INTRODUCTION

The relationship between judges and legal academics is the topic of this special issue of the *University of Queensland Law Journal* and to discuss this relationship we have assembled a stellar cast of both judges and academics from Australia, the United States and the United Kingdom. The contributors to this special issue are Judge Richard Posner, Mark Tushnet, Lord Rodger of Earlsferry, Justice Dyson Heydon, Susan Bartie, Edward Rubin, Allan Hutchinson and James Allan.

Judge Posner's paper, 'The Judiciary and the Academy: A Fraught Relationship' asks why there is a divide between modern judges and legal academics in the United States. This divide is especially puzzling because, as Posner notes, legal academics have been appointed to both federal (including the US Supreme Court) and state courts in relatively large numbers, especially in recent years. Posner explains the existence of this divide largely on the propensity of legal academics to write less and less doctrinal work which can be used by judges and practising lawyers in favour of more and more theoretical work, often philosophically influenced and politically contested. The growth in theoretical writing in legal academia is, in Posner's eyes, a result of the increasing specialization of legal academic writing driven by the large number of academic lawyers under increasing pressure to publish. Nevertheless Posner makes a plea for more useful writing (more useful from the perspective of judges), particularly writing that looks at the social and economic effects of particular rules which lies at the heart of Posner's conception of modern judging.

Judge Posner's article raises some interesting issues. He notes that in the US judges are writing less and less scholarly work. This may be the case in the United States but it is the exact opposite in the United Kingdom and Australia where the judicial contribution to scholarly legal journals has been consistently growing for at least 20 years. It would be interesting to examine this divergence in judicial practice further. In addition, Posner's plea for more 'useful' work from legal academics presumably has to be understood in the light of his earlier work on the fundamental differences between scholarly work and legal practice.[1]

In 'Academics as Law-Makers' Professor Mark Tushnet looks at the relationship from the other side. He is especially concerned with what he thinks is an overly optimistic view of the potential of legal academics to influence judges and with the effects that such an aspiration has on the legal academics. He gives as an example of the ability of academics to influence law-making the use made of 'highly qualified publicists' as a 'subsidiary means' of determining international law. He notes that in order to be effective scholars have to be considered 'sound' and that they must 'conform to an ideology, the project of international law, and must conform to norms of the community of international law'. In other words, it appears that in such an arena the potential for influence is mediated by notions of soundness and acceptability – which raises questions about who is influencing whom. For Tushnet another example is provided by doctrinal scholars who help judges by tidying up the law and providing doctrinal solutions to legal problems. Again he finds that 'doctrinal scholars must form part of the community with which the judges identify', and thus, presumably it is an open question whether the judges are influencing the academics or vice versa.

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[1] R Posner, 'Legal Scholarship Today' (1993) 45 *Stanford Law Review* 1647. See also M Dan-Cohen, 'Listeners and Eavesdroppers: Substantive Legal Theory and its Audience' (1992) 63*University of Colorado Law Review* 569 at 57-75 where he contrasts the bureaucratic, one-sided and authoritarian nature of judging with the imaginative, truth-seeking and open-ended nature of scholarship (at least in their ideal types).

However, Tushnet argues that most of US legal scholarship is doctrinal scholarship which he considers to be 'coercive' because it is doctrinal with an instrumental purpose – to persuade judges to go down a particular path governed by the policy goals of the academic. Tushnet does not believe that this form of scholarship is very influential because the judges are, not surprisingly, quite happy to come to their own conclusions about policy goals. Finally Tushnet considers what he describes as 'external' scholarship which tries to understand or describe the law from perspectives outside the law, such as philosophy, economics, sociology and the like. He describes this as scholarship written for other scholars and that judges do not seem to make much use of it. All in all Tushnet considers that all of these are 'modest' ways of influencing law reform and that academics overstate the magnitude of their influence.

As with Posner one question that arises from Tushnet's paper concerns the nature and role of legal academics and, in particular, their relationship to judges and other lawmakers. Are legal scholars primarily there to aid these lawmakers by providing high level technical advice or are they primarily scholars whose usefulness to judges is accidental at best? If Tushnet is correct academics who aim to influence judges should not expect too much return for their efforts.

While Lord Rodger is generous in his analysis of the impact of academics on English judges – indeed, he ascribes to the academics the creation of unjust enrichment jurisprudence – it is clear that he is worried, perhaps even frustrated, that academics do not offer much assistance to busy judges. In particular he bemoans the lack of assistance in two areas. First, he notes that much judicial work today concerns constitutional, administrative and criminal law and manifests itself in disputes over the meaning of legislation and regulations. Legal academics, at least in the common law world, do not, as a rule, carry out detailed analyses of difficult pieces of legislation or regulations that now make up the bulk of judges' work. Secondly, he laments that lack of academic work which brings to the judges the fruit of foreign learning and case law dealing with the sorts of problems that are the bread and butter of the modern courts.

Lord Rodger recognises that the incentives for academic work, created in Britain by the Research Assessment Exercise and in Australia by its bastard offspring, work against academics producing the sorts of work that he feels would help the judiciary. Whilst he also recognises that academic thinking is not necessarily tied to the courts he may underestimate the fundamental differences between legal practice and academic discourse. In other words, even without the perverse incentives offered by bureaucratic 'measurements' of research it may be that academics will always drift away from the needs of the legal profession. This, in turn, might suggest that we need to re-conceive our notions of legal education and whether learning law should be primarily an academic discipline rather than a vocational exercise.

The same consideration arises when one considers Lord Rodger's rather wistful acknowledgment that contract cases are less and less likely to become before the courts. In his words, the 'Arbitration Act 1996 and earlier legislation has greatly reduced the number of cases in the law of contract which come to the higher courts. Many of the developments, which must be occurring in response, for example, to the growth of new means of communication, are hidden from view in arbitrations from which no appeals ever reach the courts. The details of these developments are now known only to those who appear in the arbitrations. Academics are, in effect, shut out and cannot perform their traditional role of analysing the changes. Gradually, our textbooks will lose contact with the law of contract as it is actually being practised. In the long run, this is likely to reduce the influence of academic writings on the decisions in those cases that do come before the courts'. Again, one has to ask whether the academic discipline of law in a university provides the appropriate forum for the training of practical lawyers.

Of an entirely different flavour is Justice Dyson Heydon's 'Reflections on James Fitzjames Stephen'. Stephen is not much remembered today outside of specialist legal

circles but Heydon paints a portrait of an immensely influential man. In Heydon's words, Stephen as a 'journalist developed ideas that bore fruit in the legislator, the codifier, the law teacher, the historian, the evidence theorist, the criminal theorist and the judge. Out of his theories came laws for billions of people in several continents'. Stephen was all these things and more. Heydon paints the portrait of an industrious and driven man who believed that the purpose of life was hard work. Stephen was a committed and pessimistic conservative who believed that English rule in India was only for the good and who was a fierce opponent of democracy and liberalism. Yet despite this his Indian Evidence Act of 1872 has never been substantively changed and is considered by modern Indians to be a jewel in India's jurisprudence. Further, this fierce conservative was also a fierce opponent of irrationality in criminal law, especially when this irrationality was given effect to in 'barbarous' criminal law and sanctions. His criminal code while not adopted in England was to become the law in half of Australia's jurisdictions, in New Zealand and in Canada. As a teacher Stephen was not only influential with his own students; his *A Digest of the Law of Evidence* was, according to Heydon, 'one of the most successful students' works ever published'.

Two aspects of Heydon's study of Stephen stand out. The first is his almost frightening industriousness. Heydon reports that between 1865 and 1869, a time when he had a busy career at the bar and was writing for several periodicals 'he contributed over 850 articles, 200 notes and 50 letters to the *Pall Mall Gazette*'. He seems to have kept this rate of writing for most of his adult life. One wonders whether any human has ever written as much for so long. Perhaps the secret to this energy was to be found in his view of life with RJ White describing it as being 'inclined to believe that life would be tolerable but for its enjoyments'.[2] The second aspect is captured by Heydon's suggestion that in some ways speech was freer in Victorian times than it is today. According to Heydon 'no newspaper, and hardly any periodical, would nowadays dare to publish Stephen's political opinions'. In our strides to make sure that our writing is not offensive to others we may have sacrificed the space for non-conformists to challenge comfortable views. In any event, for Heydon Stephen was an incredibly influential figure across a variety of roles, including as an academic.

Susan Bartie's 'A Full Day's Work: A Study of Australia's First Legal Scholarly Community' examines the history of Australia's generation of legal scholars after WWII. At that time there were only a handful of law schools in Australia and they were small, with a handful of full-time staff and a large component of part-time staff sourced mainly from the profession. The received wisdom about these scholars is that they were conservative and committed to a positivistic, simplistic doctrinalism which deferred to conceptions of English legal scholarship. Bartie's strategy to examine this received wisdom is unconventional but effective. Noting that the administrative and teaching loads of these scholars impeded the production of normal scholarship, ie articles and books, she examines the prolific book review literature of the time to discern the attitudes towards law and legal scholarship held by these scholars. Her findings could not be more removed from what is commonly believed about this period of legal education and scholarship in Australia. Far from being subservient to English practices and attitudes to law these scholars showed disdain towards what were seen as old-fashioned views. Instead, in their book reviews, the First Community showed a strong commitment to American scholarship, especially to the sort influenced by American Legal Realism, and, in general terms, to legal scholarship and education that was focussed on using law to solve societal problems. In a word, the First Community's views on law were progressive, not conservative.

Bartie's findings raise some interesting questions. First, why was the received wisdom about the recent past so wrong? Did it suit the new breed of 'critical' scholars to

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2 RJ White, Introduction to James Fitzjames Stephen, *Liberty, Equality, Fraternity* (1967) 3.

mislabel their predecessors in order to embellish their self-perceived radical stances? Secondly, it appears that the attitude of the First Community towards judges was far more independent and critical than that of legal academics today. What can we learn from this? Thirdly, the First Community did not seem to require validation from the judiciary in the way that contemporary scholars do via their continual search for judicial contributions to journals and conferences. Why has modern Australian legal academia gone backwards by embracing a deferential position towards the judiciary?

Edward Rubin's 'Seduction, Integration and Conceptual Frameworks: The Influence of Legal Scholarship on Judges' argues that the impact of legal scholarship on judges has been profound yet largely indirect. In his words the 'true impact of scholarship on the judiciary lies in the creation of conceptual frameworks. Scholarship is enormously influential in shaping the judiciary's general approach to law'. Rubin's article analyses the history of American law as developed and applied by the judges with this lens in mind, explaining as he does how particular schools of legal thought worked their way through the legal system and became the conceptual frameworks within which judging then took place. Rubin's account raises several interesting issues.

First, it is Rubin's view 'that ideology always operates on judges' decision-making processes, that they always want to reach results which, according to their own lights, have good consequences and would be good policy... Because they also want to fulfil their role responsibly, however, and be well regarded by their colleagues, other government officials and the public at large, they feel obligated to express their ideological inclinations in doctrinal terms'. For Rubin, then, legal reasoning, at least as traditionally understood, is in one sense a sham. It follows that for Rubin there is not much point in considering whether classical claims for legalism and the minimizing of a judge's own policy preferences in legal reasoning are even worth examination. This is, of course, controversial to at least some in the academy and in the judiciary.

Secondly, Rubin seems to believe that if sufficient empirical legal work were done and if judges were given sufficient staffs to be able to locate and analyse this work, judges would be likely to use the insights gained from these studies in deciding particular cases and problems before them. Such a view, in this commentator's opinion, makes some heroic assumptions. In the field of empirical work in contracting, an area with which I am familiar, it appears that Rubin is going to ask more of both the scholars and the judges than they can deliver. It assumes that the studies will be comprehensive (ie they will cover all the range of industries and will be repeated enough not to be outdated). It assumes that the sort of knowledge that such studies consider (in contract, for example, norms and practices of parties and industries) exist in an identifiable form and are economically efficient or otherwise socially beneficial. It ignores the impact that this would have on judging, either in practical terms (what would it mean for judging if all such information were adopted) or in terms of justice (does contract exist primarily as a means of enhancing economic exchange or some other social value or is it primarily a means of dispensing justice).[3] It seems to this commentator that this type of knowledge is not as easy and costless to obtain, and then use, as Rubin seems to imply.

Allan Hutchinson's 'Doing the Business: Judges, Academics, and Intellectuals' considers what it means to be an intellectual and what is the nature of the relationship between university academics and judges. Hutchinson argues that there are two forms of intellectuals in legal academia, the traditional and the critical. The difference between the two is that 'traditional academics are members of the legal profession first and foremost: critical academics see their involvement with the legal community only as a necessary corollary to their more general identity as members of the professoriate'. As he has argued

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[3] See, for example, J Gava, 'Can Contract Law be Justified in Economic Terms?' (2006) 25 *University of Queensland Law Journal* 253.

in other places[4] Hutchinson thinks 'that 'law is politics' and that there is no site of political innocence or independence that academics or judges can inhabit in meeting their professional roles and responsibilities'. This means that both judges and scholars are in the 'politics business' and that they should come to terms with this political role.

Although not spelt out explicitly, presumably Hutchinson thinks that judges should be more transparent in their decision-making by making clear the economic, social and political factors that lie at the heart of their decisions and that legal scholars should try to aid the judges by providing high quality policy advice as well as giving critical analysis of what the judges have done and where they should go.

Is Hutchinson right in thinking that judging is inevitably political?[5] Is the jury out on how judges do decide cases? Or, on how judges ought to decide cases? As suggested above, there is at least a substantial number of legal academics and judges who do not believe that judging is essentially political.

James Allan's article, 'Down Under Exceptionalism', considers three aspects of legal academia in Australia. Allan first considers the place of academics in Australia's already heavily bureaucratized university system, one which only promises to get worse, and argues that they spend far more time than their counterparts in the UK, US, Canada and New Zealand on administrative tasks. He also thinks that they will be teaching far larger groups of students who will increasingly be in full-time or near full-time employment. Secondly, he argues that there are too many law schools in Australia and that this has had a negative impact on the quality of law students (and, implicitly, the quality of law teaching). Finally he describes what the adoption of a Bill of Rights would mean for legal education – an increase in courses such as human rights and constitutional law at the expense of more traditional subjects, and an increasingly symbiotic relationship between academics writing in those fields and the judges.

Allan's account raises several questions. First, why did Australian law schools and universities allow managerialism to take hold in such a strong fashion? Is there something about the culture of higher learning in Australia that allowed managerialism to gain such a command of universities? Secondly, is there anything to be learned from comparable countries about how to avoid or roll back this phenomenon? Thirdly, as Lord Rodger has argued, it may be that the nature of legal disputes before the courts has for some while been increasingly dominated by public law disputes and that the introduction of a Bill of Rights would only accelerate an already existing trajectory of change. One can also ask, perhaps naively, whether judges and academics would so readily conceive of their work in the instrumentalist way described by Allan.

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4 A Hutchinson, 'Heydon' seek: Looking for Law in all the Wrong Places' (2003) 29 *Monash University Law Review* 25.

5 For a contrary view see, for example, J Gava, 'Dixonian Strict Legalism, *Wilson v Darling Island Stevedoring* and Contracting in the Real World', forthcoming, *Oxford Journal of Legal Studies*.