"Delicate Plants", "Loose Cannons" or "A Marriage of True Minds"? The Role of Academic Literature in Judicial Decision-Making.

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Lady Justice Carr

I am delighted to be speaking at the Harris Society this evening. And can I start by saying how good it is to see so many students in the audience. As students, you will know by now that studying law involves much more than looking at the latest cases, or understanding statutory provisions. It also involves looking critically at academic writing from authors with a wide range of different perspectives. This writing helps us understand not only what the law *is*, but how it is changing, and how it should develop in the future. In fact—although I am *sure* that you all read every case on your reading list in detail—it is often easier to understand cases through an academic text than by looking directly at the primary material.

We, as Judges, also frequently look at academic texts. Sometimes there is far too much for us to trawl through. In a recent Supreme Court case (*Guest v Guest*) concerning proprietary estoppel,[1] Lord Briggs said that academic debate was so fierce that it was even continuing over the internet *during the appeal*![2] That shows us just how much fervour controversial legal issues can generate, although I doubt that the Judges paid much attention to Twitter. I am sure that you will have come across this same kind of hot debate when studying, for example, the *Miller* judgments in public law, as well as issues of contractual interpretation, or the appropriate "fusion" of Equity and Common Law.

Today, I want to talk about how, in a practical sense, the articles that you read every week are useful. What do Judges like me gain from them? Do they guide us in learning what the law is? Can they, perhaps, even help the law develop? Or are academic writers to be seen as dangerous distractions, divorced from the realities of judicial

[1] *Guest v Guest* [2022] UKSC 27; [2022] 3 WLR 911.

[2] *Ibid* [7], per Lord Briggs JSC.

decision-making? I am aware some of the academics in the room will have views on this…

In the title of this talk, I question whether academics are "delicate plants" and "loose cannons", or whether they form a "marriage of true minds" with the judiciary. The first two phrases come from a quote by Professor Neil Duxbury, where he talks about how academic lawyers were perceived in the mid-20th century. He said:

> "That they are, variously, delicate plants, loose cannons, an uncharismatic and whimsical bunch, unable to be trusted not to change their minds on points of law and unlikely to be able to perform the role of a judge; that they are sometimes too ponderous, at other times too expeditious, in articulating legal opinions; that they have the easy life of the armchair critic, under no pressure to provide solutions quickly and accountable to no-one should their solutions prove wrongheaded."[3]

So, he said, academic lawyers were perceived by some as too "delicate", and too fragile, tending towards elaborate over-analysis rather than practical solutions to legal problems. At the same time, as "loose cannons", they could be too bold, propounding grand legal theses without any regard to the real-world consequences of what they were doing.

The final quote – "a marriage of true minds" – comes from a speech by Lord Neuberger in 2012.[4] He argued that academics and the judiciary now form a constructive dialogue with one another, with both sides working together to improve deficiencies in the law. No longer, he says, are judges and academics just "ships passing in the night".

This evening, I would like to test these competing views. Let me start with a brief look at how academics have been viewed by judges in the past. I will then go on to explore areas where academics have been of great assistance in key legal developments: where, in short, we can see a "marriage of true minds" working together. After that, I will consider areas where, arguably, academics have gone too far, or been overly analytical;

[3] N Duxbury, Jurists and Judges: An Essay on Influence (Hart 2001), 77.

[4] Lord Neuberger, "Judges and academics – ships passing in the night?" (Hamburg Lecture, 9 July 2012).

that is to say, where they have been "delicate plants" or "loose cannons". That should help us answer the key question: what *is*, and what *should be*, the proper relationship between academic and judge?

Historical Approach

So, turning first to the history. Judges have not always viewed academics with the same respect that they do today. Historically, there was an established convention that academics should not be cited until long after their death. And, even then, only if they had great standing within the legal community. They were, as Professor Duxbury famously put it, "better read when dead".[5] We see this in Lord Buckmaster's speech in *Donoghue v Stevenson*.[6] As well as talking about snails and ginger beer, he also said this:

> "The law books give no assistance because the work of living authors, however deservedly eminent, cannot be used as authority."[7]

In reality, this meant that only very famous, very old works were cited. But it is not entirely clear why this was the case.[8] Many reasons have been put forward: that academics were too directly focused on influencing the outcome of a case; that the increase in law reporting in the 19th century reduced the need for judges to rely on textbooks; or perhaps, simply, that judges did not want to offend living academics. These arguments have mostly been dismissed.

One particularly unconvincing argument was suggested by Mr Justice Kekewich in 1887. He thought that the convention existed because you cannot ask living authors to clarify a point that they have made.[9] But that does not make much sense, given that dead authors were being cited regularly; we might think that it is quite difficult to ask *them* what they think.

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[5] N Duxbury (2001), 78.

[6] *Donoghue v Stevenson* [1932] AC 562.

[7] 567; see also (among others) *Re Ryder & Steadman's Contract* [1927] 2 Ch 62, 74.

[8] See Lord Neuberger (2012), [15]-[26]; and N Duxbury (2001), 66 – 77.

[9] *Union Bank v Munster* (1887) 37 Ch D 51, 54.

Perhaps we should not give too much weight to Mr Justice Kekewich's views, as he was widely regarded as one of the worst High Court judges of all time. In one case in 1889, on appeal from one of his decisions, counsel are said to have started their submissions thus:

> "This, my Lords, is an appeal from a decision of Mr Justice Kekewich – but there are other grounds upon which my client relies."[10]

Perhaps the best explanation is simply that English legal academia was behind the times compared to other countries, both institutionally and socially.[11] Oxford and Cambridge only opened their law faculties in the 1870s, and it was not until the mid-20th-century that academic law truly flourished. For a long period, in fact, academic lawyers in England were seen as *under* achievers. Writing about lawyers in the Victorian Era, an ex-Vice-Master of my old College – Trinity College, Cambridge – went as far as to say that "the law school… was generally recognised to be a refuge for those who were averse to intellectual effort".[12] I am sure no-one said the same thing about Oxford, of course.

It is also worth remembering that England had, and still has, a unique legal culture. [13] English common law has, of course, built up over time through a system of precedent. It is a legal system developed through real-world cases, and so it is natural to see why judges (rather than academics) have historically been at the forefront.[14] By contrast, jurisdictions such as Germany base their legal systems on a more high-level written civil code, into the creation of which academics had a substantial input.[15] The *interpretation* of this more abstract code is a task that suits a developed body of

[10] See J Phillips, "Sir Arthur Kekewich: A Study in Intellectual Property Litigation 1886 – 1907" [1983] EIPR 335, 337; Lord Neuberger, [17].

[11] Mr Justice Beatson, "Legal Academics: Forgotten Players or Interlopers?" (Inner Temple Reader's Lecture Series, 12 November 2012), 6 – 7.

[12] D A Winstanley, *Early Victorian Cambridge* (Cambridge, Cambridge University Press, 1940), 3.

[13] A Braun, "Judges and Academics: Features of a Partnership" in J Lee (ed) *From House of Lords to Supreme Court: Judges and the Process of Judging* (Hart Publishing, 2011) 228 – 229.

[14] See also Lord Neuberger, [37].

[15] R Zimmermann, "The German Civil Code and the Development of Private Law in Germany" (2006) Oxford University Comparative Law Forum 1.

academics. That is one of the reasons why academic opinions have, historically, gained much greater traction with the judiciary in Europe, as compared with England.

Nevertheless, returning to our shores, it is clear that we have come a long way since the time when academics were seen as "better read when dead". Following the vast expansion of university education in the 1960s, and the creation of the Law Commission in 1965, academics came to be cited more and more by Judges. Gradually, the convention fell away, and by the 1980s academics were regularly being cited in the House of Lords.[16]

There have been of course also been illustrious academics in the Supreme Court. Among them is Lady Hale, who began her career teaching and publishing at Manchester University, before spearheading reforms in Family Law while working as a Law Commissioner, including some of the most substantial reform to children's law in the 20th century.[17] She went on to become a recorder (a part-time Circuit Judge), and then a High Court Judge, before being appointed to the Court of Appeal and then the Supreme Court. More recently, in June 2020, Lord Burrows became the first Judge to be appointed to the Supreme Court directly from academia.

This shows us that, compared to the past, academics have a closer relationship with the judicial bench than ever before. This leads us to our next question: when are academics and judges in a "marriage of true minds"?

A Marriage of True Minds?

Over the past half a century, there have been several legal developments which, at their core, have been driven by academic writing, demonstrating a "marriage of true minds" between academics and the Bench. The example most commonly referred to is the doctrine of unjust enrichment.[18] Unjust enrichment, as generally accepted, is a cause of action against a defendant who is enriched at the claimant's expense, and where this

[16] Lord Burrows, "Judges and Academics, and the Endless Road to Unattainable Perfection" (The Lionel Cohen Lecture, 25 October 2021), 3.

[17] The Children Act 1989.

[18] G Virgo, "The Law of Unjust Enrichment in the House of Lords: Judging the Judges" in J Lee (ed) *From House of Lords to Supreme Court: Judges and the Process of Judging* (Hart Publishing, 2011).

enrichment is unjustified. Academics have not only played a pivotal role in *creating* this doctrine, but also in refining its conceptual boundaries.

Before the 20th century, the law in this area – that is, the area we would now call "unjust enrichment" – was very messy. A claim had to be brought under one of four different forms of action, [19] each with artificial distinctions between them, preventing the area from being considered as a whole. The actions were also very inflexible, with strict requirements for satisfying each one. Even though the procedural forms of action were abolished in 1852,[20] the injustices caused by them remained. This forced judges to invent what could be said to be artificial doctrines, such as the notion of an "implied contract", in order to overcome what would otherwise be unfair outcomes. [21]

This all changed when Robert Goff and Gareth Jones, as they then were, published the ground-breaking work *The Law of Restitution* in 1966,[22] arguing that the courts should recognise a general principle of unjust enrichment. This quickly gained traction with judges, practitioners and academics. Once Robert Goff became Lord Goff in the House of Lords, he would formally recognise the doctrine in 1991 in the case of *Lipkin Gorman*.[23] On the face of it, we see a true "marriage of minds" here between the judicial and academic spheres. The judges recognised a problem with the law, the academics proposed a solution, and the judges went on to implement it.

We must, of course, be careful not to oversimplify. Lord Goff was not the first to suggest that a cause of action in unjust enrichment should exist – it had been put forward by judges as early as 1943,[24] and touted in lectures even earlier.[25] It must also be remembered that, effectively, Lord Goff was affirming *himself*, having by now reached the House of Lords – so this might be seen as quite an exceptional case. Nevertheless, the importance of academic literature to the development of unjust enrichment should not be forgotten. Subsequently, academics such as Professor Peter

[19] *Moses v Macferlan* (1760) 2 Burr 1005, 1012; G Virgo, 170.

[20] Through the Common Law Procedure Act 1852.

[21] *United Australia v Barclays Bank Ltd* [1941] AC 1, 29.

[22] R Goff and G Jones, *The Law of Restitution* (1st edn, Sweet & Maxwell, 1966).

[23] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 578.

[24] *Fibrosa Spolka Akcyjna v Fairbairn Lawson come Barbour Ltd* [1943] AC 32, 61.

[25] As discussed in G Virgo (2011), 172.

Birks were pivotal in shaping the boundaries of the doctrine, as well as its wider relationship with the law of restitution.[26]

Professor Birks effectively created the unified four-stage structure of unjust enrichment – which is now widely used – framed around enrichment of the defendant, at the expense of the claimant, with an unjust factor, and in the absence of a relevant defence.

More recently, both judges and academics – including Professor Robert Stevens – have increasingly questioned whether it is helpful to constrain unjust enrichment within this staged approach. As Lord Reed explains in the foreword of Professor Stevens' publication this year on *The Laws of Restitution*:

> "Birks was an exceptional scholar and teacher, but it has to be remembered that his thinking was still in the course of development at the time of his death… He had himself departed in his most recent work, published in the year of his death, from the earlier approach which had by then received the imprimatur of the House of Lords, leading some of the Law Lords to wonder whether they had too readily accepted his previous ideas…. Some of the decisions of the House of Lords based on Birks' theory have been departed from, and others have been viewed with evident reserve. "[27]

In this passage, on the one hand, we see the concern that I discussed earlier - judges being too easily influenced by academics who can then change their minds at the drop of a hat. At the same time, we see a close inter-relationship between judges and academics, with the advancement of academic theory prompting judges to question old ideas and assumptions. This discussion is at the heart of the "marriage of true minds".

Another famous example of the "marriage of true minds" is *R v Shivpuri*,[28] in which the House of Lords held that attempting to carry out an impossible act could still be a criminal offence. In that case, the Appellant was convicted of attempted drug offences,

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[26] E.g. P Birks, *An Introduction to the Law of Restitution* (Oxford, Oxford University Press, 1985).

[27] R Stevens, *The Laws of Restitution* (Oxford, Oxford University Press, 2023).

[28] [1986] 2 WLR 988.

despite the fact the white powder he was carrying was not heroin or cannabis, as he thought, but entirely legal snuff. In overruling the earlier House of Lords decision in *Anderton v Ryan*,[29] Lord Bridge drew attention to Glanville William's scathing critique of the earlier decision,[30] stating that it would be "churlish not to acknowledge" the assistance that he had gained from it.[31] Once again, we see a "marriage of true minds": here, it appears that academic literature assisted the judge in reaching his final opinion.

A final and interesting illumination comes from the much more recent decision in *Miller (No 1)*.[32] As you will know, this was the case ultimately deciding that the Government could not withdraw from the European Union without an Act of Parliament giving them permission to do so. The Supreme Court, in dismissing the appeal from the Divisional Court, said that they had been:

> "much assisted by a number of illuminating articles written by academics following the handing down of the judgment of the Divisional Court. It is a tribute to those articles that they have resulted in the arguments advanced before this Court being somewhat different from, and more refined than, those before [the Divisional Court]."[33]

What we see here is a stark example of a "marriage" between judges and academics. Academic literature, even released *between decisions*, helped counsel to refine their arguments, and judges to reach their conclusions.

These are just examples – there are many more than we have time to cover today. Academic literature has helped to develop, for example, private nuisance,[34] the

[29] *Anderton v Ryan* [1985] AC 560.

[30] G Williams "The Lords and Impossible Attempts, or Quis. Custodiet Ipsos Custodes?" [1986] CLJ 33.

[31] *Shivpuri,* 23G.

[32] *R (Miller) v Secretary of State for Existing the European Union* [2017] UKSC 5; [2018] AC 61.

[33] *Ibid* [11].

[34] Keith Stanton has suggested that the modern law of private nuisance developed out of FH Newark's seminal 1949 article in the Law Quarterly Review: F H Newark, "The Boundaries of Nuisance" (1949) 65 Law Quarterly Review 480; K Stanton, "Use of Scholarship by the House of Lords in Tort Cases" in J Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing 2011).

defence of duress of circumstances, [35] and the situations in which the Human Rights Act can be engaged between private individuals.[36] So it is undoubtedly true that academic opinion can be instrumental in creating new legal doctrine, correcting apparent errors or deficiencies in the law, and providing food for judicial thought.

At the same time, as I said at the start of this speech, academics are often criticised: either as "delicate plants" or "loose cannons". Let us now move to consider each of these accusations in turn.

Delicate Plants

The first accusation – that academics are "delicate plants" – implies that they are fragile, over-analytical, and detached from the realities of judicial decision-making. In my view, there are two reasons why this might be said to be true of academics today. However, both reasons have been overstated.

Reason 1: Different Perspectives

The first reason is that academics adopt a very different perspective to judges. They often take high-level theoretical views which, while useful in the abstract, do not help decide individual cases, which often turn on their individual facts. Lord Goff puts this well through an analogy that compares the law with a "mosaic". To him, it is the judges who: "manufacture the tiny pieces of which the mosaic is formed, influenced very largely by their informed and experienced reactions to the facts of cases."[37]

However, it is the *academics* who consider the mosaic as a whole, including the production of new pieces, and the readjustment of others. In this sense, he says, the approach of academics is broader and more philosophical.

A difficulty with this approach can be seen in the field of public law, which is notoriously abstract. In the recent case of *TN (Vietnam)*,[38] the asylum claim of a

[35] *Re (A) (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 232.

[36] *X v Y* [2004] EWCA Civ 662; [2004] ICR 1634, [44] Mummery LJ.

[37] Lord Goff, "The Search for Principle" (Maccabean Lecture in Jurisprudence, 5 May 1983); reprinted in W Swadling and G Jones *The Search For Principle: Essays in Honour of Lord Goff of Chievely* (OUP, Oxford, 1999), 328.

[38] *R (TN (Vietnam)) v Secretary of State for the Home Department* [2018] EWCA Civ 2838; [2019] 1 WLR 2647.

foreign national was rejected by the First-tier Tribunal under statutory rules made in 2005. An earlier judgment had said that these rules were unlawful. So, did this mean that the decision to refuse asylum *also* had to be quashed? The Court of Appeal held that it did not: just because the statutory rules were "*capable* of creating unfairness" did not mean that "every case" was procedurally unfair.[39] Just because the Rules were unlawful did not mean that the ultimate decision needed to be reversed.

This case tapped into a deep academic debate in administrative law: the difference between acts which are "void" and "voidable"; the scope of the executive's "jurisdiction" to act; and the constitutional foundations of administrative law. Christopher Forsyth and Paul Craig had (and have) very different views on these issues.[40]

However, when it came to this part of the judgment, the court did not need to engage with the debate. They drew attention to both theories before simply stating that both reflect a "similar view" to one another.[41] Faced with the individual facts of the case, the academic debate fell away. The Supreme Court, dismissing the later appeal, did not even mention the academic literature.[42] We might say, therefore, that the role of the academic here was nothing more than a "delicate plant": Craig and Forsyth provided an abstract academic structure, with which the judges did not need to engage. The theories seemed to do little, in reality, to guide judicial decision-making.

However, despite this, it would be going too far to describe academics as "delicate plants". First, it is imperative that the legal "mosaic", viewed as a whole, is conceptually sound. If no academic theory can justify the outcome of a case, then either the mosaic as a whole needs to change, or the judge may need to make the individual piece fit. For this reason, the formulation and adaptation of legal principles helps judicial analysis become better-reasoned and ultimately more satisfactory.[43] At the same time, as Lady

[39] *Ibid*, [84].

[40] Contrast, for example, C Forsyth, "The Legal Effect of Unlawful Administrative Acts: The Theory of the Second Actor Explained and Developed" [2001] 35 Amicus Curiae 20 and P Craig, *Administrative Law* (8th edn, Sweet & Maxwell, 2016)744 – 749.

[41] *TN (Vietnam)*, [76].

[42] *R (TN (Vietnam)) v Secretary of State for the Home Department* [2021] UKSC 41; [2021] 1 WLR 4902.

[43] See Lord Goff (1999), 328 – 329.

Hale has suggested,[44] it is unrealistic to expect complete doctrinal coherence of judicial decisions – as hard as some academics may try.

Secondly, it would be wrong to characterise all (or even most) academics as being too abstract. Sometimes academics have helped judges avoid over-analysis. For example, in *O'Reilly v Mackman*,[45] Lord Diplock was assisted by discussions with Sir William Wade, who drew attention to the dangers of a strong dichotomy between "public" and "private" law. Wade warned against giving a "legacy of rigid statements" which may "contain the seeds of much future trouble".[46] In this case, the academic literature prevented an overly-analytical outcome which might be said to be characteristic of a "delicate plant".

Reason 2: Type of Scholarship

The second reason why one could accuse academics of being "delicate plants" is by reference to the type of literature that they undertake. Increasingly, academics are writing not from a purely legal perspective, but rather from social, political, or economic perspectives. A broader explanation of not so much what the law is, but *why* it is a particular way, is popular in academic institutions – both here in Oxford, as well as across the Atlantic.

Lord Burrows, in particular, has been vocal in emphasising that this scholarship is less helpful than what he calls "practical legal scholarship" – that is, black-letter law, analysing exactly what the law is in a given area, and how it operates.[47] He regrets that practical scholarship is now seen as "old-fashioned and dull",[48] and forcefully argues that judges gain the most assistance from an objective explanation of the law. Courts have less to gain from economic or philosophical insights, so to him it is "perverse" to favour scholarship with a non-legal perspective.[49]

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[44] Lady Hale, "Principle and Pragmatism in Public Law" (Sir David Williams Lecture, 18 October 2019), 16.

[45] [1983] 2 AC 237

[46] Although not referred to in the judgment, see Beatson (2012), 6.

[47] See Lord Burrows (Oct 2021), and Lord Burrows, "Professor Sir Guenter Treitel (1928 – 2019)" (Talk at a workshop on *Scholars of Contract Law*, 7 May 2021).

[48] Burrows (Oct 2021), 5.

[49] Burrows (May 2021), 7.

He is not the only one to raise this criticism. Lord Rodger has discussed his disappointment that, while deciding a series of cases on Work Equipment Regulations, there was no scholarship pulling the Regulations apart in an attempt to decipher the individual provisions.[50] Mr Justice Beatson, as he then was, vividly described the decline in practical scholarship as being: "as deplorable as distancing top medical academics from… the treatment of the sick."[51]

Professor Jim Harris, after whom this Society is named and in whose honour this evening's lecture is given, certainly had socio-economic aspects to his writing, although he tended to balance this with the practical. An article written posthumously about his seminal work *Property and Justice*, states:

> "Jim combined a critical understanding of the philosophers with an up-to-date interest… in the day-to-day problems of the practitioner. Furthermore, he was well aware that… [practitioners] make their living by producing results in the real world, affecting the lives, liberty, and happiness of particular individuals."[52]

I never had the pleasure and privilege of meeting Professor Harris. But many of my colleagues did, and were taught by him. They include Phillips LJ whom he supervised for trust law. Phillips LJ describes him to me as "delightful, incredibly clever, personable, engaged with his students and engaging".

Lord Burrows' concerns are well-founded. Without traditional scholarship, it is more difficult for judges to understand the law, and apply it to a particular case. In many judicial decisions, Courts have asked for this type of scholarship to be put before them – for example, in *White v Jones*, a seminal case on solicitors' negligence.[53] At the same time, we should be careful not to under-value doctrinal scholarship. Justice, after all, does not operate in a vacuum. As Lady Hale has pointed out, scholarship with a non-legal perspective can help judges understand the surrounding circumstances and

[50] Lord Rodger, "Judges and Academics in the United Kingdom" (2010) University of Queensland Law Journal 29, 35 – 36.

[51] Beatson (2012), 26.

[52] B Rudden, "James William Harris" (extract from book *Proceedings of the British Academy*, 2006): https://www.thebritishacademy.ac.uk/documents/1729/138p125.pdf, 134.

[53] *White v Jones* [1993] 3 WLR 730, 751 (Court of Appeal decision).

policy concerns in a particular case.[54] If the law is founded upon common-sense, it is important for judges to listen to the views of others as what exactly the common-sense view should be.

We see this in *Osborn v Parole Board*,[55] where the Supreme Court was asked to consider the circumstances in which the Parole Board should allow prisoners to have an oral hearing. Lord Reed cited some Cambridge criminological research, which in his words was "directly relevant" to his thinking.[56] This research revealed (among other things) the impact of perceived unfairness in the Board's proceedings arising out of the potential implications for rehabilitation, public safety, and on prisoners' respect for authority.[57] This type of scholarship clearly helps judges understand the context in which they make decisions, and their impact. As Lord Reed more poetically puts it, "fish don't know that water is wet".[58]

A second example of the value of socio-economic literature is *Wells v Wells*.[59] Here, the House of Lords determined the appropriate discount for lump sum damages in cases of future financial loss. The Court of Appeal had decided the question by accepting the argument that it was reasonable to expect personal injury victims to invest in a mixed portfolio, including risky equities. Economic research, carried out by Hazel Genn for the Law Commission,[60] suggested that claimants preferred to put their money into banks and building societies rather than more risky forms of investment. This challenged the Court of Appeal's assumptions, and the House of Lords reversed the outcome; at least three of the Law Lords went on to apply the research in reaching this conclusion.[61]

So, in this example as well as the last, we see how broader literature can help in judicial decision-making. Far from being "delicate plants", detached from the realities of the

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[54] Lady Hale, "Should judges be socio-legal scholars?" (Socio-Legal Studies Association 2013 Conference, 26 March 2013).

[55] *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115.

[56] Lord Reed, "Triremes and Steamships: Scholars, Judges, and the Use of the Past" (The Scrymgeour Lecture, University of Dundee, 30 October 2015), 2.

[57] *Osborn*, [70].

[58] Lord Reed (2015), 2.

[59] [1999] 1 AC 345.

[60] Law Com No 225 (1994).

[61] Lady Hale (2013), 11.

outside world, here the academics help judges *better* understand the real world outside of the courtroom.

However, by way of contrast, a more controversial example is provided by the concept of "parental alienation" in family law. This term was first adopted by Richard Gardner, who defined it as a syndrome in which the child, without justification, is manipulated into disliking another parent.[62] Although it has pervaded the family courts, it has since been widely criticised, with later academics suggesting that it is liable to mislead the courts into (for example) failing properly to consider the views of the affected child.[63] As a result, higher courts have been at pains to emphasise that "parental alienation" is not a diagnosable syndrome, and the focus should be on the *behaviour* of one parent towards a child – as pointed out by the President of the Family Division, Sir Andrew McFarlane, in *Re C.*[64] So, while socio-economic literature can be helpful, it is only useful if the research itself is reliable: something that judges may find hard to verify.

So, for those two reasons – the different reasoning of judge and academic, and the prevalence of socio-economic studies – academics have been accused of being "delicate plants". Although the criticism has some force, it is important not to overstate it.

"Loose Cannons"

The second criticism of academics – that they are "loose cannons" – is the other side of the coin of "delicate plants". It argues that academics are too bold and invasive, taking greater strides than the law could ever, in reality, take. It does, however, stem from the same idea that academics are detached from the realities of judicial decision-making. Justice Heydon, in the High Court of Australia, put the point forcefully when he said that many academics:

[62] R Gardner "Does the DSM-IV have equivalents for the Parental Alienation Syndrome (PAS) diagnosis?" (2003) 31 American Journal of Family Therapy 1.

[63] See e.g. A Barnett "A genealogy of hostility: parental alienation in England and Wales" (2020) 42 Journal of Social Welfare and Family Law 18.

[64] [2023] EWHC 345, [103].

> "are not concerned with attempting to expound the law as a coherent and clear system… Rather they are concerned to fillet the law, to deride the attempts of judges to expound it, and even to try to explode it."[65]

Academics must, of course, appreciate the constraints on judges. In a common law system, in particular, the law must develop carefully and incrementally. There are a range of transformative academic theories, but truly ground-breaking judicial decisions – in the sense of going off in a completely new direction - do not come along very often.

For example, in *Cavendish Square v Makdessi*,[66] the famous case reforming the law on penalty clauses, the Judges considered submissions to the effect that the penalty clause doctrine should be abolished entirely – a perspective that had garnered considerable academic support – including in particular from Keble's very own Ed Peel! However, the Judges said this:

> "We rather doubt that the courts would have invented the rule today if their predecessors had not done so three centuries ago. *But this is not the way in which English law develops*, and we do not consider that judicial abolition would be a proper course for this court to take"[67]

That is far from the only example. The same comment has been made in unjust enrichment,[68] and proprietary estoppel cases. In *Thorner v Major*, for example, Lord Walker disapproved of the academics' "apocalyptic view" that proprietary estoppel was abolished in an earlier decision.[69]

Interestingly, perhaps the extent to which radical academic literature is useful depends on the Court in which it is deployed. A good example is the case of *Soldiers, Sailors, Airmen and Families Association v Allegemeines*.[70] This case arose out of injuries

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[65] JD Heydon, "Threats to Judicial Independence: The Enemy Within" (2013) 129(Apr) LQR 205, 211; cited in Beatson (2012), 10.

[66] *El Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2016] AC 1172.

[67] *Ibid,* [36] (my emphasis).

[68] *Deutsche Morgan Grenfell Group plc v Commissioners of the Inland Revenue* [2006] UKHL 49; [2007] 1 AC 558, [97]; Braun (2011), 235 – 236.

[69] *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776, [31]; the earlier decision was *Yeoman's Row v Cobbe* [2008] UKHL 55; [2008] 1 WLR 1752

[70] SC: [2022] UKSC 29; [2022] 3 WLR 1111; HC: [2019] EWHC 1104 (QB) [2020] QB 310.

suffered by a baby, Harry Roberts, during the course of his birth in June 2000. The injuries were allegedly caused by negligence at a hospital in Germany which provided medical services to members of the UK Armed Forces. As a preliminary issue, the Court had to decide whether the claim was time-barred, which would be the case unless English law governed the contribution claim between the German hospital and the Association.

The academic consensus was that English law should *not* govern the claim. The High Court was dismissive of academic literature, simply stating:

> "The academic texts and articles provided no assistance. At best they reflected observations as to how the law ought to be."[71]

When the matter reached the Supreme Court, however, the Judges overturned the High Court (and the Court of Appeal) decision. Dedicating several paragraphs to an analysis of the academic literature, they said that "the weight of academic commentary on the issue strongly favours the appellant".[72] They went on to support the literature and allow the appeal.

So, here, we see the lower court unable to run with academic thinking that was out of step with the law as it stood, the Supreme Court was able to run with progressive academic suggestion.

Therefore, we might ultimately question whether more controversial scholarship is detrimental to legal development, or actually provides food for thought for judges, helping them to come to sounder conclusions. It is the academic's role to suggest fundamental changes to an area of law. It is the Judge's to decide whether such change is possible. Rather than decrying academics as "loose cannons", perhaps it is best to value their contribution to debate – however unconventional. Indeed, without the more extreme suggestions about the law of unjust enrichment, and criminal attempts, for example, which I mentioned at the start of this speech, we would not have made the same legal strides today.

Conclusion: The Role of Academics Today

[71] *Ibid (HC)*, [80].

[72] *Ibid* (SC), [73]-[79].

So, taking a step back, what can we say the role of the academic is today, in the modern judicial system? As will now be clear, I do not believe that academics can properly be characterised as "delicate plants". I also think that, while they *can* sometimes be "loose cannons", academic literature helps, rather than hinders, legal development. I agree that judges and academics participate in constructive dialogue with one another: in other words, as a "marriage of true minds".

But it is also much easier to look at this through the lens of individual cases, rather than at a high level, or through an empirical study. There have been some attempts at gathering statistical data, with varying conclusions. Lord Burrows, carrying out a rough-and-ready study, found that the number of academic citations increased steadily throughout the 1990s and early 2000s, before levelling out to a fairly standard rate.[73] A more formal attempt is made by Soh and Goh in the Singaporean High Court – which should be very similar to English law in its approach. They found a steady increase in academic studies over time, particularly in traditionally theoretical subjects such as restitution and constitutional law.[74] 13 of the 23 restitution cases cited the Goff and Jones text discussed earlier, showing its continuing importance. Neither of these studies, however, tell us about *how* the literature is being used: for that, we look at the individual cases.

Keith Stanton, focusing on the law of tort, provides four reasons why judges cite academic literature, with which I broadly agree.[75] First, to state the law as it is. This is the "practical legal scholarship" that, as discussed above, is vital to helping judges understand (and neatly explain) legal developments. This is very common in judicial decisions. Secondly, and related to that, academic literature helps chart the development of case law over time.

Thirdly, academics can provide factual or historical background. It's here that the socio-economic literature – in cases like *Wells v Wells* – becomes useful.

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[73] Lord Burrows (Oct 2021), 3.

[74] J Soh and Y Goh, "How and why do judges cite academics? Evidence from the Singapore High Court" (2022) 17(1) Asian Journal of Comparative Law 134.

[75] K Stanton (2011); see also the six similar reasons of R Smyth, "Other Than 'Accepted Sources of Law'?: A Quantitative Study of Secondary Source Citations in the High Court" (1999) 22 University of New South Wales Law Journal 19, 22.

And fourthly, and perhaps fundamentally, academics help judges think more critically about their decisions. Through reform proposals and critiques, academics help judges think about their decisions more closely, and consider alternative perspectives.

It is in these ways, and especially the last, that academics and judges have a constructive dialogue. Academics help judges not only understand what the law *is*, but also, from a variety of perspectives, what the law *should be*. Lord Goff famously compared judges and academics to "pilgrims… on the road to unattainable perfection". In doing so, he drew attention to two particular academics and said this:

> "They will observe that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance…"[76]

So to return to our central question—it must be true that, sometimes, academics are analytical and abstract, or, conversely, radical. But it is unfair to simply disregard the academics involved in this debate as "loose cannons" or "delicate flowers". Academic scholarship is vital – helping us to reach law that is conceptually, morally and legally sound. So that is why, at University, it is more than worthwhile to study it.

Thank you.

[76] *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10; [1987] AC 460, 489.