
CAN DOCTRINAL LEGAL SCHOLARSHIP BE DEFENDED?

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Abstract

This review article investigates the question whether doctrinal legal scholarship can be defended. And it does so in the light of a new book by Mátyás Bódig that sets out an epistemological defence of this scholarship. The second half of this article critically examines this work, while the first half looks more generally at how doctrinal legal scholarship is defined in the civil and common law traditions and how it has traditionally been defended in the United Kingdom. One secondary question that is considered is whether doctrinal legal scholarship is of any greater value, epistemologically, than scholarship in astrology. The article is sceptical as to whether doctrinal legal scholarship can be defended, except as scholarship providing assistance to the legal profession and judiciary.

Keywords: astrology; Bódig (Mátyás); Dworkin (Ronald); doctrine; epistemology; hermeneutics; methodology; theory.

[A] INTRODUCTION

The recent results from the Research Excellence Framework ought, once again, to encourage academic lawyers to reflect on what they do. Is their role only to assist the legal profession and the judiciary with their more reflective views on the law and legal analysis? Or is their role to advance knowledge? The purpose of this review article is to consider this question in the light of a new book defending legal doctrinal scholarship. However, before turning to this new work this article will examine the notion of doctrinal legal scholarship and the epistemological problems that attach to it. Is, for example, doctrinal legal scholarship more valuable, in terms of the pushing at the boundaries of knowledge, than, say, astrological writings?

[B] DOCTRINAL LEGAL SCHOLARSHIP

What is doctrinal legal scholarship? One obvious way to respond to this question is to look at what this scholarship has been from its inception to the present day. There is not a lack of literature in respect of this diachronic view. Several French works have examined the notion of *la doctrine*, either directly under this title, or as an historical approach to legal methodologies and legal science (see, for example, Jestaz & Jamin 2004; Champeil-Desplats 2016). The question is important in France because to become a professor of law one has to demonstrate a high level of competence in doctrinal legal scholarship. In other words, one has to be a good legal doctrinalist. What, then, is a good doctrinalist? One can only really answer this question by first determining what is *la doctrine* and secondly by describing the methodology that is associated with it. As for *la doctrine*, this is, synchronically, although rather tautologously, defined as the body of writings of law professors whose mission is, and has been, to comment on positive law. The methodology that accompanies this mission is termed *la dogmatique*, which to the English ear has a rather pejorative orientation but does not to the ears of all jurists within the continental (civil) law tradition. *La dogmatique* has been defined as ‘a learned, reasoned and constructive study of positive law from the angle of what ought to be (*devoir être*), that is to say what ought to be the desirable and applicable solution’ (Jestaz & Jamin 2004: 172). Another professor has defined this methodology more precisely:

The dogmatic approach consists, then, in reproducing, categorising, putting in order and systematising the law. Three principal results are expected: a) a manifestation of law as a unitary system complete and coherent in itself; b) classifications and categorisations created according to logical criteria (exhaustive, absence of overlap, and non-contradiction); c) the formulation of concepts and principles which reflect ‘the totality of the legal order being studied’ in such a way that they permit the resolution of any type of case (Champeil-Desplats 2016: 87).

When one views both the writings of professors and *la dogmatique* from an historical perspective what emerges is not just a very long tradition stretching back over two millennia (or more) but also a history marked by changes in methodology (see further Samuel 2022). These changes were themselves provoked by shifts in epistemological outlooks, but, in the civil law tradition, the object with which these methods engaged has principally remained the same, namely the body of Roman laws known as the *Corpus Iuris Civilis* (see Stein 1999). The object of juristic scholarship has largely been, then, an authoritative text and the scholarship that has attended this text was for many centuries after its rediscovery in the

11th-century commentaries. There was, in consequence, the text and the commentaries on it. Gradually these commentaries freed themselves from actual attachment to the books and sections of the *Corpus Iuris* and from the 16th century onwards there started to appear independent books on Roman (civil) law which were free-standing in the sense that they both re-systematized the Roman law and reduced it more and more to a set of abstract propositions. One of the most famous of these books was Jean Domat's *Loix Civiles* published towards the end of the 17th century (discussed in Gordley 2013: 141-147). Legal scholarship on the continent had moved from detailed commentaries on each text of the *Corpus Iuris* to much shorter works setting out Roman law as a series of coherent normative principles (*regulae iuris*). Reform of the law, Henry Maine famously noted, meant reform of the law books (Maine 1890: 363). With codification in France in 1804 the scholarly process repeated itself: in the first stage were commentaries on each article of the *Code civil* followed by a second stage where independent manuals and treatises—*la doctrine*—came to replace such commentaries (although these did not disappear).

This doctrinal scholarship based on an authoritative text in the discipline of law is analogically close to theology which is equally a discipline whose object of study has been authoritative texts. Both disciplines could, accordingly, be said to be governed by what might be termed an 'authority paradigm' within which a text is given an absolute authority (Samuel 2009). By this is meant that the texts can be criticized and engaged with in very different methodological ways, but they cannot be dismissed just as the natural scientist cannot dismiss inconvenient facts in nature. The texts are the very foundation of scholarship. Indeed, the foundational principle of the authority paradigm was well expressed by the early Italian medieval jurists: *non licet allegare nisi Iustiani leges*. Or, as another glossator put it: *omnia in corpore iuris inveniuntur*. One can only reason using the materials in the *Corpus Iuris Civilis* (Errera 2006: 46, 53). Another way of viewing this authority paradigm orientation is to see it as a matter of adopting an internal point of view. As one common lawyer discussing legal scholarship has put it: the 'doctrinal method is a doubly "constrained" or "circumscribed" way of thinking'. This is because:

First, the doctrinal scholar is constrained in the sense that one is seeking to understand practices that emerge from a specific set of materials. There is, so to speak, a closed or sealed system from within which answers must be sourced.

And:

Second, the doctrinal scholar is seeking to understand those practices as a participating member of an ‘interpretive community’, which includes judges and practitioners, using the received methods of that community (Varuhas 2022, forthcoming).

There are, arguably, two epistemological consequences that flow from this situation. The first is that history provides one of the most fruitful means of understanding what it is to have legal knowledge. Or, put another way, modern legal scholarship is the result of a two-millennia ‘project’ which, if studied, will provide all the elements that have gradually built up to form the basis of contemporary legal knowledge (on which see Jones 1940; Gordley 2013).¹ The second, more negative, consequence is that the authority paradigm could well have doomed doctrinal legal scholarship to remain trapped within an institutional and epistemological framework that will probably mean that it has, now, nowhere to go in its ability to furnish serious advances in legal knowledge. In turn this has resulted, at least in the common law world if much less so in the civilian one, in a proportion of academic lawyers turning to other disciplines—to interdisciplinarity—in order to escape from this epistemological doldrum (Cownie 2004; Siems 2011; Husa 2022).

This last point is of course in need of development, especially as some recent writing is now attempting to challenge this doldrum assertion. However, before looking at these challenges, something needs to be said about what has been, and what is, the view of legal scholarship in the common law world. The first and obvious point that needs to be made here is that, compared to Continental Europe, there is no long tradition of legal scholarship in England since there were virtually no legal academics before the 19th century. Indeed in 1846 a Parliamentary Select Committee Report concluded that there was no legal education worthy of the name to be had in England and Wales. The most notable piece of scholarship before this date was Sir William Blackstone’s *Commentaries on the Laws of England* (1765-1770), which was an attempt to re-organize the common law along Roman institutional lines (Cairns 1984). An academic tradition of substance developed only in the 19th century in the United States and in the 20th century in England and Wales. Serious reflection in England on the nature of academic scholarship is therefore a somewhat recent phenomenon.

What, then, is the role of an academic lawyer—a jurist—in the common law world? One can note again that common lawyers do not of course employ the term dogmatic for obvious reasons, but do they in substance see doctrinal legal scholarship in much the same way? In the middle of

¹ The idea of a ‘project’ is taken from Gordley (2013).

the last century Herbert Jolowicz thought that textbooks and articles were important as guides to the case law and that if they were good they were more than mere guides; such books and articles would not just systematically arrange the cases but also extract from them general principles of law and show how such principles might be developed (Jolowicz 1963: 314). A similar view was expressed in a lecture by Robert Goff examining in more detail the different roles of judge and jurist (Goff 1983). The late Professor Gareth Jones, in his defence of traditional legal scholarship, similarly thought that the jurist's task was 'to *assist* the judge in finding principle which may lie buried in a morass of case law and to consider the wider implications of the acceptance or rejection of that principle' (Jones 1996: 10 emphasis in original). More recently several publications have examined in some detail the role of academic scholarship. Jason Varuhas in a contribution to an edited work identifies four methods which he describes in the following way:

This chapter identifies and elaborates upon each of these methods. Listed in order of increasing sophistication, they are: (i) description, which may for example involve summarizing a case; (ii) derivation, which involves distilling legal propositions from legal materials; (iii) systematization, which involves organization of interconnected legal propositions into categories, which form part of a wider system; and (iv) interpretivism, which involves interrogating normative justifications which explain legal propositions or categories, and refining one's account of those legal phenomena by reference to those justifications (Varuhas 2022, forthcoming).

Whether this description is equally applicable to legal scholarship in the United States is much more ambiguous. Certainly, the four methods identified by Varuhas are not absent, but the influence of Realism tends to make many American legal scholars more open to perspectives from other disciplines. Legal formalism is likely to be less watertight so to speak; other disciplines intrude. One should not be surprised by this more interdisciplinary outlook given the history of Realism, Critical Legal Studies and Law and Economics within American law schools—a history that has created a profound scepticism on the part of some academic legal scholars about the intellectual value of the methodology associated with 'dogmatic' legal reasoning (Priel 2021). Yet are all academic lawyers who display something of an interdisciplinary attitude to be classed as 'realists' (or worse)? According to some common lawyers the answer to this question is that the moment one does engage in an interdisciplinary pursuit one is no longer indulging in proper academic legal scholarship. Dan Priel has noted that doctrinal scholars viewing their discipline from an internal viewpoint '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). Indeed, he goes on to point out, for these scholars interdisciplinarity is an 'enemy' which may provide observations *about* law but cannot contribute to the study *of* law (2019: 167). Moreover, it is not just history that is irrelevant, but equally legal history: for the 'way [a] rule came about is neither here nor there' (2019: 174).

[C] METHODOLOGY OF LEGAL SCHOLARSHIP

An epistemologist of the social sciences would surely observe from the above juristic comments that there is much going on, both expressed and implied, in these assertions about doctrinal legal scholarship. If one focuses on Jason Varuhas' four 'methods'—although he is reflecting comments (consciously or unconsciously) made by others discussing what civilians call the 'dogmatic' method—they would seem to reveal some more specific approaches (Varuhas 2022, forthcoming). What he means by 'derivation' is essentially induction which when employed by 'pioneering scholars' who having identified 'core concepts' were able to give 'shape and structure to what had been a formless mass'. These generalized propositions, he says, give 'practical guidance' and so abstraction has 'significant practical value'. The second method is systematization or, more prosaically, classification and categorization of the inducted legal propositions, which 'are the basic unit of the systematizing enterprise' because these 'are organized into a scheme which evinces an internal, deductive logic'. From induction one now moves, it would seem, to deduction. Yet systematization does more than establish a deductive model; it provides a map of the law and this is what makes systematizing legal textbooks so important in terms of legal knowledge. One is involved, he says, in a kind of legal cartography. Varuhas sees this systematizing method as having provided a major advance in legal knowledge within the common law world:

Treatises, adopting the systematising methodology, are largely responsible for establishing the fields of law we know today, as recognized fields. This was a significant shift for a system in which legal thinking had traditionally been organized around the formulary writ system, which focused the legal mind on procedure and factual matrices (Varuhas 2022, forthcoming).

As for interpretivism, this, according to Varuhas, is the highest form of doctrinal method. It 'involves articulation of "second-order", "deep" or "archetypical" propositions, which stand behind, explain and justify

first-order propositions'. It is a matter of second-order propositions which are 'vital in that they demonstrate that the categories that make up the system are normatively significant'. Interpretivism involves identifying doctrinal patterns and then explaining those patterns. Yet what is the actual methodology of this interpretive approach? Varuhas says that it is a matter of a creative tension between 'fit' and 'justification'. What, then, is meant by 'fit'? Varuhas explains it as follows:

When it comes to legal interpretation what has to fit is the given normative justification. But what must it fit with? It must fit with an account of the normal, proper or received body of legal practices, which are referable back to legal materials and recognizable and plausible in the eyes of the interpretive community. In this way fit is a threshold requirement for the success of an interpretive account. If the account of the law is not accepted as plausible, the interpretation shall fail (Varuhas 2022, forthcoming).

And so 'one is seeking to explain legal phenomena at a certain level of abstraction so as to avoid one's account collapsing into something akin to description'. With regard to 'justification', Varuhas says that this 'explains the phenomenon, where the account of the phenomenon is one that would be accepted as plausible by the interpretive community'.

Jason Varuhas' account of doctrinal method is not particularly original in its analysis since the methods that he describes had already been developed and asserted by previous jurists, in particular by the legal philosopher Ronald Dworkin whose influence with regard to 'fit' and 'justification' seems undeniable (Dworkin 1985). Nevertheless, it is a valuable restating because it does attempt to describe doctrinal methodology, from within the authority paradigm, in some considerable detail in turn permitting academic observers outside of the discipline of law an insight both into the apparent methods of jurists and into the epistemological underpinning of these methods. Justification, for example, is not a matter of correspondence with some external object, as would be the case in most of the natural sciences, but of consensus amongst the 'interpretive community' supported also by a hoped-for systematized internal coherence. Equally, however, the external observer might find herself puzzled by some of this. Just what is this 'legal phenomenon' (or mass of 'legal phenomena') with which these methods engage? One clue here is a comment by another jurist who has asserted that even 'if we closed all the courts, and civil recourse were completely abolished, this would not alter private law and its duties' (Stevens 2019: 121). Legal rights and legal duties are intangible things that exist independently of the physical and social institutions that give expression to law. This is what legal scholars treat as their object of engagement. Yet how are these

abstract forms of knowledge represented? The immediate answer is of course through texts. Roman law is represented through the *Corpus Iuris* and the textual commentaries that it attracted, while contemporary law is represented through legislative texts, reports of cases and doctrinal writings. So, is legal scholarship a matter of engaging with ‘law’ or with texts supposedly giving expression to law (or more precisely giving expression to a shared assumption among participants to act ‘as if’ law exists)? In other words, are legal scholars in the end engaging with something that in itself does not exist (cf Glanert & Ors 2021: 1-30)?

[D] EPISTEMOLOGICAL CHALLENGE

Given all the doctrinal texts on legal theory and on legal thought, it might seem an outrageous claim to assert that law does not exist. It might not exist in a physical sense, but does it not exist as an intangible intellectual guide as to how to live in society? Does it not exist as a means of achieving certain social goals? One problem here is that some doctrinal scholars claim, as we have seen, that resolving conflicts between the rights of individuals ‘does not depend upon wider social policies or goals, as rights do not take the justification for their existence from such concerns’ (Stevens 2019: 164). Or, as Dan Priel puts it, the phenomenon of law ‘corresponds to a pre-existing, rationally discoverable, order of reality’ (2019: 177). And thus ‘in the domain of private law, ignoring the consequences of decisions that potentially apply to millions is the mark of moral uprightness and legal rigour’ (2019: 181). If the social goals of law are, then, irrelevant, it becomes difficult to embed any epistemological foundation for law in society itself. Law would appear to exist only as some pre-existing conceptual system whose epistemological justification is purely internal to the conceptual model itself. Citing one German jurist of the 19th century, Olivier Jouanjan perhaps sums up the position: it is the legal form which is the figure of the law (*Rechtsgestalt*) and it is this that is of interest to legal science, not its material goals (2005: 219). Earlier Jouanjan had noted that for some German Pandectists ‘the purity of the system in its entirety is the guarantee, and this system is the system of a science of law, of a positivist science’. And in a footnote he adds a comment by Windscheid that ‘ethical, political or economic considerations’ are not ‘the concern of the jurist as such’ (2005: 193). The epistemological justification, in the end, can only be one rooted in the coherence of the system and the ability to generate consensus amongst the internal participants.

Perhaps one way to investigate this problem of existence of law as a distinct intellectual phenomenon is to examine some statements that a

doctrinal scholar might make about the subject, say in an introductory work. At a general level the scholar may say this:

Though the earliest knowledge of *law* dates back to the mists of antiquity, it lives and grows and needs constant re-presentation in the light of current research. Its development may well be compared with that of medical knowledge. From time to time, certain treatments have been believed to be the most effective possible. Further experience changes these ideas and differences of opinion are then acknowledged.

The introductory work would possibly go on to point out that there is a multiplicity of things that will need to be learned but that this should not dismay the student provided he or she follows certain steps. And so 'before a beginner starts his first attempt at a personal *legal analysis* (or "*judgment*" to use the traditional word) he must list all the factors that he finds in the *legal map* before him, and he cannot do this until he has understood each, if only partially'. As the student lawyer becomes more experienced, he or she must start to appreciate the potentialities of the pattern of the *legal system*. It is the potentialities for development which is one of the jobs of the *legal scholar*. The introductory textbook might then go on to say:

He then evaluates future trends. He makes his deductions from these. Such deductions depend on the acumen and experience of the *jurist*. The very common mistake which has brought contumely on to *law* is to confuse the human deduction which may be right or wrong, with the assessment of the trend which can technically be ascertained.

The textbook might illustrate this point with an example from the law of tort. The rule of vicarious liability states that an employer will be liable for torts committed by an employee acting in the course of employment. One aspect of this rule which has proved very problematic is the course of employment issue and at the end of the last century the House of Lords formulated the 'close connection' rule which replaced the older, and narrower, 'frolic of his own' test. If the wrongful act was closely connected to the employment, the employer would be liable (*Lister v Hesperley Ltd* (2002)). Thus, when an employee of a supermarket viciously attacked a customer the supermarket employer was held liable (*Mohamud v Morrison Supermarkets plc* (2016)).

Subsequently, in a case involving the same supermarket, an employee wrongfully leaked a mass of private data onto the internet and to several newspapers, such an act causing damage to a range of individuals who brought claims against the supermarket (*Morrison Supermarkets plc v Various Claimants* (2020)). A deductive approach seems to provide a clear solution:

1. whereas the major premise states that a wrongful act by an employee that is closely connected to his employment will bring the act within the course of employment;
2. whereas the minor premise consists of an employee, employed *inter alia* to transfer data to certain specific recipients, who exceeds the authorization and transfers, wrongfully, the data to non-authorized recipients causing damage to the claimants;
3. then it would logically follow that this act (like the act of viciously attacking a customer) is closely connected to his employment and is within the course of employment.

However, anyone adopting such a deductive approach would be wrong, for the Supreme Court held that the employee was not acting in the course of his employment. The academic jurist examining these cases would therefore be mistaken in thinking that the approach to be adopted in understanding the more recent course of employment cases is one of deductive logic; he or she would be making a ‘very common mistake’. What the jurist should be doing is examining the *trend* to be ascertained from the more recent Supreme Court cases involving vicarious liability. What is the overall movement in respect of employers being held liable for criminal acts committed by their employees? What are the underlying conceptual reasons for moving in one direction towards a greater scope of liability, but then apparently reversing or restraining this movement? What legal methodology did the judges employ in order to effect this correcting trend?

In order to be able to make these ‘deductive trends’ (assessments rather than human deduction), the scholar writing the introductory work might well issue a word of warning and explain how to avoid being disheartened:

Every text-book repeats one sound piece of advice, which is that the student can never hope to be a quick and practised *lawyer* if he relies on copying descriptions from his text-book. This may seem a disheartening difficulty at the beginning, but the way out of it is easy. The student must get an understanding of the meaning of each *concept, category* and *rule*, must understand their strength in the *legal system’s cartography* under consideration, and make a synthesis of his findings.

Perhaps the language of this imagined introduction to law is a little reminiscent of works dating from the late 19th, or early 20th, century. But, as we have seen, the theories of the contemporary conceptualists seem to be little more than a restating of Pandectist thinking and so, whatever the force of these theories, one cannot accuse these common law doctrinal theories of displaying any originality of thought (see further Samuel

2020). What is worse, the quotes from the imagined textbook are taken, with the exception of the words in italics, from a textbook on astrology (Hone 1990). This of course begs a question. Is doctrinal legal scholarship any more relevant to the academic community than a doctrinal work on astrology? For those students not wishing to enter the legal profession, would not studying astrology be as valuable as studying law (at least in terms of transferrable skills)? Would not studying the complex movement of the stars and how this movement (supposedly) correlates with human experience and trends be just as fruitful as studying the zig-zagging opinions and trends of supposedly authoritative judges when faced with, for example, wayward supermarket employees? One of course might argue that astrology has no social value whatsoever since there is not a scrap of scientific evidence that there is any correlation between the movement of the planets and human experience. It is, in short, pseudo-scientific drivel. Yet if one is not permitted to judge the opinions and decisions of the judiciary in terms of social goals, then surely one is dealing equally with a pseudo-social reality? Is one not, in effect, and despite its intellectual challenges, dealing with pseudo-scientific drivel? Those doctrinal jurists who might wish to found their view of law on the philosophy of, say, Emmanuel Kant as a means of differentiating legal scholarship from astrological work might perhaps reflect on a view attributed to the critic Ivor Richards that most critical dogmas of the past are either nonsense or obsolete (see Eagleton 2022: 90). The idea that the legal test whether or not victims of car accidents should receive compensation for their injuries is one based on a rule whose philosophical grounding is to be found in an 18th-century philosopher would, for Richards, have been absurd.

[E] DEFENDING DOCTRINAL SCHOLARSHIP

In asking these questions one is not denigrating the value of doctrinal legal scholarship as a form of activity that is valuable to the legal profession and to the courts. And one is not questioning the important—vital perhaps—role of the courts and the legal profession as a social and political institution. There is much doctrinal scholarship that is of great value to the legal profession and which displays work emanating from impressive legal minds. The sole emphasis is on *doctrinal* (non-interdisciplinary) legal scholarship. Does it really have a future? Is it capable of generating, in itself, new knowledge?

Mátyás Bódig thinks that it does have a future and mounts what he sees as an exhaustive defence. However, he accepts that trying to maintain doctrinal legal scholarship is ‘fraught with difficulties’, one of these being the ‘ideological aspects of the association with the legal profession’

which has ‘the capacity to compromise the epistemological credibility of the discipline’ (2021: 10). His aim, therefore, is ‘to demonstrate that a precarious balance can indeed be found and maintained between a commitment to the legal profession on the one hand and commitment to academia on the other’ (2021: 10). He sets out to provide a doctrinally orientated legal theory. What is interesting about this mission is his early observation that, with respect to this formulation of a theory of doctrinal legal scholarship, help and support from existing legal theories ‘are hard to come by’ primarily because ‘the contemporary agenda of mainstream legal theory is far removed from the epistemological challenges facing legal scholarship’. Indeed, some ‘academic legal theory has been positively unhelpful’ (2021: 12). One of course should not be surprised by this observation since it has long been obvious that one can be an excellent doctrinal lawyer without ever having studied legal theory. So, what Bódig says he needs to do is to fashion a doctrinally orientated legal theory that explores both the depth and complexity of justificatory issues around law and the methodological profile of legal doctrinal scholarship so that it reflects that complexity. His epistemological and methodological vehicle for achieving this aim is ‘the rational reconstruction of law’ (2021: 13). Regarding the epistemological aspect of this defence, doctrinal legal scholarship, he goes on to say, is to be tied to the concept of doctrinal knowledge and this knowledge revolves ‘around the epistemic relevance of authoritative materials in legal practices’ (2021: 16).

In terms of escaping the authority paradigm it does have to be said at once that this plan does not look promising. And by the time one gets to the fourth chapter this lack of promise becomes more evident. Bódig notes in this chapter that ‘the legal profession casts a long shadow on any attempt at accounting for legal doctrinal scholarship’. He then goes on to observe:

Academic legal work of this kind cannot be framed as an external force seeking to influence legal processes: legal scholars are bound to be participant insiders. The discipline ends up aligned with the professional culture of lawyers. Its epistemological focus comes with an ideological commitment to preserving the dominant position of a professionalised version of doctrinal knowledge in legal practices (2021: 117).

The academic sceptical about the value of doctrinal legal knowledge might perhaps unkindly comment that one hardly needs to spend over a hundred pages before arriving at a conclusion that has been evident to many for a considerable period of time. Indeed, this is an evident conclusion regarding any pursuit of knowledge pursued within an authority paradigm. Worse, Bódig goes on to admit that much doctrinal legal scholarship ‘does not

qualify as producing new doctrinal knowledge' (2021: 127). He should not be criticized for saying this since his point has equally been evident for some time, but, if Bódig is right, then questions must be raised about the viability of doing a United Kingdom doctorate since such research is supposed (or at least was once supposed) to result in new knowledge. Moreover, it would seem that such doctorates are not even of much use to the legal profession either (2021: 138 especially footnote 47). Professor Bódig appears to have gone far in undermining his own project.

This said, his thesis nevertheless deserves a serious critical examination. Bódig's key epistemological notion is something he entitles 'rational reconstruction of the law' (2021: 142). This notion, he says, 'makes it possible to address issues of institutional design without giving up on a specifically doctrinal perspective' and it appears to be a means by which one engages with the law 'depending on the character of the actual or potential problems with the law' (2021: 143). This notion of rational reconstruction does not function in isolation; it has to operate, says Bódig, in conjunction with 'a paradigm of reasonableness that provides standards for testing the truth value of academic legal analysis'. This paradigm must be 'built into the epistemological model [that] scholars rely on' (2021: 136); and it 'gets embedded by associating all aspects of the practices of legal scholarship with rational reconstruction' (2021: 144). Bódig goes on to explain:

The central significance of rational reconstruction commits the discipline to the value of the coherence and integrity of legal practice. It captures the law as a practice that rational agents can live by—despite its deficiencies. And if one is to find 'enough' reason in the law so that rational agents can live by it, doctrinal analysis needs to be able to reproduce the law in a form that more clearly embodies patterns of reasonableness. Even the deficiencies of the law will be defined with reference to patterns of reasonableness revealed from the law by way of interpretative engagement (2021: 144).

What does all this mean? It would perhaps be a little unfair to say that these statements could have come just as easily out of a textbook on astrology, but when one probes the text for enlightenment it seems to come down to 'identifying operative principles' and 'working on systematising the law' (2021: 144, 145). In other words, Bódig seem to be saying much the same kind of things as Jason Varuhas, though in a rather more long-winded way. What, then, is the epistemological foundation for this rational reconstruction embedded in a paradigm of reasonableness? According to Bódig, as 'to the epistemological side of the issue, legal doctrinal scholarship has been captured as being normative, internalist, practice specific, and interpretative' (2021: 149). This 'epistemological'

observation is not inaccurate in that it somehow does not capture the essence of legal doctrinal scholarship. The problem is that the description could, almost, equally apply to astrological doctrinal scholarship.

More interesting, perhaps, is Bódig's rejection of what he describes as two paradigms. These are 'epistemological formalism' and 'empiricism' (2021: 150). The first paradigm is to be found in natural science disciplines such as physics and is defined as a 'formalism [which] makes it possible to organise scientific claims into coherent, systematic and mutually supportive sets' (2021: 150). Bódig, presumably, is not one who is going to start asserting epistemological nonsense such as that Gaius was the Darwin of law or that classifying certain legal actions as 'quasi-contractual' or 'quasi-delictual' is equivalent to classifying all birds as either pigeons or sparrows (cf Samuel 2000; 2004). This, surely, is to be welcomed.

The second paradigm, empiricism, is rejected by Bódig on the basis that it is 'a poor fit for legal scholarship'. This is because, he says, law is a normative discipline that remains a repository of a range of opinions; indeed, he says in a footnote, 'doctrines are fundamentally opinions' (2021: 150). This is a curious comment, not because it is necessarily inaccurate with regard to legal scholarship, but because, first, it seems to display a remarkable ignorance of social and human science writings on epistemology and, secondly, because it appears to be confirming that doctrinal scholarship is little more than an opinion column in a daily newspaper (cf Toddington 1996: 74). A little further on Bódig is more reflective in that he asserts that the problem is that legal scholarship 'represents a qualitatively different model of interpretivism'. But does it? Given that nowhere in his book does he properly discuss social science methodology—there is no discussion of causal, structural, functional, dialectical schemes of intelligibility or of methodological individualism, only some very lightweight analysis of hermeneutics with a superficial reference to Gadamer—his statement must be taken with extreme caution. There is really no proper justification for his assertion 'that in terms of its epistemological features we cannot find a place for legal scholarship in the "methodological triangle" of natural sciences, social sciences and humanities' (2021: 152). How on earth is one supposed to know that legal scholarship is different in its epistemological features if there is no in-depth analysis of the epistemological features of the natural sciences, of the social sciences and the human sciences? There is no discussion or mention of, for example, Jean-Michel Berthelot's contributions to social and human science epistemology (see Berthelot 2006). Indeed, Bódig goes on to say that he can think of only one other discipline with a similar

epistemological profile as law, namely theology. This is hardly surprising, of course, because theology is equally subject to the authority paradigm. Yet there are theologians who have tried to draw epistemological analogies with other disciplines such as mathematics and so doctrinal theology at least tries to be more intellectually sophisticated (see, for example, Puddefoot 2007). One suspects that what we are being fed here is just a more sophisticated, or supposedly more sophisticated, version of the old and tired ‘law is different’ argument. Indeed, just to reassure anyone who might be tempted to look at the interdisciplinary literature on epistemology, Bódig concludes that ‘the epistemological ambitions of legal scholarship are not fully intelligible’ (2021: 243). Comments like this make one want to reach for the astrology textbooks in the hope of finding something a little more sophisticated.

[F] EPISTEMOLOGY AND METHODOLOGY

Perhaps this comment about astrology is a little unfair—although astrology is a useful ‘discipline’ when it comes to an epistemology that cannot in any way be interdisciplinary since it is a rationalized (in the sense of a tightly constructed set of elements) that bears almost no connection to any other science or social science discipline. It is a completely self-contained pseudo-science full of concepts, signs and notions that have no relation whatsoever with the real world, save the stars and planets. But Professor Bódig has set himself an impossible task in trying to provide epistemological justification from an entirely internal position with, at best, only very little recourse to interdisciplinarity. However, he does seem to recognize this problem, for in a footnote he writes:

It is an important assumption in my inquiry that the epistemological deference to the legal profession poses a distinctive difficulty compared to other professional degrees like engineering or medicine. These disciplines can always anchor the taught material to the relevant natural sciences. For legal scholarship, there are no such ‘fall-back’ disciplines in place (2021: 155 note 91).

Yet this problem is not just confined to legal scholarship itself. It also embraces epistemology: how can one provide a convincing epistemology without a detailed knowledge of the epistemological literature in general? Bódig thinks that concrete examples of legal research can only count as interdisciplinary engagement if one can make sense of it against a background of a settled epistemological paradigm for legal scholarship. The ‘key’, he says, ‘to interdisciplinary engagement, from the viewpoint of legal scholarship, is reaping the epistemological benefits of its hermeneutic mediation between disciplines’ (2021: 196). Yet having admitted that

as a hermeneutic discipline, law ‘is not exactly a factory of new ideas’ and that it is a ‘parasitic discipline’ (2021: 196), it seems bizarre then to go on to argue that ‘the peculiar character of legal scholarship leaves a relatively narrow scope for interdisciplinary engagement’ (2021: 215). Most epistemologists would probably think that the opposite is true. With respect, Professor Bódig gives the impression that he is not that interested either in epistemology or, for that matter, in methodology. Perhaps a little more interdisciplinarity might be in order.

This point needs further development. What Bódig’s book lacks, on the whole, are any very specific clear examples of what amounts to good legal (and non-interdisciplinary) scholarship and also any serious in-depth analysis of methodology in the social and human sciences (see further on this point Samuel 2019). Without such an analysis of method, the discourses on epistemology are always going to appear rather trite. This said, with regard to examples of legal scholarship, Bódig, does, in fairness, give one important clue in a footnote in which he says that ‘textbook writing should be at the heart of legal doctrinal scholarship’ because in ‘terms of cultivating doctrinal knowledge, an influential textbook is a crowning achievement’ (2021: 155 note 89). This assertion is a little odd when on the same page Bódig says that doctrinal training not only ‘may be of debatable academic value’ but also might lack ‘important aspects of adequate preparation for professional legal practice’. Given that textbooks play a fundamental role in many law faculties, what he seems to be implying is that while textbooks represent the crowning achievement in cultivating doctrinal knowledge, they are, intellectually and professionally, inadequate. In other words, Professor Bódig seems to be defending a form of university scholarship which fulfils neither the required intellectual nor the necessary professional criteria. A faculty research director might conclude that this does not look so good for any Research Excellence Framework.

As for methodology, Bódig sees doctrinal legal scholarship as a hermeneutical exercise. Given the considerable literature on hermeneutics one might be forgiven for thinking that this would lead the professor into a serious interdisciplinary investigation and, indeed, there is a discussion, if somewhat brief, of Hans-Georg Gadamer’s contributions. However, Bódig seems to think that Gadamer is more of a hindrance than a help since ‘understanding is always conditioned by the “fore-understanding” of the interpreting agent’ and also ‘intelligible objects (like texts) can always be invested with new meaning’ (2021: 140). Quite so, one might say. What is needed, he says, is an ‘interpretative articulation’ that displays ‘deference to practice-specific authorities and respect for the professional

culture of lawyers' (2021: 141). So much for Gadamer, then, and back to the authority paradigm. For, says Bódig, 'alignment with the prevailing power relations makes it possible to attribute fixed meanings to normative materials' (2021: 141). Legal hermeneutics must display '[d]eference to existing authority structures'. Indeed, he says, 'legal scholarship cannot cultivate just any kind of doctrinal knowledge, and it cannot represent an external point of view on the law' (2021: 141). If nothing else, Professor Bódig provides both lawyers and those in other disciplines with quite an insight into the effect of the authority paradigm on legal knowledge and its generation.

[G] METHOD AND THEORY

Whether or not Professor Bódig ends up rather undermining his own case about the value of legal scholarship is an interesting question. Yet this is not to suggest that his book lacks some interesting reflections. His analysis of the relationship between abstract legal theory and actual legal practice is noteworthy in the way that he emphasizes not the relationship itself but, rather, the lack of relationship. This lack of any direct relationship stems from Bódig's own 'interpretivist legal theoretical perspective' which implies two theory requirements:

First, it must be capable of making sense of 'doctrinal knowledge' and developing an account of the epistemological profile of the academic discipline designed to cultivate that knowledge. Secondly, it must be able to provide active methodological support to legal doctrinal scholarship (2021: 33).

Anyone who has studied jurisprudence (or legal theory) will of course appreciate the problem. Much abstract legal theory fulfils neither of these two conditions. In fact, few of the classic rule-model or norm-model theories provide any insights into the methodological complexities of legal reasoning as it operates in the actual cases. There are some minimal engagements in rule-model theories such as the judge having a margin of discretion in hard cases owing to the ambiguity of language. But on the whole, as Bódig accurately observes, this abstract legal theorizing is a 'discursive space not shared with doctrinal scholars, comparative lawyers or legal historians' (2021: 39).

Bódig's reaction to this problem is to suggest that theorizing in law takes place at three different levels, abstract theorizing being consigned to level 3. Doctrinal scholars, he says, operate typically at level 1. 'Doctrinal scholarship', he suggests, 'is more directly and closely associated with the analysis of primary legal documents with the help of established

doctrinal tools and methods' (2021: 35). He gives as an example of this kind of theorizing the debates by obligations jurists around the problem of causation in law (2021: 36-37). Level 2 theorizing is the one 'of strategic importance' because it deals with those issues which 'concern the conceptual features that determine the identity and character of concrete legal practices'. This level of 'theorising is often targeted at figuring out patterns of legal evolution through the interactions of legal practices' and he gives as an example here of the 'theorising ... by theoretically minded comparative law scholarship' (2021: 37). Indeed, he not only mentions comparative law, but also legal history of the type that sheds light on the Western legal tradition. This three-level analysis is one of the epistemological strong points of Bódig's book since it does provide an explanation as to why, for example, courses on jurisprudence rarely seem to include—at least if one examines the standard contemporary textbooks—jurists such as Walter Ullmann, Donald Kelley, Harold Berman (mentioned by Bódig), Alan Watson, Peter Stein and Michel Villey. They, according to the Bódig plan, are, or were, operating at level 2 (and sometimes maybe level 1) and not level 3.

What is to be regretted, at least by an epistemologist, is that Bódig fails to exploit, no doubt through his fear of interdisciplinarity, this epistemic framework to provide some real insights into the methods of engagement by lawyers, judges and legal scholars. How does a legal reasoner engage with a text and with a set of facts? Bódig on the whole tends to employ rather generalist terms such as 'interpretive', 'hermeneutical', 'rational reconstruction' and 'constructs of legality'. Certainly, one can begin to identify some of the basic schemes of intelligibility or *grilles de lecture* that a social science epistemologist would recognize; hermeneutics and structuralism are two fundamental *grilles*. But if one examines analytically the reasoning in judicial and scholarly legal texts there are to be found methodological (using the term in its epistemological sense) complexities that go well beyond interpretation and constructivism.

Take for example some ordinary statutory or contractual interpretation cases. In one case the question for the court was whether an injury sustained by a passenger in a multi-storey public car park arose out of the use of the vehicle on a road. Is a public car park a 'road' (*Cutter v Eagle Star Insurance Co Ltd* (1997))? One can of course state that what is required is a hermeneutical engagement: one must go beyond the signifier (road) to discover what it signifies and this involves finding the intention of Parliament (if a statutory text) or the intention of the parties (if a contractual document). However, in both situations in English law, one cannot in principle go beyond the words and look at external evidence as

to what the legislator or contractors intended. In other words, one cannot undertake a serious hermeneutical investigation (although there may be exceptions where the court can look beyond the text). So how does one engage with the word ‘road’? One could adopt a functional approach: what is the function of this textual provision? If the function was, say, to distinguish between a person being injured in a vehicle off the road so to speak and a person injured on public land designed for vehicles it would not be unreasonable to conclude that, functionally, a road should include a public car park because the function of the text is to compensate in this kind of situation. If, in contrast, one wanted to adopt a narrower non-functional approach one could indulge in a dialectical analysis: one contrasts ‘road’ with a ‘car park’ rather as one might define a ‘flood’ as not being just an ‘ingress of water’ (cf *Young v Sun Alliance and London Insurance Ltd* (1977)). If it is a ‘road’ it is not a ‘car park’ and if it is a ‘car park’ it is not a ‘road’. Another possibility is a structural approach: in this scheme one creates a structure out of the elements in play—‘road’ (public), ‘non road’ (private), ‘vehicle’, ‘victim’, ‘compensation’ and ‘compensator’ (potential)—in order to match a conceptual structure within the legal text with a structural analysis of the facts. If there is a match, then ‘road’ will include a ‘car park’; if not, the car park will be excluded from the definition. An example where such a structural approach was adopted by a majority in the House of Lords was in a case involving the interpretation and application of the Animals Act 1970 section 2(2) to the facts of a road accident caused by a panicking horse (*Mirvahedy v Henley* (2003)). The majority looked at the inherent conceptual structure within this difficult-to-understand text and matched it to the facts; the dissenting judges adopted a functional approach (see further Samuel 2018: 168-196, 273-277).

Lawyers do recognize that there are different approaches to textual interpretation, but usually in terms of vague rules such as the literal, golden and mischief rules which to an extent actually mask the epistemological engagements in play. It is, then, surely the role of the legal scholar to penetrate deeper and to identify the different schemes of intelligibility or *grilles de lecture* in play. Yet if the scholar is prohibited from researching and discussing literature from other social science disciplines such penetrating investigations seem *hors de service*. One is just left with weak internal methodological notions which result in law being a hermeneutical discipline that ‘is not exactly a factory of new ideas’ (Bódig 2021: 196). This said, Bódig, in fairness, is not completely dismissive of, or hostile to, interdisciplinary research and so he, himself, might be happy to incorporate some ideas from social science epistemology

and methodology if it can, in the end, improve doctrinal scholarship itself (2021: 215-217). The problem, it seems, is that the ‘influx of non-doctrinal knowledge into legal materials generates adaption pressures that complicates the job of cultivating doctrinal knowledge of law’ (2021: 216). This, however, can be a good thing if it ‘improves the ability of legal scholars to recognise when developments in other corners of academia call for adjustments in their own disciplinary practices’ (2021: 216). Such a view is hardly going to be unwelcome to those who might be tempted to think that law has more in common with astrology than with other social science disciplines, but what is to be regretted is that Bódig does not pursue this interdisciplinarity issue into a more specific examination (with examples) as to how inputs from other disciplines could actually permit doctrinal legal scholars to up their game so to speak. The paradox is, one imagines, that if Bódig had done this he would have undermined his own defence of doctrinal scholarship, as well as irritating those traditional doctrinal scholars who regard interdisciplinarity as an ‘enemy’.

Engagement with texts by legal scholars is just one side of the methodological coin (so to speak). The other side is an engagement with facts (Samuel 2018, 143-167). What epistemologists in other disciplines have long appreciated is that there is no such thing as a set of ‘brute’ facts (Nadeau 2006); and this has led to some fundamental debates in both the natural and the social and human sciences. It has, *inter alia*, given rise to a dichotomy or tension between anti-realists and realists: ‘anti-realists think narrative structure is imposed on the world to make sense of it for us, whereas realists think that narrative structure, in part, reflects how the world is’ (Currie 2019: 46).² Is the narration of facts a description of what is ‘out there’ or is the narrative—that is what is supposedly ‘out there’—a construction of the observing mind? This is particularly difficult for lawyers because since Roman law times facts themselves have become impregnated with legal notions (see Schiavone 2017). Sale, hire, possession and even contracting are just some legal constructs that have gradually been embedded within social facts themselves with the result that these terms might well be used by non-lawyers—for example journalists—in their descriptions of everyday events. This means that facts are never

² Interestingly, the realist versus anti-realist debate in the context of legal scholarship is rather the reverse of the situation to be found in the natural sciences; it was the American realists who raised some fundamental questions about how lawyers view facts and how these facts have been ‘cleansed’ (so to speak) of ones that are irrelevant. As Karl Llewellyn observed, in a litigation problem involving a car accident, facts like the colour of the defendant’s hair or the clothes worn by the claimant are irrelevant, as are many other facts attaching to the status of the parties (married or unmarried for example), the make of the cars involved and so on (1951: 48). Jerome Frank went further. It is not so much the law that makes prediction difficult, but the facts; the difficulty is to foresee what a particular judge or jury will believe to be the facts (1949: x-xi).

neutral and, impregnated with legal notions such as ownership, they are therefore impregnated with an individualist ideology. Doctrinal legal scholars who describe say private law as being about bilateral relations between individuals (which for them oddly include corporate bodies of whatever size) are not just indulging in some neutral legal ‘science’. They are unconscious ideologues which means that a serious epistemological investigation has to probe the conceptual frameworks through which the facts are observed and narrated (Nadeau 2006: 488). What are the metaphysical beliefs of doctrinal legal scholars? What are the ontological engagements, background knowledge beliefs, the specific symbols and language of interpretation, the models of evaluation, the criteria for evaluation for research results and the way these results are shared with others in the same discipline? As Robert Nadeau puts it, the fundamental epistemological question is whether scientists—or in this case doctrinal legal scholars—are prisoners in their ‘gilded cage’ or whether they can escape it (2006: 488). Answers to these questions are not in essence to be found in Professor Bódig’s epistemological investigation, although at times he seems aware that there is an ideological dimension to legal scholarship and its relation to legal practice. It is, then, not really an *epistemological* defence; it is essentially an ideological one masquerading as an epistemological enquiry. His so-called epistemological framework had already delivered the conclusion that he set out to prove, and, reading between the lines, it is not always evident that he fully believes in his defence.

[H] WAITING FOR DWORKIN

Yet if there is one legal theorist who, so far, and like Godot, seems ever present but somewhat offstage it must be the late Ronald Dworkin. The importance of this jurist is that he did provide a hermeneutical model that not only straddles Bódig’s three levels of theory but also one that actually provides a purpose and a justification for legal scholarship. Of course, his model was not directly concerned with the legal scholar; the object of his theory was the judge and his thesis was concerned with how such a judge ought to go about deciding a hard case. But his famous chain novel analogy—surely now too well-known to need repeating here—can easily be seen as a process that includes legal scholars as well as the judiciary (Dworkin 1986: 229). Judge and jurist are involved in a joint venture in developing the common law for the future but by continual reference to the past (Dworkin 1985: 159). They are both involved in a constructive interpretation in which a judicial decision must always ‘fit’ into this construct of the past precedents as well as taking forward

into the future this constructive enterprise. If this appears fanciful—is the legal enterprise really like a literary project?—it has to be noted that very recently the President of the United Kingdom Supreme Court has proposed a very similar analogy. Lord Reed said that each generation of common law judges ‘inherits a tradition which has been developed over a very long period by its predecessors’. And that these judges ‘have a responsibility to preserve, repair and renew that tradition as necessary, and to pass it on to those who succeed them’ (Reed 2022: 7). He then adds:

Rather like the scriptwriters of a long-running radio serial, they make their own contribution during the period when they are in post, but they have to write in a way which is both continuous with what has previously been written and a development of it (2022: 8).

One can understand why Professor Bódig might want to shy away from any attempt to locate his non-interdisciplinary epistemic thesis in literary theory and Radio 4’s *The Archers*. Nevertheless, the professor does not actually ignore Dworkin completely. He recognizes that interpretivism is associated with Dworkin but goes on to say that this ‘is not the right starting point’ (2021: 28). He prefers Herbert Hart and his analysis of legal concepts and normative mechanisms (2021: 29). Bódig thinks that Hart’s conceptual structures matched to social practices ‘make transparent their character and interconnections with other social practices’ (2021: 30). In contrast the Dworkin model is not explanatory but normative. ‘We need’, he says, ‘to preserve the methodological space for an explanatory project about law with an interpretivist epistemology’ (2021: 57). It is true of course that Dworkin was not providing a theory of how judges reason but how they ought to reason, a normative process so idealistic that it is beyond the wit of an actual human judge leading Dworkin to invent his superhuman Hercules. Yet what really makes Bódig turn away from Dworkin’s version of interpretivism is that it ‘turns the law into a passive recipient of moral and political principles’. Moreover, ‘by organising legal justification around values “imposed” on law, Dworkin runs the risk of conflating justification of the law and *by* (and within) the law – external and internal justification’ (2021: 247). Bódig concludes:

Legal interpretation ends up divorced from the problem of legal expertise, and crucial issues about doctrinal knowledge and doctrinal reasoning drift out of focus. In a way, it turns out that Dworkin’s approach is not interpretive enough. In the end, it does not offer adequate theoretical framing for the core epistemological challenge of legal scholarship: the rational reconstruction of law by way of interpretive engagement with its normative mechanisms (2021: 247).

So much, then, for Dworkin, who now moves offstage again. Who can come onstage to replace him? In his desperation to provide a vision of legal scholarship from a non-instrumentalist perspective (although he says that he is not involved in a crusade against instrumentalism) (2021: 249), Bódig turns to theorists like Ernest Weinrib who claim that ‘there is something specific and irreducible to law’ (2021: 248). There is an ‘inner structure’.

This may be true—although structuralism is hardly a scheme of intelligibility dreamed up by lawyers—but it is also true of astrology. As an astrology textbook says, ‘astrology is a unique system of interpretation’ (Hone 1990: 16). Moreover, and this is the major failing of Bódig’s book, he does not engage directly with, say, Felix Cohen’s view that this kind of Pandectist influenced metaphysical ‘inner structure’ is nothing but transcendental nonsense (Cohen 1935). But, then, anyone who challenges the authority paradigm-orientated legal scholarship misses, apparently, ‘how dependence on the legal profession is constitutive of the very character of the law school and, by implication, of legal scholarship’ (Bódig 2021: 162). With respect, this is an extraordinary statement; the whole point of the authority paradigm in law is that it is embedded in this dependence and so one can hardly say that one is missing the point. However, to Bódig’s credit, he does admit that ‘legal doctrinal scholarship may not be a worthwhile academic pursuit’ (2021: 162). This is a brave admission, but it undermines the idea that legal scholarship can be defended in terms of the academy. In the end, he says legal theory needs to do more to ‘address the objectivity of legal scholarship’ (2021: 263). Well, one might say, quite so.

Now, one is not disputing Bódig’s assertion that lawyers ‘possess a distinctive expertise that involves more than just the thoughtful exercise of moral judgment in the face of practical challenges’. And ‘that legal knowledge cannot be reduced to any other discipline’ (2021: 249). But the same can be said of astrology. What undermines astrology is that other disciplines with more reliable methodologies—astrophysics and astronomy in particular—have shown that astrology is drivel rather than genuine knowledge. A discipline cannot simply remain isolated from other disciplines; they feed into it and provide—or help provide—epistemic validity. Whatever one thinks of Dworkin’s interpretivism, he did realize that external disciplines are fundamental to validating legal knowledge. Thus, his comparison of law with literature indicates that the judge’s search for structural fit cannot be considered in isolation either of political theory or of social goals and the actual method is best explained through reference to, or analogy with, literary criticism (Dworkin 1985:

146-166). In saying this, one is not claiming that Dworkin has provided an epistemology of law. Bódig is surely right to say that it is too normative and Dworkin's hermeneutical scheme certainly does not give an account of what judges actually do, although if Lord Reed is to be believed it might be that the judiciary is moving in a Dworkinian direction. Yet, whatever one thinks of Dworkin's thesis, or theses, he does present a sophisticated academic project in which both judge and legal scholar contribute. And, who knows, such a project might even impress social science referees—or at least a referee from the humanities—examining a grant application from a doctrinal legal scholar.

[I] CONCLUDING REMARK

Can, then, traditional legal scholarship be defended? The first response is to say defended from what? If nothing much is expected from academic legal scholarship in terms either of new knowledge or of epistemological insights valuable to the social sciences in general, then such scholarship can be defended. All one needs to show is that such scholarship fulfils its purpose of assisting the courts and other parts of the professional legal community. If, however, more is expected; if doctrinal legal scholarship is expected to contribute to the academy in general in respect both of new knowledge and of epistemological insights useful for those outside law, then traditional doctrinal scholarship needs defending. And if anyone is sceptical about the necessity for a defence, they need only read Mathias Siems' chapter on a world without law professors (Siems 2011). It is not that doctrinal legal scholarship has no impact on various sections of the legal community; it undoubtedly has. But in terms of establishing general truths about society or coming up with new ideas, then doctrinal legal scholarship is pretty worthless as others have observed (Siems 2011: 78-79; see also Samuel 2020). Deep scholarly legal research is, probably, only achievable through interdisciplinarity. Professor Bódig clearly wants to counter these views, but, in the end, he does not really tell doctrinal legal scholars who see interdisciplinary approaches as the 'enemy' how they can actually do this. Moreover, some of the authority paradigm methodological notions that he fashions—one thinks of 'rational reconstruction' and 'interpretation'—could sit comfortably in a textbook on astrology.

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