THE NATURE OF LEGAL SCHOLARSHIP

WE tend to assume that everyone knows what is meant by scholarship in general and legal scholarship in particular.[1] Professor Geoffrey Wilson's recent essay on English legal scholarship is an example.[2] He conducted a wide-ranging review of the state of English legal scholarship without feeling the need to articulate any model of scholarship. Nevertheless, since he doubted the possibility of scholarly study of English law in isolation from any comparative,[3] sociological or philosophical[4] element, and decried the general quality of much of English legal scholarship,[5] some model of scholarship must be implicit. What is it?

Scholarship is related to the good of knowledge.[6] The object is to discover more about whatever is being considered, and to understand it better. Are some kinds of knowledge and understanding, or some ways of seeking them, better than others? Here are four ways in which forms of knowledge-related enterprise might be evaluated:

(a) as being more or less scientific;
(b) as being more or less in tune with certain formal values which are integral to a serious search for truth;
(c) as being more or less useful;
(d) as being valued more or less highly in the market-place of ideas.

Wilson seems to assume that option (a) is the best criterion for judging scholarship: a scientific activity is more scholarly than an unscientific one.[7] Section I of this paper evaluates that view, and argues instead that option (b) offers a more appropriate model. Section II explores some implications of that for research and writing in legal and socio-legal spheres. Options (c) and (d), which are related, will re-surface there (only to be discarded again).

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[1] See the essays on legal scholarship in the fiftieth anniversary edition of the Modern Law Review, (1987) 50 M.L.R. 673–854, *e.g.* M. Chesterman and D. Weisbrot, "Legal Scholarship in Australia," 709–724; M. Tushnet, "Legal scholarship in the United States: an overview," 804–817.

[2] G. Wilson, "English Legal Scholarship" *ibid.*, 818–854.

[3] Wilson has a strong belief in the value of comparative study: *ibid.*, 829–834.

[4] *Ibid.*, 823–829.

[5] *Ibid.*, 819: "The words 'English legal scholarship' though high sounding have a similar function to the words 'disposable plastic cup.' Each adjective strengthens the message that one cannot expect much in terms of quality or long-term utility from it."

[6] On knowledge as a "good," see J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 59–80.

[7] Wilson, *op. cit.* note 2, p. 822, asks (following Daniel Mayes and Brian Simpson) "Is law a science or is it something less dignified?"

I. THE MODEL

1. *Science, objectivity and the nature of scholarship*

Why should we regard science as the paradigm of scholarship? The argument implicit in Wilson's article is that understanding can best be furthered through techniques which allow us to cast off, so far as possible, subjective beliefs and *a priori* assumptions: socio-legal studies manages it by adopting scientific techniques; comparative law can claim a scientific objectivity denied to studies rooted in a single legal system; jurisprudence and political theory likewise attempt to transcend the limits of individual systems in the search for understanding of legal phenomena generally. If the right scientific techniques are used, he seems to say, we might come closer to scientific legal theory, though law will always be a "second order and applied" rather than an "original" science, and perhaps will never be a "discipline."[8]

By contrast, Wilson sees studies of individual systems, using the techniques of analysis developed through the legal cultures of those systems, as being intrinsically unscholarly for two reasons. First, they necessarily adopt many of the basic assumptions and beliefs which underlie the system being studied. The attempt to expound or explain law from an internal viewpoint[9] is inescapably fettered by the ideological lumber of the legal system itself. Secondly, despite lawyers' claims that law[10] is sufficiently systematic, predictable and principled to be studied scientifically,[11] sceptics can find remarkably little logic in law. Instead, there is a pragmatism masking judicial dogmatism whose chaotic consequences are only slightly mitigated by attachment to the ideological values of the rule of law, rights and so on.[12]

The appeal *of* science is that it cloaks one's work in an aura of objectivity. The appeal *to* science, however, is open to challenge on three grounds. First, one can argue that portraying the social sciences, comparative law and philosophy as specially scientific or objective ignores the limitations of scientific method. Secondly, it takes too uncritical a view of inflated claims for the scientific status of

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[8] *Ibid.*, 827.

[9] See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 55–56 on the internal aspect of a rule, and pp. 109–114 on the significance of the internal point of view for understanding the existence of a legal system; R. M. Dworkin, *Law's Empire* (London: Fontana, 1986), pp. 78–85, on the significance of the distinction between internal and external critiques of an interpretation of law.

[10] Or, at any rate, successful law, *i.e.* law that is performing its proper functions (whatever they may be). See, from different perspectives, M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (ed. G. Roth and C. Wittich, New York, 1968), Chap. 2, and L. Fuller, *The Morality of Law* (revised ed., New Haven: Yale University Press, 1969), Chap. 2.

[11] The desire to allow lawyers to operate as legal scientists was one of the main motivations behind Kelsen's development of a "pure" theory of law.

[12] Wilson, *op. cit.* note 2, 842–844.

those disciplines. Thirdly, there is a case for viewing law as being rather more coherent and principled than it appears at first sight.

Consider first the idea that science is objective. It derives from the claims made by positivists for the value-freedom and probative power of experimental science, in which a researcher constructs an hypothesis and devises experimental means to investigate its truth or falsity. However, philosophers of science recognise the limitations of experimental science. Popper showed that a scientist who derives a principle from experimental findings by inductive logic does not thereby *prove its validity* as a general causal explanation. Experiments can only logically *falsify* an hypothesis. Scientists therefore assess theories according to their falsifiability rather than verifiability.[13] An explanatory theory can only be said to be verified when every alternative explanation, or null hypothesis, has been formulated, tested experimentally and shown to be false. Even in that negative role, scientific techniques have limitations. Any experiment is intrusive, and may change the conditions affecting the phenomenon under investigation. Experimenting on one part of a system may make it impossible to discover anything about other parts of that system.[14] Furthermore, the issues that are chosen for research depend on the kinds of questions that researchers are taught or conditioned to regard as worthwhile. A state of affairs can only be classified as problematic in the light of certain prior assumptions, and the classification will be conditional on accepting an epistemology which may itself be problematic. It has indeed been argued that philosophy is complementary to science because philosophy operates as a critique of scientific method.[15]

That applies even more powerfully outside the natural sciences. It is hard to apply the Popperian falsifiability method where one relies on statistical methods to test hypotheses, as is often the case in the social and biological sciences. It is practically impossible to construct, let alone test, the null hypotheses for a social scientific theory, because of the infinite number of different cases which the null hypothesis for even the simplest hypothesis must cover. The social sciences cannot, therefore, be scientific in quite the same way as natural sciences, and talk of scientific objectivity must not be accepted

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[13] Karl Popper, *The Logic of Scientific Discovery*, English translation (London: Hutchinson, 1959); "Science: conjectures and refutations," in Popper, *Conjectures and Refutations*, (4th ed.) (London: RKP, 1972), pp. 33–65 on the difference between science and "pseudo-science."

[14] This was enunciated by Niels Bohr as the "complementarity principle" in quantum mechanics. The most famous example of this is Heisenberg's uncertainty or indeterminacy principle: experiments on electrons to establish their position and momentum can only have limited success, because the diffraction caused by an attempt at measurement would render both position and direction (and hence momentum) uncertain.

[15] J. Habermas, *Knowledge and Human Interests*, (2nd ed.), trans. J. J. Shapiro (London: Heinemann, 1978).

uncritically. What distinguishes the true scientist is an awareness of the limitations, as well as the potential, of the techniques at his disposal. This produces a critical attitude in which no theory is accorded more than conditional acceptance. If that is the essence of scholarly science, it can be applied just as well in the arts, humanities or social sciences. The nature of the theories may vary, being more or less descriptive, interpretive or causational, but the attitude required by the investigator is the same.

Secondly, claims to scientific objectivity are often inflated. Comparative lawyers sometimes make large claims for the scientific status of their subject. They seem to take it for granted that comparing several systems will permit objective and value-free assessment.[16] Yet comparison is impossible, even on the broadest scale, without first finding out about the law of each system, which is bound to be affected by the assumptions and values underlying them. Even the decision that there is a problem needing a legal response is value-laden.[17] In order to have things to compare, comparative lawyers must start off from exactly those *a priori* assumptions which mark any lawyer's approach to his own system of law. If they do not, they are likely to misinterpret the system, making any comparison worthless. Furthermore, comparing systems in order to seek solutions to perceived problems in our own law is dangerous unless we place each system in its own political, economic and social context.[18] Trying to transplant solutions between systems which do not share a common set of economic, social and political values and conditions is worse than pointless: it can be counter-productive, as has been demonstrated in relation to the attempt to adopt U.S. antitrust 'rule of reason' thinking in EEC competition law.[19] Comparative law is no more scientific than other forms of jurisprudence, and will be less objective unless coupled with extensive sociological, economic and political analysis. Comparison may make it easier to see that our assumptions are problematic, and so encourage a critical attitude, but comparative lawyers seem to question their own assumptions no more consistently than other lawyers. Legal philosophy, by contrast, can escape from the technicalities of individual legal systems, but at that level it may be relatively unhelpful in explaining legal pheno-

[16] This is discussed by Jonathan Hill, "Comparative Law, Law Reform and Legal Theory" (1989) 9 O.J.L.S. 101–115.

[17] Hill, *op. cit.* note 16, at p. 108, points out that the Soviet legal system, "as a result of its ideological bases, faces the 'problem' of how to prevent the acquisition of unearned income through the purchase and resale of consumer goods at a profit. Among the techniques employed by Soviet law is the imposition of criminal liability for 'speculation.' [Article 154 of the R.S.F.S.R. Criminal Code.] In western legal systems, however, the resale of goods at a profit is regarded as legitimate economic activity."

[18] Kahn-Freund, "On Uses and Abuses of Comparative Law" (1974) 37 M.L.R. 1–27.

[19] Whish and Sufrin, "Article 85 and the rule of reason" [1987] *Yearbook of European Law* (Oxford: Clarendon Press, 1988), pp. 1–38.

mena.[20] Perhaps it is most useful, scientifically speaking, as a critique of scientific method. Using it to generate a set of values is problematic.

Thirdly, it is doubtful whether English law is really so disorganised and unprincipled as to be an unpromising subject of disciplined study. Even in an area of rapid and fairly recent common law development such as administrative law, it is at least arguable that the law has never been more systematic and theoretically stable than it is now. Other areas, for example negligence and restitution, may give a different impression, but this is not the place to develop the point. For present purposes we need only note that some perceptive philosophers and lawyers suspect that under the mish-mash of pragmatic judicial and legislative responses to problems there lurks a far more coherent, principled legal structure which informs legal development even when practitioners and academics seem to have lost sight of it.[21] In refusing to use legal techniques, either to investigate that claim or to discover the state of the law, one discards analytical tools of some interpretative value.

To summarise the argument so far, to equate scholarly objectivity with science, as Wilson does, produces scientism.[22] That is a mistake: it is based on a misunderstanding of science; the qualities which inform the best science are also displayed in the best historical, literary and legal research and writing.

2. *What, then, is scholarship?*

I define scholarship as *action* informed by a distinctive *attitude of mind*. This general conception of scholarship[23] can be applied to any discipline or subject-matter. *Legal* scholarship is a conception which results from the application of the concept of scholarship to the special kinds of problems that are discovered in the study of laws and legal systems. The title of scholar is not to be denied merely because a student has chosen to study law rather than philosophy, or to undertake one type of legal study rather than another. In all fields scholarship involves curiosity about the world, which may be stimulated

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[20] Wilson, *op. cit.* note 2, 826–828, discussing reasons for "a strategic withdrawal from high abstraction to the middle range."

[21] P. Atiyah, *Principle and Pragmatism in Law* (London: Stevens, 1987), Chap. 4, treats the advancement of principles as one of the responsibilities of academic lawyers. See A. T. Kronman, *Max Weber* (London: Arnold, 1983), pp. 87–89 and D. Trubek, "Max Weber on law and the rise of capitalism" [1972] *Wisconsin Law Review* 3, on the so-called "England problem" in Weber and other problems relating to the rationality of common law systems. For an important recent discussion of styles of reasoning, see P. Atiyah and R. Summers, *Form and Substance in Anglo-American Law* (Oxford: Clarendon Press, 1987).

[22] " 'Scientism' means science's belief in itself: that is, the conviction that we can no longer understand science as one form of possible knowledge, but rather must identify knowledge with science." J. Habermas, *op. cit.* note 15, p. 4; see also pp. 67–69.

[23] On the meaning of conception, see J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), pp. 5–6.

either by the need to achieve a goal or by desire to understand something for its own sake. It is the attempt to understand something, by a person who is guided by certain ideals, which distinguishes scholarship both from the single-minded pursuit of an end and from dilettantism.

The ideals include: (1) a commitment to employing methods of investigation and analysis best suited to satisfying that curiosity; (2) self-conscious and reflective open-mindedness, so that one does not assume the desired result and adopt a procedure designed to verify it, or even pervert one's material to support a chosen conclusion; and (3) the desire to publish the work for the illumination of students, fellow scholars or the general public and to enable others to evaluate and criticise it. If scholarship is directed to the pursuit of understanding, those ideals must represent normative standards which are functionally related and intrinsic to any scholarly enterprise.[24] Of its three features, the first, commitment to methodological rigour, needs no explanation, save to notice that sometimes (but not always) the appropriate research techniques will be those favoured by Wilson, though it will depend on the nature and scope of the inquiry. The other features need to be explained, because they are often ignored.

Reflective open-mindedness can be illustrated by reference to Rawls' *A Theory of Justice*. This represents a sustained effort to think through a subject while constantly re-assessing the assumptions from which the train of thought began. Rawls incorporates that process into his framework for moral reasoning under the title of "reflective equilibrium,"[25] and the technique is one which all scholars consciously or unconsciously adopt. The method has the drawback, for people more interested in axe-grinding than understanding, that it makes the weaknesses as well as the strengths of an argument clear. For instance, Nozick's *Anarchy, State and Utopia*[26] seems (and this is admittedly a personal impression) to be arguing for a position rather than examining a problem with an open mind, despite his claim to have been converted to his position against his will.[27] This is curious, considering Nozick's general disapproval of attempts to provide knock-down arguments.[28]

Fernand Braudel's *Civilisation and Capitalism, 15th–18th Century*[29]

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[24] This mirrors Fuller's idea that law has an "inner morality": L. Fuller, *op. cit.* note 10, Chaps. 2 and 5.

[25] Rawls, *op. cit.* note 23, pp. 20–21, 48–51.

[26] Oxford: Basil Blackwell, 1974.

[27] *Anarchy, State and Utopia*, pp. ix–x.

[28] R. Nozick, *Philosophical Explanations* (Oxford: Oxford University Press, 1981), p. 5: "Why are philosophers intent on forcing others to believe things? Is that a nice way to behave towards someone? I think we cannot improve people that way—the means frustrate the end."

[29] Volume 1, *The Structures of Everyday Life* (London and New York: Collins, 1981); Volume 2, *The Wheels of Commerce* (London and New York: Collins, 1982); Volume 3, *The Perspective of the World* (London and New York: Collins, 1984), all translated by Sian Reynolds.

provides another example: Braudel confronts a mass of evidence and various theories of historical development and causation, using theories to help to organise the material but constantly re-examining the theories themselves in the light of the evidence. This is the technique of reflective equilibrium applied to the study of history.[30] The best research scientists work in the same way: theories or models are accorded conditional acceptance as explanations of phenomena, but are continually reappraised in the light of new problems and discoveries which might seem to threaten them. The process of explaining involves a commitment to order of some sort,[31] for explanation sets discrete phenomena in some ordered relationship. To find order requires a leap of the creative—or, perhaps more accurately, *re*-creative—imagination, to imagine what might be going on, with only limited information to help, inside an atom, in a sixteenth century economy, or in the mind of a judge. It then demands a disciplined examination, in the light of all the available material, of the intuitively attractive ideas that the process throws up. This helps to prevent us from becoming so enamoured of a theory that we ignore or suppress apparently inconsistent findings.

Let us turn to the importance of dissemination of the fruits of scholarship. For scholars to operate as a community, communication is essential. Admittedly publication inevitably involves a compromise between the need to finalise a text and the fact that understanding does not finally stop growing at any one point: "no work of scholarship ever attains a static perfection,"[32] but one must stop somewhere. Although never truly final, the text is important, because failing to communicate frustrates one of the objects of scholarship. The language of scholarship, therefore, should be of concern to all.[33] Yet a good deal of writing obscures its message behind impenetrable language and structure. Being too lazy to write properly is an unscho-

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[30] See especially *The Wheels of Commerce*, Chap. 5, and *The Perspective of the World*, *passim*.

[31] In the context of legal scholarship, this need not be an internal order: the order sought, identified and used as an explanatory framework may be external to the legal system, as is the case with critical legal studies. See further section II.2 below.

[32] Dorothy L. Sayers, *Gaudy Night* (1st ed. London: Victor Gollancz, 1935), New English Library edition (Sevenoaks: Hodder and Stoughton, 1978), p. 40. The whole book constitutes one of the most interesting discussions of the nature of scholarship in the literature. Miss Sayers obtained a First in Modern Languages at Oxford, and completed translations, with critical commentaries, of Dante's *Inferno* and *Purgatorio*. She was also at one time an advertising copy writer, which to the modern scholar is of almost equal importance, as Professor Cretney has pointed out to me. (J. I. M. Stewart, in *Dictionary of National Biography*, 1951–1960 supplement.)

[33] I am referring here to the language in which scholars express their decisions. P. Goodrich, "Rhetoric as Jurisprudence," (1984) 4 Oxford J.L.S. 88–122, examines the rhetoric of non-radical jurists in this light; the exercise could constructively be extended to radical writing. I do not refer to studies of rhetoric and reason in judicial decisions, on which see, for example, W. T. Murphy and R. W. Rawlings, "After the Ancien Regime: the writing of judgments in the House of Lords 1979/1980" Part I (1981) 44 M.L.R. 617–657, Part II (1982) 45 M.L.R. 34–61.

larly trait, but some writers may feel that the form in which their message is communicated is of secondary importance when compared with the substance. They may even suspect that concern with style rather than content is unscholarly. However, from the reader's viewpoint at least, style and substance are hard to separate. As Dame Veronica Wedgwood has written[34]:

> "Good writing is no guarantee of good scholarship; but neither is bad writing . . . . There have been scholars of great distinction and valuable influence, who were bad writers. But they are rare . . . . The scholar who cultivates—as he must—the patience, the self-discipline, the spirit of inquiry, the open mind, the exactitude, and the strong but controlled imagination which are all necessary for research, will almost certainly find some of these qualities—equally important for the writer—reflected in his handling of the English language when he comes to set down his conclusions. In the same way, the writer who cultivates these qualities in his writing will find his perceptions sharpened and his ideas clearer when he turns to research."

What is more, the discipline of expressing an idea comprehensibly is a good test of the idea itself: if it cannot be done, then it might suggest that the idea is unsound.

There is a slightly different problem if the author is writing not for the full community of legal scholars but only for a group within it, perhaps the followers of a particular programme. He may then twist the language until it becomes almost unrecognisable, a sort of private code. This "Humpty Dumpty"[35] approach is out of place in the field of scholarship. It prevents knowledge and understanding being disseminated, confining it instead to a closed group. It negates the desire to share knowledge. It also devalues anything worthwhile which may be hidden behind the impenetrable language: sensible people are liable to say, "I don't understand this enough to know whether it makes sense, but if this is the best possible presentation of it then it probably doesn't." Obscurantism is not scholarship; the person who could make interesting contributions to knowledge, but is unable to set his ideas out clearly enough for others to understand, suffers a defect as a scholar, because the communication of ideas is one of the innate goods, or part of the inner morality, of scholarship.

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[34] "Literature and the historian," in C. V. Wedgwood, *History and Hope* (London, 1987), pp. 300–301.

[35] Lewis Carroll, *Through the Looking Glass and What Alice Found There*, in *The Annotated Alice* (ed. M. Gardner, revised edition, Harmondsworth, 1970), p. 269:

> " 'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'
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> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
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> 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' "

See further Gardner's note to that passage, *ibid.* pp. 268–270.

Is originality one of the virtues of scholarship? This is a different question, because originality has three different meanings. The first is the avoidance of plagiarism, meaning, for present purposes, the unacknowledged appropriation of the work of others. Plagiarism is a form of dishonesty which denies one's audience part of the material needed to make an accurate assessment of one's views, and it can undermine the role of the community of scholars. Secondly, originality can mean an interesting and novel reassessment of the findings or ideas of others. This may lead to a new and improved understanding of a subject through a re-interpretation of data or a new conceptualisation of a problem or phenomenon. In legal terms, it may even lead to the creation of new doctrines[36] or whole new divisions of law, such an unjust enrichment and, in the recent past, family law. Thirdly, it can mean having a novel idea, which might consist of a new hypothesis together with a way of testing it, or a new approach to a subject, or a new school of thought.

One would hope that every piece of research would be free of plagiarism, thus displaying the first form of originality. Many works also display the second and third forms, but are they necessary qualities of scholarship? Suppose someone sets out to test a hypothesis which is already commonly accepted, and fails to disprove it. Taking falsifiability as the basis for scientific inquiry, one has proved nothing. On the other hand, one has not necessarily behaved in an unscholarly way. The scholarship lies in the selection of an appropriate method for testing a reasonable hypothesis, pursuing the method and interpreting the results in a fair and open-minded way.

Not only are the second and third forms not necessary parts of scholarship; the conscious pursuit of originality can be positively unscholarly. The novelist, poet or artist may perhaps be able to aim at originality as a quality in its own right, although even this is doubtful. Originality must be assessed by others, who have a more balanced appreciation of the relationship between a person's work and the works of others than the scholar or artist, bound up in his or her own ideas, can ever have. But for the scholar, while originality may be the result of one's work, to aim at it makes it likely that the product will be flawed. The determination to be different may prejudice one's approach to the subject in a way that vitiates the conclusions: the range of available conclusions is improperly narrowed by the commitment to originality rather than to the best possible explanation or account.

II. Implications

The model of scholarship developed above has implications for the nature of academic freedom and the relationship between scholars and the wider community. Anyone pursuing knowledge will have to

[36] Samuel Warren and Louis Brandeis, "The right to privacy" 4 *Harvard L. Rev.* 193–220 is perhaps the most famous example of this sort of originality.

balance two different models of social life: individualism and communitarianism. The former, taking individual interests to be the basis of social morality, places a high value on individual scholars' freedom to choose subjects for investigation, settle their own methodology, and publish their results. Choices of goals and methods are central to academic freedom, and the degree to which individuals are free to make those choices is a benchmark of the level of tolerance in the academic and the wider communities. Apart from the argument for academic freedom from natural rights or primary goods,[37] it is rational from a utilitarian angle to adopt a liberal approach to academic freedom. As it is impossible to know which research will prove to be of social benefit, we should give teachers and researchers their heads as much as possible and so maximise the amount of material available for society as a whole to increase its understanding.

However, this model has limitations. Unqualified liberalism misrepresents the human condition: it ignores the way in which our rights are conditioned by our dealings with others in a framework maintained for us by the joint action of other people in a spirit of "community."[38] If we want to collaborate in research, especially in large scale projects where collaboration is a practical necessity, we have to be prepared to sacrifice some of our individual ideals and goals for the sake of the common enterprise.

The communitarian model is based on the idea that the community can pursue goals which are different from, and take precedence over, those of any individual or group within it. In the context of scholarship, it is a powerful model for two reasons. Firstly, we all recognise that we are members of an academic community on which we rely to test ideas, methods and so on. Secondly, costly new types of research require co-operation between numerous researchers and major provision of funds, often from the public purse. Indeed, in the experimental sciences teamwork in research is more common than pioneering work by individuals. People who want to engage in such research will inevitably have to surrender some of their independence. Funding bodies or others may justifiably claim a say in the subject of research, methods of investigation and form of publication. However, while individuals can acknowledge debts to the community, communitarianism as a social theory suffers three problems: firstly, justifying the personification of the "community" as a single entity with interests which can be consulted; secondly, justifying treating the community's interests as different from and of greater moral weight than those of the individuals who make it up; and thirdly, calculating what course of action is "best" for the community from among all those available.

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[37] Finnis, *op. cit.* note 6.

[38] On the relationship between individual and community, see for example S. I. Benn, "Individuality, autonomy and community," in E. Kamenka (ed.), *Community as a Social Ideal* (London: Arnold, 1982), pp. 43–62.

Despite their shortcomings, both liberal and communitarian models can illuminate aspects of a web of social relationships, in which individual freedoms express recognition by social agents of the day-to-day demands of social co-operation.[39] In the context of scholarship, the pursuit of understanding is both a good for individual scholars and one of the main values justifying claims to academic freedom within a liberal democratic political system. Individuals are vitally important. No committee or commune ever had an idea. Individuals have insights and make discoveries, either alone or when co-operating with other individuals. In the latter case, the co-operative ethic to which individual scholars adhere supplies the opportunity for a pooling of individuals' talents, but it should never be forgotten that the talents are those of individuals, not the group. It is therefore proper to allow the greatest possible scope for individual initiative in the planning and conduct of research and teaching. The idea of scholarship as a co-operative enterprise does not impose any particular programme or detailed plan for life on scholars.[40]

On the other hand, neither does it leave scholarship stranded in a wilderness of relativism. Scholarly values are formal but demanding, and it is the duty of the academic community to encourage and safeguard them. What is important is how one behaves. A degree of rigour; an open-minded, self-critical attitude to one's work; careful research; careful thought; careful, clear writing up; these are the essence of scholarship, in law as in other disciplines.

Wilson appears to suggest that some forms of activity are intrinsically of questionable scholarly value. For example, he draws attention to the intimate connections in English law schools between syllabuses, approaches to teaching, legal practice and ideas of legal scholarship, and suggests that concentrating on training may deflect attention from fundamentally important issues.[41] While this is undoubtedly right, we devalue both teaching and scholarship if we ignore the fact that generally they go hand in hand. The person who *only* teaches or administers may cease, ultimately, to be a scholar, but a scholarly approach in teaching is essential if we are to provide students with a way of interpreting material. Scholarship can be brought to bear on the writing of a student text and on the construction and teaching of a syllabus; if it is not, it will be a poor syllabus, lecture or text.

It is one thing to say that many disappointing lecture courses are given, but it is quite unacceptable to say that preparing lectures is of

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[39] D. Feldman, "Rights, capacity and social responsibility," (1987) 16 *Anglo-American Law Review* 97–116, 101–104.

[40] *Cp.* Rawls' view of the value of rational self-directed choice of goals, *op. cit.*, note 23, 424–439; Finnis, *op. cit.*, note 6, 103–105; D. Held, *Models of Democracy* (Cambridge: Polity Press, 1987), Chap. 9 on "democratic autonomy."

[41] Wilson, *op. cit.* note 2, 821, 846–7. This is not peculiar to England, as essays on legal scholarship in other parts of the common law world in the fiftieth anniversary edition of the Modern Law Review make clear.

itself less scholarly than other activities. We can judge work of many kinds by applying scholarly standards. The short note for practitioners, the casenote, the research or review article, the learned monograph, the socio-legal research project, the lecture course and the student text can all be done in a scholarly way. We are bound to criticise the unscholarly, but as between different manifestations of scholarship it would be arrogant to discriminate. If we write off some types of law-related activity as intrinsically less scholarly than others, we are blind to the values which may be displayed in diverse works. That may ultimately damage both academic freedom and the pursuit of excellence.

The law is a complex normative institution which has foundations in politics and morality while using distinctive methods of manipulating its rules. In one sense, all jurists study social institutions; from another viewpoint, they can treat the literature of law (texts such as judgments and statutes) as raw material, and approach it in as many different ways as historians, literary critics and anthropologists approach texts; from a third position, they can theorise about the formal or moral philosophy of the subject; from a fourth, they might see legal scholarship as a form of political theory, or as a kind of practical politics. These are all legitimate ways of conducting (indeed, of delimiting) particular legal studies. The scholarly community, and the wider community, therefore need to display considerable tolerance of the ways individual jurists choose to approach their subjects and the moral and political standards they adopt.

At the same time, individuals must respect the academic and the wider communities, recognising the academic community's importance as the guardian of formal scholarly values and as a facilitator of co-operation between workers, and also accepting the calls made on scholars by the wider community, which supports the pursuit of understanding both financially and materially. This raises serious questions about the division of responsibility for the formulation, funding and control of research projects between individual scholars, the scholarly community and the wider community, to which I now turn.

1. *Programmes and the control of scholarship*

The importance of co-ordinated programmes of research organised by funding bodies is growing. Wilson's article addressed important questions about the implications for academic freedom and legal scholarship of different methods of funding and providing other necessary resources for research. In that area, the tendency to use utility and marketability as criteria for scholarship is most marked.[42] But the utility test for scholarship fails because it is generally impossible to predict the ultimate utility of information or ideas, and the

[42] These, it will be remembered, were options (c) and (d) set out above.

market-place cannot place a value on scholarship because market reaction may be a measure of trendiness rather than inherent worth.

The programme for scholarship as a means of encouraging scholars is not in itself objectionable. A well-planned research initiative by a funding organisation can identify areas in which scholarship can thrive and then direct the energies of researchers towards those areas. If such an exercise is to succeed, it is important that the programme should be drawn up in a scholarly way. That was done successfully by the ESRC when planning a research initiative on citizens' grievances and administrative justice in the light of a review of the available literature specially commissioned from Richard Rawlings,[43] whose scholarly paper is a valuable bibliographical tool for other researchers.

Nevertheless, programmes have some potential drawbacks which flow from the ways research projects are funded. It is an unfortunate aspect of empirical socio-legal research that the cost of projects and the support services that they call for are often greater than can be funded from within research centres, universities and polytechnics. People who want to pursue such research are dependent on outside funding, and most of the major co-ordinated programmes of legal scholarship now are in the socio-legal field.

If researchers seek money from funding bodies which are not governed by a programme, they have a chance of selling an idea for research if they can convince a body that it promises valuable results. At the moment, however, very few funding bodies are not substantially programme-oriented.[44] Once a funding body allocates funds specifically to programmes, it closes off those funds from scholars with valuable research proposals which happen not to fit in with the current programme. In effect, the programme operates normatively, placing value on some research proposals above others merely because they fit the programme. It short-circuits discussion of the comparative worth of different kinds of projects. When that happens, the "scholarship as programme" approach institutionally discourages and devalues scholarship which is conducted outside it.

When the funding body sets the area for research and invites researchers to tender for a contract to carry it out, there is a further problem. Many researchers will spend a great deal of time formulating proposals which will never be funded. If one in four tenders were successful (and the actual success rate is generally far lower than that), three-quarters of the time and effort put into preparation and drafting proposals is wasted, unless one subsequently obtains a grant

[43] R. Rawlings, *Grievance Procedure and Administrative Justice. A Review of Socio-Legal Literature* (London: ESRC, 1987).

[44] The main non-programme-governed funding sources at the moment are the Joseph Rowntree Memorial Trust, the Leverhulme Trust and the Nuffield Foundation, while the British Academy gives a reasonable number of fairly small grants. It is theoretically open to applicants to make bids to the ESRC for funding outside organised programmes, but very few people do so.

elsewhere. Why are so many people prepared to bid for funds when their chances of success are far below what would justify a rational person in spending that amount of time in that way?[45] In part, the answer lies in the growing number of institutes pursuing (*inter alia*) socio-legal research, which depend on raising external funding for their projects. They have had to develop expertise both in conducting the research and in tendering for contracts and obtaining research grants. Accordingly they have a better chance of success in obtaining money than other researchers trying to break into the field.[46]

Why, then, do others bother? For some career researchers it is the only way of staying in business. For others, it has a lot to do with current university funding arrangements. Departments are assessed by the UGC on research and publication records; the standing of departments within institutions depends heavily on the department's record in attracting research money from outside agencies. Furthermore, institutions gain financially from winning research grants and contracts. That creates considerable institutional pressure on researchers to restructure their interests so that research plans can be used to attract money, and to apply for research money if there is even the slightest chance of getting it. As a result a lot of people waste a lot of time which in a rational world could be better used in other ways.

John Baldwin has written of the pressures faced by academics to "give greater emphasis to financial returns," which "could be at the expense of academic concerns." He drew attention to the fact that preoccupation with economic exigencies "has produced a situation in which the appropriate subjects for study and the way they should be tackled are being determined to a growing extent by government departments. It is a crucial question at present whether researchers or policy makers formulate the problems for study." He mentioned "the danger that researchers may find they have surrendered their independence out of an understandable wish to please their sponsors to generate further funding."[47] There is always a potential for tension between the intellectual integrity of the researcher and the needs or desires of the funding body,[48] and that is particularly awkward when

[45] For example, the ESRC research initiative on administrative justice resulted in over 100 teams putting in bids; some 25 were shortlisted, and only five awards were made. For those starting out, therefore, the odds against success were over 20–1; those who were shortlisted, and had to produce a fully detailed account of the proposed research, faced odds (whether they knew it or not) of 5–1 against a successful result from weeks of work.

[46] In the ESRC research programme on administrative justice, three of the five successful tendering bodies were specialised research institutes.

[47] *Institute of Judicial Administration 19th Annual Report* 1986–1987 (University of Birmingham Faculty of Law), Introduction, at pp. 1–2. Wilson, *op. cit.* note 2, 847–850, makes similar points.

[48] One thinks of traders in art and artefacts who placed detailed orders for pictures: "A panel of Our Lady on a background of fine gold with two doors, and a pedestal with ornaments and leaves, handsome and the wood well carved, making a fine show, with good and handsome figures by the best painter, with many figures. Let there be in the

the funding body is the state: only the very prestigious and independent academic is likely to be able to withstand the pressure.[49]

That fosters a patronage system of scholarly research, similar to the court artist system which flourished in Italy before and during the renaissance. As in that age, it has advantages: patronage makes for status and a relatively secure life for those patronised. But it also has disadvantages. The independent scholar/artist had, as Peter Burke has observed[50]:

> "less economic security and a lower social status, but it was easier for him to evade the commission he did not want. . . . Whether individual artists cared about their freedom or not, the difference in working conditions seems to be reflected in what was produced. The major innovations of the period took place in Florence and Venice, republics of shop-keepers, and not in courts."

Even if one suspends one's scepticism about the chances of a programme for research successfully forecasting the most promising areas for developments, it is easy to foresee the long-term dangers for scholarship if programmes for research come to dominate funding decisions. It is important for academic freedom that we preserve as far as possible our independence of overarching programmes and of patrons. Where programmes are unavoidable or are adopted for special reasons, they are best kept fairly loose, leaving researchers free to propose a range of projects. The funding bodies can then decide what they want to spend their money on, without insisting on people using their skill in any particular way. The growing practice whereby government departments with specific problems provide money to have them researched, but have the allocation of contracts administered by the research councils, threatens to place a short-term utilitarian value on scholarship, and devalue any scholarship which has no obvious short-term value. That is as short-sighted in law and socio-legal studies as it is in science and technology, where it is now generally accepted that the most exciting developments originate in pure, not applied, science.

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centre Our Lord on the Cross, or Our Lady, whichever you find—I do not care, so long as the figures are handsome and large, the best and finest you can buy, and the cost no more than 5½ or 6½ florins." Francesco di Marco Datini to Niccolo and Lodovico del Bono, July 10, 1373, quoted in I. Origo, *The Merchant of Prato* (Harmondsworth: Peregrine Books, 1963), p. 42.

[49] *Cp.* the extent to which patrons could dictate the form and composition of paintings to artists, a matter which led to some notable conflicts, discussed in P. Burke, *The Italian Renaissance. Culture and Society in Italy* (London: Batsford, 1972; revised edition, Cambridge: Polity Press, 1987), pp. 103–110.

[50] P. Burke, *op. cit.* note 49, p. 96.

2. *Schools of thought and scholarship*

These days all legal academics are expected to belong to a school. Membership of a loose group (such as the Critical Legal Conference) provides innovative thinkers with mutual support and a forum for discussing and developing ideas. Groups tend to produce and pursue programmes. A programme provides a rallying point; it systematises and moulds a school of thought. It therefore has practical and symbolic importance.

Programmes and schools of thought have advantages, then. They encourage collaboration, and can provide a degree of coherence to challenges to orthodoxy. However, there are potential disadvantages. From the angle of scholarship, the most serious lies in the phenomenon one may call "scholarly imperialism." Schools are committed to a belief in the importance of their own insights. This often leads them to belittle the insights of other schools. Insights are presented as offering not just one piece of the jigsaw puzzle of understanding, but the central, most important piece of it. That can distort rather than enhance understanding.

For example, Ronald Dworkin's theory of adjudication[51] presents a picture of judges who, when adjudicating, seek to identify and give effect to *rights*. This is important to him because of the need to reconcile law, so far as possible, with the political theory of democratic liberalism to which he is committed.[52] Dworkin focuses attention on adjudication because his rights-based model fits it better than it fits other legal activities, such as legislating, regulating, or enforcing legal rules or structuring government action. He argues that his theory provides a more attractive and realistic description of the enterprise of law than positivism or any form of legal scepticism: it is presented as the soundest theory of *law*, not just of adjudication. That claim depends crucially on accepting adjudication as the central or archetypal form of legal activity. If one approaches law from another perspective, rights look much less important, and the need to mount a challenge to positivism or scepticism may be less pressing. This is hidden in Dworkin's theory, which displays the distorting effect of scholarly imperialism.[53]

That calls in question the desirability of adopting an overarching

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[51] This has developed over a period of about 20 years. The main steps are to be found in: "The Model of Rules I and II," originally published in 1967 and 1972, reprinted in R. M. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), Chaps. 2 and 3; "Hard Cases," 1975, reprinted in *Taking Rights Seriously*, Chap. 4; "No right answer?", in P. Hacker and J. Raz (eds.), *Law, Morality and Society* (Oxford: Clarendon Press, 1977), pp. 58–84, and in an expanded form in R. M. Dworkin, *A Matter of Principle* (Oxford: OUP, 1985), Chap. 5; "The forum of principle," 1981, reprinted in *A Matter of Principle*, Chap. 2; and R. M. Dworkin, *Law's Empire* (London: Fontana, 1986).

[52] See R. Dworkin, *A Matter of Principle*, Chaps. 8–10.

[53] See Allan C. Hutchinson, "Indiana Dworkin and Law's Empire" (1987) 96 Yale L.J. 637–665.

theory or programme that may distort perception. The development of critical legal studies provides an unusual example of a group debating that sort of question internally. At the moment, the movement is a loose collection of scholars bound together mainly by a certain attitude towards conventional legal scholarship. They take this to be unhelpful in explaining the reality of modern law, because orthodox theories accept the assumptions and ideology of the law *a priori*, whereas (according to the CLS movement) one needs to break away from them in order to develop a realistic account of the dynamic elements and objectives of a legal system.[54] CLS scholars, failing to find a rational order in law's own logical and conceptual framework, look for an externally observable order in legal phenomena.[55] That gives rise to some distinctive methodology, described by one exponent as follows[56]:

> "Here's one account of the technique that we in Critical Legal Studies often use in analyzing texts, a technique I call 'Trashing': Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed."

This "global internal scepticism"[57] may prove to be theoretically unconstructive. For example, writers claiming allegiance with the CLS movement have explained how traditional administrative law scholarship falls short of providing a satisfactory explanation of what makes public law tick,[58] but the CLS approach seems to offer no way forward except the deconstruction of social institutions in the hope that it will produce something better. This has led Alan Hunt to sug-

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[54] Although a recent development, the ideas of CLS are not particularly original (though they are none the worse for that). *Cp.* D. Herzog, "As many as six impossible things before breakfast," (1987) 75 Cal. L. Rev. 609–630, 609: "Roberto Unger's *Knowledge and Politics* has impressed many in legal circles as a strikingly original work, but for those of us trained in political theory it's quite familiar, a quaint pastiche of Hegelian formulas about the Riddles of Modernity and sentiments reminiscent of nothing so much as de Maistre's reactionary-theocratic indictment of the French Revolution."

[55] On the external and internal viewpoints, and the implications of the CLS movement, see R. Dworkin, *Law's Empire* (London: Fontana, 1986) pp. 266–275, 440–444, where he particularly criticises Allan C. Hutchinson. It is fair to say that Hutchinson amply repays Dworkin in kind: *op. cit.* note 53, 637–665, especially 650 ff.

[56] Mark G. Kelman, "Trashing," 36 Stanford L. Rev. 293–348 at p. 293. The main difference between British and American writing in the genre seems to lie in the Americans' humour, dash and refusal to take themselves or anyone else too seriously. They often seem to do it only to annoy, because they know it teases; but it does make people think.

[57] The phrase is Dworkin's: *Law's Empire*, p. 79.

[58] See for example Allan C. Hutchinson, "The rise and ruse of administrative law scholarship," (1985) 48 M.L.R. 293–324.

gest that "the critical school cannot avoid the challenge of elaborating a distinctive theory of law" which "should strive to contribute to some specified goal(s) of social change."[59] Creating and structuring a programme for the movement may be a scholarly endeavour, as long as the creators apply as reflectively critical an approach to their own work as they do to the legal system.

Nevertheless, CLS scholars display different attitudes to the role of a programme. The leading attempt to provide a unifying programme is to be found in the writing of Roberto Unger, whose essay on the Critical Legal Studies Movement[60] did much to pull the strands together. On the other hand, Duncan Kennedy, described by one commentator as the "charismatic pope" of the CLS movement,[61] regards not constructing a coherent philosophy as an essential part of his programme.[62] On that view, unity within the movement, so far as it is required at all, exists at the level of a similarity in outlook and technique rather than in a shared coherent philosophy. That worries some scholars, but the commitment to eschewing general theories may, on one view of the world, have a distinct wisdom. Perhaps general theories are doomed to fail; perhaps explanations themselves are destructive.[63] If the real world is made up of incompatible elements producing strange, quirky effects, it would be unrealistic to try to resolve paradoxes even if it were possible to do so. It would be enough to identify them and come to terms with the way that they produce what we observe as reality. This allows for considerable detachment, avoiding any commitment to monocausal explanations. Such theoretical explanations as can be formulated will reflect the multi-faceted complexity of a living society.

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[59] A. Hunt, "The critique of law: what is 'critical' about critical legal theory?," in Fitzpatrick and Hunt (eds.), *Critical Legal Studies* (Oxford: Basil Blackwell, 1987), pp. 5–19 at p. 18.

[60] R. M. Unger, "The Critical Legal Studies Movement" 96 Harvard L. Rev. 563–675 (1983).

[61] Louis B. Schwartz, "With gun and camera through darkest CLS-Land," 36 Stanford L. Rev. 413–464 at p. 413, describes one of the characteristics of the movement's pope as *chutzpah*.

[62] See, *e.g.* P. Gabel and D. Kennedy, "Roll Over Beethoven," 36 Stanford L. Rev. 1–55 at p. 6 ff (1984).

[63] This is a recurrent theme of mysticism, best expressed in a story in Elie Wiesel, *Souls on Fire and Somewhere a Master*, translated by Marion Wiesel (Harmondsworth: Penguin Books, 1984), p. 106. Rebbe Israel, the Maggid of Kozhenitz, was a charismatic Jewish mystic. On one occasion:

> "A woman begged him to pray for her; she wanted a child.
>
> 'My mother was as unhappy as you are, and for the same reason,' he told her. 'Until the day she met the Baal Shem Tov. She presented him with a cape. I was born the following year.'
>
> 'Thank you,' the woman said, beaming. 'I'll do as your mother did. I'll bring you the most beautiful cape I can find.'
>
> The Maggid of Kozhenitz smiled: 'No, that won't help you. You see, my mother didn't know this story.' "

This dilemma is not peculiar to the CLS movement. It arises whenever a new set of ideas arises to challenge accepted values. It has parallels, for example, in the aesthetic movement in nineteenth century England: a group of influential figures developed unconventional attitudes towards art and its relationship to life. Pater, Ruskin, the pre-Raphaelites, Whistler and Wilde each had rather different views, making no attempt to intellectualise a common approach or programme until Wilde's lecture tour of the United States in 1882. Previously Wilde "had espoused attitudes rather than theories, and encouraged a cult rather than a movement."[64] Now he set out to provide a philosophical programme, and in doing so presented aestheticism as a unified movement.[65]

A balanced approach would recognise that one's own insights, such as they are, can usually only offer a partial explanation of any phenomenon, and that very different theories may each have explanatory value. One is entitled to think that some are simply wrong, or that some are more important than others, but commitment to a school of thought as such is as unscholarly as unreflective chauvinism. Perhaps the only way to gather a balanced appreciation of a subject, be it law or anything, is to espouse no school of thought.

Conclusions

The view of scholarship which emerges is one which places value on academic freedom. It is a model of scholarship as a co-operative enterprise, in which the individual scholar is important but not more important than the goal of improving understanding. It is as applicable to legal study as to mathematics or physics, sociology or classics. Whatever methods we adopt, it involves translating into action the attitudes born of a commitment to the inner morality of scholarship: careful thought, choice of techniques and formulation of issues; honesty; detachment and reflective open-mindedness; clear and fair communication of ideas; co-operation and mutual assistance among scholars in a spirit of community. These, and particularly the last, impose a heavy responsibility on legal scholars, but it is a privilege as well as an obligation, and one which is ably discharged by (among others) the editorial teams of many journals. Law may be

[64] R. Ellmann, *Oscar Wilde* (London: Hamish Hamilton, 1987), p. 150.

[65] A further, more superficial, parallel can be seen in the attention paid by CLS scholars to the aesthetics of their own theorising. Duncan Kennedy, while refusing to make a coherent philosophy, acknowledges that there will be fragments of theory in the CLS enterprise, and describes his fragmentary philosophy as "aesthetic and erotic." ("First year law teaching as political action," 1 J. Law & Soc. Probs. 47, 52 (1980). What could be more Wildean? Schwartz, *op. cit.* note 61, at p. 455, comments: "We do not deal here with reason but with volcanic sub-rational emotion; we are in the domain of id, not ego. Think of the poet Blake raging against the Industrial Revolution. (It went on without him.)"

more or less dignified than science, but lawyers' capacity for scholarly work cannot be measured by reference to scientific techniques. When English legal scholarship, thus understood, is examined, the picture looks brighter than that painted by Wilson on his canvas of scientism.

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