researcher go about engaging with these questions? The historian is going to pose questions about old cases. What kind of language will be used to describe the factual situation in past cases? What if the case is several centuries old: is it to be engaged with via its own time period mentality where the social and procedural contexts were markedly different or through the mentality

of a contemporary analyst? Take a case like *Paradine v Jane* (1647) often discussed in contract textbooks under the chapter on frustration of contracts. How can one discuss this case in relation to contract and frustration when there was neither a general theory of contract in 1647 nor (obviously) any doctrine of frustration? Is one not indulging in historiographical nonsense? Turning to fact, how do the legal texts under examination relate to the facts of these cases which, presumably are also being examined? In brief, it will be asked by members of the panel: what is meant by ‘fit’, by ‘coherence’, by ‘accessibility’, by ‘practical workability’ and by ‘normative validity’? And what are the methodological and epistemological implications attaching to these words and terms?

The doctrinal jurist can try to respond to these questions in a number of ways. The first, and one associated with Lord Goff, is that it is a matter of principle. ‘It is in the formulation, if necessary the adaptation’, said Lord Goff in a passage quoted by Lord Burrows, ‘of legal principle to embrace that just solution that we can see not only the beneficial influence of facts upon the law, but also the useful impact of practical experience upon the work of practising lawyers in the development of legal principles’ (2021: 10; Goff 1983: 325). The methodological pursuit, the doctrinalist might say, is the search for principle. This of course suggests an inductive exercise in which a number (perhaps quite large) of legal texts are examined in order to formulate from them an abstract *regula iuris* which would then be employed in something of a deductive manner to provide solutions for future cases. This was a method formulated by the medieval Italian jurists (see Errera 2006) However, as the late Christian Atias once pointed out:

In any event, the passage from a general rule—or anterior decision—to the solution of a concrete case cannot be analysed in a simple deductive process of application; the subsumption of an individual case under the rule brings into play multiple circumstances, elements and variables which prevent any claim to predict with certainty its result. Among these multiple givens always somewhat conflicting, debatable and indeterminate, where is the truth with regard to the law said to be positive? (1994: 119)

Where, then, is the truth, the panel might say? What kind of methods will be brought to bear on this passage from rule to solution? It is not clear how a doctrinalist might answer these questions, especially given both the authority paradigm and the apparent interdiction to refer to Realists such as Jerome Frank (the jurisprudence of despair).

A second response might be to refer to the late Ronald Dworkin’s chain novel analogy. This legal philosopher suggested that the role of a judge is rather like that of an author participating in a chain novel:

In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity In our example ... the novelists are expected to take their responsibilities of continuity ... seriously; they aim jointly to create, so far as they can, a single unified novel that is the best it can be (1986: 229).

Whatever one might think of this analogy, it would make quite a sophisticated response to social scientists and humanities academics in as much as it suggests that doctrinal jurists are involved in a constructive intellectual exercise. Both judges and jurists are constructing a model that both makes sense of past decisions (precedents) and legislative texts and permits lawyers to predict how the courts will behave when faced with difficult cases. This is a similar form of modelling, it might be argued, to the one used by natural scientists who construct models which both explain a phenomenon and predict its future behaviour.

The difficulty with the model is how to explain its elements. Of what does it consist? Dworkin himself saw it as a rights model—judges should be concerned only with the rights not policy—but what lies behind these rights would appear to be legal principles (1977: 90). One is back to the problem of explaining how one gets from a principle to a solution. Dworkin did not avoid this issue; far from it, since he developed a thesis of legal reasoning founded on argumentation. Law is about interpretative arguments and these arguments are not equal in their weight. One argument is always superior *vis-à-vis* another and the role of the judge—perhaps aided by jurists—is to find the argument which is superior to all others and this will form the right answer in the hard case (well expressed in Dworkin 1995). This exercise, however, as Dworkin admitted, is superhuman and thus Dworkin again made use of fiction in creating his superhuman judge. His model, in the end, does not actually reflect the chain novel as an empirical exercise; it is entirely an exercise in idealism. What, then, it might be asked, is the social value of this model if it can only function at a superhuman level? The answer no doubt is to say that it is an ideal to which human judges (and no doubt jurists) should aspire. Yet, if the model does not actually reflect what judges do—for example judges in the common law world (and civil law world it would appear: Lasser 2004) do use policy arguments and many have been sceptical of a rights thesis (see for example Waddams 2011)—where does that leave the doctrinal scholar?

Another difficulty with the Dworkin model—indeed with many legal analysis and reasoning models—is the highly individualistic nature of a rights thesis. In the Roman model, private law is about relations between individual persons and individual things (law of property) and about bilateral relations between individual persons (law of obligations) (Birks 2014: 13-14). As for corporations, these are treated on the whole as if they are individual persons with the same status as human individuals (on which see Duff 1938). Such an individualistic model is not always inappropriate since individuals and their interests ought to be recognized and protected. Yet it is also inappropriate in that to view society as if it consisted only of individuals of equal economic status and capacity is to create a model that clearly does not represent a good many Western countries in which a range of corporations have such enormous economic power that they can influence economics and politics in profound ways. Moreover the industrial revolution gave rise to certain activities—on the roads and in the workplace in particular—which resulted in a largely predictable number of deaths and injuries each year. To apply a legal model that is, in the case of English law, no different from the one employed by the Roman jurist Alfenus in Republican Rome might well seem completely and totally bizarre to many in other disciplines (Dig 9.2.52.2; cf *Mansfield v Weetabix Ltd* (1998)). Appeals to commutative justice seems a bizarre method of dealing with the accident compensation issues arising out of activities that in themselves generate accidents.² Certain activities have human costs and surely, social justice demands, these costs should not be externalized onto the individual, especially as the activities in question contribute to the public benefit?

In fairness some law academics and even judges have urged reform. But when one looks at the response of some doctrinalists one wonders what academics from other disciplines might make of them. Take this example:

The fact that someone else may end up picking up the tab for A's negligence—A's insurer, or A's employer, or in the case where A is a public body or works for a public body, the state—is irrelevant: what is crucial is that there was a tab and it would have had to have been picked up by A if nobody else paid. In this way PI [personal injury] law shows that the duty of care that its first tier imposed on A for B's benefit was not an empty aspiration, but had real force (McBride 2020: 12).

And this professor later concluded:

² Comparative lawyers seem more rational with regard to accident compensation: see eg Jolowicz (1968); Tunc (1972).

When the Church of England proposed to update its forms of service, abandoning the traditional Book of Common Prayer, WH Auden asked, 'Why should we spit on our luck?' We would, I suggest, be guilty of the same were PI law to be dispensed with in this country (2020: 14).

This is a response by an academic lawyer to a speech by a retired Supreme Court judge who thought that serious reform was needed in the area of personal injury law (Sumption 2018). No doubt there will be young academic lawyers who will respond to this kind of individualistic morality often associated with philosophers who lived in times long before the advent of motor vehicles, trains, factories and multinational insurance companies. But as a reasoning model of contemporary society it is surely as reliable as the contents of the Book of Common Prayer. This latter book brings huge comfort to many—as indeed does astrology—but few astrophysicists and social scientists would see the book as providing an accurate model of the universe or of contemporary industrial societies. In short, doctrinal law seems, at least in the common law world, to be a 'map' charting a fictional social territory. Indeed, such an individualist model is nothing short of a right-wing political ideology hiding behind a legal model that is no more scientific than some astrological chart which assigns to humans various supposed characteristics and which warns them not to venture out on a car journey when Mars is in some special alignment with Jupiter.³ One is back to the fundamental (Vaihinger) question. What is the pragmatic value of doctrinal scholarship? The cynic might argue that it is the protecting of profits of insurance companies and incompetent builders.

[G] CONCLUDING OBSERVATIONS

Nothing said in this response to Lord Burrows should actually be taken as suggesting that there is something intellectually illegitimate in traditional legal (or doctrinal legal) studies. The aim has not been to assert some head-to-head opposition to Lord Burrows' views as set out in his Cohen (and other) lectures. Indeed, it was most unfortunate and quite wrong that Gunther Treitel should have been faced with hostility by colleagues in an American law faculty and it would be an intellectual crime if any judge, doctrinal jurist or legal practitioner were to be made unwelcome in any university. Rather, the aim has been to question some of the assumptions upon which he—and others—have built their arguments.

³ Perhaps Terry Eagleton's remark is apt in this respect: 'The difference between a "political" and "non-political" criticism is just the difference between the prime minister and the monarch; the latter furthers certain political ends by pretending not to, while the former makes no bones about it': Eagleton (2008: 182).

The principal assumptions are these. First, it is not obvious why the role of law academics is to assist the judges and the law profession in their professional roles. The duty of a university academic is, arguably, not towards a particular interest group but towards the advancement of knowledge in general. And it is not always evident, as Professor Mathias Siems has shown in a rather devastating chapter, that law professors in Europe are fulfilling this duty (Siems 2011). Indeed, one leading French social science epistemologist thought that law as a discipline had nothing to offer to epistemology in general (Berthelot 2001: 12). This is an unfortunate situation. If the judiciary and the legal profession feel that they need a legal scholarship institution to aid them in their work they should either fund university law faculties or establish their own institutions or think tanks. Expecting academics to do for free legal research that the professionals themselves should be doing is untenable as an academic obligation.

The second assumption is the distinction voiced by Lord Burrows between doctrinal scholarship and what he calls ‘grand theory’. Such a distinction implies that black-letter scholarship is not based on any grand theory. Terry Eagleton’s response to this kind of thinking was to observe (an observation whose origin he attributes to John Maynard Keynes) that those economists who disliked theory, or claimed to get along better without it, were simply in the grip of an older theory (Eagleton 2008: xiii). That doctrinal law is somehow not in the grip of a theory has been convincingly dismissed, as has been seen, by Dan Priel. Black-letter law is a highly theorized area of intellectual activity; it is just that few doctrinal scholars have been able, or willing, to articulate the theory other than through references to law somehow being different from other social science disciplines. Doctrinal lawyers and jurists are committed ‘systems theorists’ (Blanckaert 2006: 138-140), even if they are unaware of it and simply think in terms of weaker or stronger versions of legal positivism.⁴ Indeed, as again Priel implies, the aim of these ‘systems theorists’ (or a good proportion of them) is to impose a paradigm on those working within the discipline. This aim was bound, in the end, to fail because the tendency in the social sciences—in all disciplines perhaps—is to gravitate towards a plurality of different programmes. These different programmes will of course create tensions within a discipline (see further on this tensions point: Samuel 2019).

⁴ This does appear to be one of the implications of Professor Catherine Valcke’s recent book on comparative law: Valcke (2018). She insists on the notion of a system when looking for ‘law’ in other cultures.

The third assumption concerns methodology. In fairness to Lord Burrows, he sets out what he perceives to be the method of the doctrinal jurist aiming to aid the courts in their decision-making. Yet his ‘interpretative methodology’, which seeks to provide the ‘best interpretation’ of the content of the law, applying criteria such as ‘fit’, ‘coherence’, ‘accessibility’, ‘practical workability’ and ‘normative validity’, is asserted without any kind of epistemological programme within which these notions might have meaning. In other words, he assumes that they are somehow neutral and independent of any theory and (or) paradigm context. It would, perhaps, have been more valuable if he had presented these notions within, say, a Dworkinian framework which would at least have given them some theory underpinning. However, such a Dworkinian thesis comes with other baggage (so to speak)—such as the sharp distinction between principle and policy—which understandably makes the judiciary wary of aligning themselves with the late legal philosopher. Lord Burrows’ described methodology also fails to recognize that there are different reasoning models in play even within a doctrinal view of legal reasoning. These models have been identified elsewhere, supported indeed with examples from the law reports themselves, and will not be revisited here (see Samuel 2018: 87-116). However, the different focal points for these models inject into doctrinal methodology a diversity that can exist even within an approach governed by the authority paradigm.

On a more positive note, then, one might conclude by indicating that this last point about methodology contains within it the possibility of one area where doctrinal legal scholarship of the kind helpful to the judiciary could find some common ground with legal academics working outside of the authority paradigm and who operate within social science and humanities thinking more generally. This area is the relationship between the reasoning strategies and techniques used by judges and the methods and schemes of intelligibility employed by those working in other social science and humanities disciplines. One might object that such a domain is just another example of ‘grand theory’ or ‘reasoning imported from other disciplines’. Yet to think like this is to commit a grave error. For a start, such cooperation could result in law being taken more seriously by those outside the discipline and thus to be represented in works on social science methods and epistemology. That law finds itself excluded from a seminal work on epistemology in the social sciences is intellectually tragic. Furthermore it is idle to think that different schemes of intelligibility are somehow not as relevant to legal reasoning as they might be to reasoning and research programmes in any other discipline. They are just as relevant as induction, deduction and analogy. In addition

judges who do not take method very seriously usually end up like the literary critics described by Terry Eagleton:

Many literary critics dislike the whole idea of method and prefer to work by glimmers and hunches, intuitions and sudden perceptions. It is perhaps fortunate that this way of proceeding has not yet infiltrated medicine or aeronautical engineering; but even so one should not take this modest disowning of method altogether seriously, since what glimmers and hunches you have will depend on a latent structure of assumptions often quite as stubborn as that of any structuralist (2008: 172-173).

This is not to suggest that judges and jurists should regard themselves as scientists using methods similar to those employed by medics and aeronautical engineers. The most dominant methodological scheme of intelligibility used by these scientists is the causal scheme—a scheme that often encounters difficulties in the social sciences. As Lord Burrows recognizes, one predominate scheme in doctrinal law is hermeneutics, although the dialectical scheme perfected by the Roman and medieval jurists is still a central legal tool of analysis (Samuel 2018: 212-213). Hermeneutics is of course the subject of ‘grand theory’ and thus all judges, whether they know it or not, are operating within such a theory (Glanert & Ors 2021: 47-58, 102-106). Thus the distinction between doctrinal legal scholarship and ‘grand theory’ is a false one, just as the distinction between ideology and legal modelling is a false one. In the end it is the Vaihinger (functionalism) question that prevails: what is the pragmatic value of the fiction in play?

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