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# THE “NEW CONTRIBUTION TO KNOWLEDGE”

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A Guide for Research Postgraduate Students of Law

by Robert J. Morris (司徒毅), JD, PhD

June 2011

**THE “NEW CONTRIBUTION TO KNOWLEDGE”  
A Guide for Research Postgraduate Students of Law**

**by Robert J. Morris (司徒毅), JD, PhD<sup>1</sup>**  
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June 2011

**ABSTRACT**

As law schools and their students integrate with the global realm of both law and non-law research postgraduate (RPG) scholarship, and as RPG scholars in other disciplines, schools, and departments increasingly incorporate legal studies in their research projects, they encounter the demands, norms, and expectations of that global realm. Among these is the requirement that the RPG candidate make a “new contribution to knowledge” by identifying and filling an important “gap” in the existing scholarship. This is variously referred to as “adding value,” being “innovative,” and as being “original” and “novel,” and this requirement applies whether the researcher works in traditional black-letter law or in one of the many other methods of legal research. While these ideas are understood, defined, and well-settled in the sciences, humanities, and social sciences, they are problematic in legal studies. This is so because what traditional law schools and lawyers call “legal research” may not be recognized as research at all by other disciplines within the university. The law school is a creature of both the university and the legal profession, and it must serve both and work with both even though those two roles

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may sometimes conflict. It is a fluid and constantly evolving situation. If the work of law RPG students, and of their counterparts in other disciplines, is to achieve global recognition beyond the local law school, they must cultivate full-bodied “legal scholarship” in contradistinction or addition to traditional “legal research,” with distinct understandings of what counts objectively as “new,” as a “contribution,” and as “knowledge,”—and to whom and why they count globally. This requires them to identify their “core competence” as RPG researchers in a world where education is increasingly commodified as a business model. Only by doing this will their research product “pass without objection in the trade.”

## Acknowledgments

I am the beneficiary of many great teachers of many years—Wilson R. Thornley, M. Thatcher Allred, Rod Julander, Gordon T. Allred, Gary S. Williams, Eric B. Shumway, John J. Flynn, Edwin B. Firmage, Robi Kahakalau, M. Puakea Nogelmeier, Albert J. Schütz, John Charlot, Steven Goldsberry, Albert H. Y. Chen (陳弘毅), Jill Cottrell, and Fu Hualing (傅華伶)—whom I thank for their inspiration and steadfastness.

Much of the theory that I develop in this book arises out of my experience teaching Advanced Research Methodology (ARM) LLAW 6022 at HKU from 2005 to 2011, and before that as an RPG student and PhD candidate at HKU 2002-2007. I am grateful to the RPG students in my classes and their supervisors at the University of Hong Kong, as well as to those with whom I have worked in other disciplines and departments, for all they have taught me about the issues discussed here and for the contributions they have made to this study. This book is dedicated to them.

The law is the calling of thinkers.

—Oliver Wendell Holmes, Jr.

*Inā he ‘ike hou aku kekahi, e pono ke ali‘i e hele ilaila, no ka mea, aia nō ka pono o kēia hana ‘o ka pau mai o nā ‘ike apau, o pā auane‘i i ka hoa ho‘opāpā.*

If you want some new knowledge, it is right for you the chief to go there [to the place of knowledge], because the correct procedure of this work lies in exhausting all the different knowledges, lest you perhaps be defeated by your companion in the contest of wits.

—Hawaiian story of Kalapana

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## Foreword

The Teacher said: “There is nothing new under the sun.”<sup>2</sup> It is a rebuttable presumption, but whoever claims to have something “new” to contribute has the burden of proving it. Newness that matters, substantive newness, is never assumed. It must be demonstrated. Surely, a scholarly offering in the law must be not only new but importantly new, yet it must respect the law’s reverence for form, tradition, precedent, and authority.<sup>3</sup> This may be difficult to achieve. “What’s new” runs the gamut from the trivial to the unique—and every point in between.

A scholarly offering in the law can be made by both law students and others, and hence the title—*Students of Law*. This Guide is for RPG students in all schools and all disciplines who are working in any aspect of postgraduate legal research. This is not precisely a book on “how to conduct legal research.” It is a discussion of some of the different research methods and approaches available to RPG scholars, but it is not a nuts-and-bolts procedural manual. This is a crucial difference. “How-to” books abound for whatever kinds of specialist research you may want to conduct (black letter, empirical, comparative), and I am not trying here to duplicate them. The “core competence” of this book, rather, is the definition of a single concept: the “new contribution to knowledge” in the law and the problems and questions that surround that concept. Its mission is to guide all prospective RPG candidates in any discipline (not just law students but all students *of* the law) through the issues and pitfalls that surround RPG work. Like much of the RPG project itself, this book is self-instructional: you are both student and teacher. RPG work is very much a *causa sui* project—that is why it is “new.” It is literally your own special invention. This work is especially important because in the typical RPG course over a period of even a few years, the RPG student will move into the rapidly evolving world of

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<sup>2</sup> *Old Testament*, Ecclesiastes 1:9. “What has existed before will exist again, and what has been done before will be done again.”

<sup>3</sup> Phillip C. Kissam, “The Evaluation of Legal Scholarship” (1988) 63(2) *Washington Law Review* 221; Note, “Originality” (2002) 115(7) *Harvard Law Review* 1988 (part of a symposium on the subject); Mathias M. Siems, “Legal Originality” (2008) 28(1) *Oxford Journal of Legal Studies* 147; Susan Bartie, “The Lingering Core of Legal Scholarship” (2010) 30(3) *Legal Studies* 345.

what we now call the future.

\* \* \*

The young lawyer John Adams (1735-1826), in words perhaps typical of young people just starting out, lamented somewhat insecurely to his diary:

“Reputation ought to be the perpetual subject of my Thoughts, and Aim of my Behavior. How shall I gain a Reputation! How shall I Spread an Opinion of myself as a Lawyer of distinguished genius, Learning, and virtue.... Why have I not Genius to start some new Thought. Some thing that will *surprize the World*. New, grand, wild, yet regular Thought that may raise me *at once* to fame. Where is my Sout? Where are my Thoughts. When shall I start some new Thought, make some new Discovery, that shall surprize the World with its Novelty and Grandeur?”<sup>4</sup>

The diary entry is dated March 14, 1759. Adams was twenty-four, admitted to practice at the Massachusetts bar the same year after having graduated from Harvard College and having “read law” for nearly three years in the office of an established practitioner. The question that nagged him was: “Shall I creep or fly[?]” In the passage quoted, he pondered, then rejected, three possibilities by which to distinguish himself. One, he could make “frequent Visits in the Neighbourhood and converse familiarly with Men, Women and Children in their own Style,” but that would “take up too much Thought and Time and Province Law.”<sup>5</sup> Second, he could impress by “making Remarks,

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<sup>4</sup> John Adams, *Diary and Autobiography of John Adams*. L. H. Butterfield, Leonard C. Faber, and Wendell D. Garrett (eds). (Cambridge, MA: Belknap Press of Harvard University Press, 4 vols, 1961), I:78, 95, original spelling and punctuation; quoted in Susan Dunn (ed), *Something That Will Surprise the World: The Essential Writings of the Founding Fathers* (New York: Basic Books, 2006), pp. 3-4; retaining Adams’s original emphasis and spelling.

<sup>5</sup> Adams *Diary*, *ibid.* p. 78.

and proposing Questions [to] the Lawyers att the Bar, endeavour to get a great Character for Understanding and Learning with them,” but “this is slow and tedious.”<sup>6</sup> Third, he could “look out for a Cause to Speak to, and exert all the Soul and all the Body I own, to cut a flash, strike amazement, to catch the Vulgar,”<sup>7</sup> but these projects, he concluded, would not “bear Examination.”<sup>8</sup> He continued this intellectual trial-and-error long past his twenty-fourth year. He served in the First and Second Continental Congresses as the delegate from Massachusetts, helped draft the American *Declaration of Independence*, served as minister to France and Great Britain, drafted a new constitution for Massachusetts, served as George Washington’s vice-president, served as second president of the United States, appointed John Marshall as chief justice of the US Supreme Court, and did a thousand other things that secured his fame as one of the American Founding Fathers. He contributed to the milieu that assisted others in creating the US Constitution and the massive co-authored and interdisciplinary legal dissertation which provided the research and argument that supported it—*The Federalist Papers*.<sup>9</sup> Adams was, in all respects, a man of reputation who participated in affairs that would indeed surprise the world and result in a new “creation”—a new law and a new legal system.<sup>10</sup> He created a body of work that was indeed new and important—a paradigm shift. His formula and his process of thought, though tortuous, is a good model for RPG law students and their counterparts: “new, grand, wild, *yet regular*,” not merely something to “cut a flash, strike amazement, to catch the Vulgar.” Creep or fly? It is a good way of “thinking like a lawyer,” of deciding what you want to be, of making the necessary choices properly, and

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, Isaac Kramnick ed (London & New York: Penguin Books, 1987).

<sup>10</sup> Joseph J. Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic* (New York: Knopf, 2007).

of raising your reputation as a world-class scholar. It includes learning how to be adjudicative—how to adjudicate information, sources, witnesses, arguments, and conflicting values. But let us bring John Adams, John Marshall, the Constitution, and the *Federalist* together for a closer “RPG look” by means of a commemoration speech given by US Supreme Court Justice Oliver Wendell Holmes, Jr., on the 100<sup>th</sup> anniversary of Marshall’s appointment by Adams:

“The *Federalist*, when I read it many years ago, seemed to me a truly original and wonderful production for the time. I do not trust even that judgment unrevised when I remember that the *Federalist* and its authors struck a distinguished English friend of mine as finite.... When we celebrate Marshall we celebrate at the same time and indivisibly the inevitable fact that the oneness of the nation and the supremacy of the national Constitution were declared to govern the dealings of man with man by the judgments and decrees of the most august of courts.... My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which...have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law. *The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind.*”<sup>11</sup>

In these words of a great legal mind come together the issues—and indeed the

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<sup>11</sup> Oliver Wendell Holmes, Jr., “In Answer to a Motion that the Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day on which Marshall Took His Seat as Chief Justice” in Oliver Wendell Holmes, Jr., *Speeches of Oliver Wendell Holmes* (Boston: Little, Brown & Co., 1918), pp. 87-91, esp. pp. 89-90; emphasis added. For an explication of the importance of Marshall, see Robert J. Morris, “China’s *Marbury*: Qi Yuling v. Chen Xiaoqi—The Once and Future Trial of Both Education and Constitutionalism” (2010) 2(2) *Tsinghua China Law Review* 273.

essential conflicts, contraries, and tensions<sup>12</sup>—that every RPG student must face and resolve in dealing with any research project in the law that aims to take its place globally: the location and boundedness of a “new” production in its “time,” the adjudication as to whether it is “truly original” or merely “finite” (and whether after the passage of time it remains so), the “germs” of ideas that may work “profound interstitial changes,” the need for “transforming thought,” and the common-law tension between originality and judgment based on authoritative precedent.

The University of Hong Kong (HKU) where I teach provides orientation for newly matriculated research postgraduate (RPG) students in all disciplines. Regardless of which department or faculty the new student will join, the University, like universities elsewhere, requires that each of them must produce a “new contribution to knowledge” in order to qualify for a degree. Such requirements are set forth in the *Graduate School Handbook* published every two years and on the Graduate School’s Web page.<sup>13</sup> To this end, the Graduate School offers a series of short general courses, some of them mandatory and all of them lasting about six weeks, which are designed to position all RPG students within the general framework of what modern RPG research is “all about.” The foundational courses are the mandatory “Introduction to Thesis Writing,”<sup>14</sup> after which other courses provide orientation for the social sciences and humanities on the one hand, and the sciences on the other. Several of these include substantial grounding in empirical research. These courses are generally useful, but as I can personally attest, it is not uncommon in these short orientation classes to hear the instructors say something like

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<sup>12</sup> Peter Elbow, *Embracing Contraries: Explorations in Learning and Teaching* (New York and Oxford: Oxford University Press, 1986).

<sup>13</sup> See, e.g., “University’s Mission on RPg Education” at <[www.hku.hk/gradsch/web/outcome](http://www.hku.hk/gradsch/web/outcome)>. Such standards and goals are operationalized through each faculty’s governing board, curriculum development committee, and are standardized to a global level through devices such as external examiners for programs and individual courses.

<sup>14</sup> GRSC 6001 Introduction to Thesis Writing; GRSC 6020 Introduction to Thesis Writing (The Humanities and Related Disciplines), and GRSC 6021 Introduction to Thesis Writing (The Sciences and Related Disciplines); <[www.hku.hk/gradsch/web/student/course/gs/index.htm](http://www.hku.hk/gradsch/web/student/course/gs/index.htm)>.

this: “Now, for you law students, this exercise (or chapter, or commentary, or rule) does not fully apply. You will have to ignore it or adapt it.” RPG law students are constantly aware that in many ways, they are a class apart from students in other disciplines. The problem is that the law is not one of the humanities, the social sciences, or the sciences. The law is the law. Perhaps we could say that it is *almost* unique. Not all lawyers or scholars will agree with that statement, but I must insist upon it as a fact. The law is like the sea, and the various subjects and walks of life, including scholarly disciplines, are the islands. The sea touches all of them, but it is not any one of them. RPG students who understand this fact, and understand why it is a fact, will do better in their legal studies. So, also, will their counterparts in other disciplines who are studying law. As far back as 1989, just a few months after the fall of communism in Europe and the massacre at Tiananmen Square, Professor Peter Wesley-Smith of the HKU law faculty, advanced this rather remarkable and counterintuitive idea:

“University *legal* education could so easily be the *paradigm* of *university* education. Law is at the intersection of the ideal and the real, of metaphysics and magic, of the actual and the possible, of ideas and power, of fact and value, of is and ought, of the past and the future, of the individual and the social, of economics and politics.”<sup>15</sup>

It could, perhaps should, be the other way around, but it is not. These Graduate School courses do not quite match the needs of RPG law students or their counterparts studying law in other disciplines—not quite, but somewhat, almost, and approximately. The student of law must tug and stretch them to make them fit—like a pair of wrong size shoes. When this happened to me, I felt ill at ease. I resented the fact that I was forced to do this, that everyone winked at the problem but had not thought through how to deal

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<sup>15</sup> Peter Wesley-Smith, “‘Neither a Trade Nor a Solemn Jugglery’: Law as a Liberal Education” in Raymond Wacks (ed), *The Future of Legal Education and the Legal Profession in Hong Kong* (Hong Kong: University of Hong Kong Faculty of Law, 1989), pp. 60-76, at p. 60, quoting Philip Allott; emphasis added.



with it. In every system there should be “a little play in its joints,”<sup>16</sup> but this was not even a system. It was a dysfunctional amalgamation of systems—metric and imperial, digital and analog, Copernican and Galilean—all trying to interface but not quite knowing how. I did not realize it at the time, but this problem was emblematic of a whole cluster of disciplinary and institutional problems that, if I could understand them, I could understand it and work through it, maybe even to my advantage. The mismatch or gap—perhaps parallax or differential are better words—exists for many complex reasons, but it is not utter, and it is not unbridgeable. It is that space which this Guide aims to occupy.

The course materials for Introduction to Thesis Writing have been collected in the book, *Dissertation Writing in Practice*.<sup>17</sup> It is an excellent basic work for new RPG students. But like the classes from which it is taken, it reflects the practices and rules for non-law subjects. The same is true for a well-known companion volume, *How To Get a PhD*,<sup>18</sup> which is widely read at HKU and around the world. Unfortunately, many of the RPG students I meet have not read such books, nor have they had the benefit of even such minimal instruction in RPG work. Furthermore, the principles and examples they encounter in both books and in the courses based on them are taken from non-law disciplines, and because these texts are one-size-fits-all, the law RPG student must constantly adapt them to her own situation by laboriously *walking them through* her own mental processes of “thinking like a lawyer.” It is something like the way new language learners mentally translate a foreign language which they are hearing or reading into their own tongue before they learn to think in the target language. This ought not to be. Filling this gap is not simply a matter of “sprinkling a little legal water” on these existing materials in the hope of providing a clear vision for RPG law students and their counterparts. Guidance cannot be given simply by asking them to analogize these

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<sup>16</sup> *Bain Peanut Co. of Texas v. Pinson*, 282 US 499, 501 (1931) (Holmes, J).

<sup>17</sup> Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003).

<sup>18</sup> Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Maidenhead: Open University Press, 2005).

materials to legal research. At the very least, analogizing would be superficial and uncertain. The parallax between these materials requires some real analysis if any kind of unified method is to be achieved. The similarities between legal method and other disciplines must, of course, be highlighted and harmonized, but the differences particularly must be set in sharp relief because they must be exploited, not minimized. The law and its methods cannot be *made into* something else, nor vice versa. What can and cannot be homogenized is a delicate business.

RPG students in law deserve to know up front (and thereby to be taught and forewarned of) precisely the tasks and pitfalls they must uniquely face, and especially how those tasks and pitfalls positively differ from those encountered by their counterparts in other disciplines. They must be given the exact tools they need to complete a fully worthy RPG program that commands the respect of the global academic community while remaining true to the disciplinary demands of the law.<sup>19</sup> The same is true for their counterpart non-law RPG students whose research includes some aspect of the law. *A fortiori*, the increasing interest of RPG students in compound studies (law-and-\_\_\_\_, \_\_\_\_-and-law) makes this balancing act even more delicate, as evidenced by the increasing number of non-law academic journals publishing articles on the law written by non-lawyers. At present, no single study provides these tools, these supplemental concepts between what is found in the two example books mentioned above. Hence, this study does not supplant but complements the other two.

The tools and goals which these students need to craft the product demanded of them are encapsulated within the well-known phrase, “a new contribution to knowledge.” It includes the requirement of identifying, by means of an exhaustive survey of the existing literature, a gap in the existing body of knowledge, conducting research to fill that gap, developing a working “thesis statement” that expresses a special point of view or the “core competence” of the work and its author, and thereby making a new

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<sup>19</sup> Chang-fa Lo, “Driving an Ox Cart To Catch Up with the Space Shuttle: The Need for and Prospects of Legal Education Reform in Taiwan” (2006) 24(1) *Wisconsin International Law Journal* 41, 69-74.

contribution to existing knowledge. It is often expressed in a “mission statement.” A “contribution” is an innovation that adds value and brands its author as a creative thinker—indeed helps create the author’s academic “brand name.” In any subject, the project of making a “new contribution to knowledge” requires a passionate investment in analyzing materials that are often recondite and tedious.<sup>20</sup> It is a principle of academics *and* a principle of competition. In order to be genuinely new, the research product may not be mere reiteration or “bombastic redescription”<sup>21</sup> of what has been said before. It must meet the tests of reliability, validity, and transparency under the intense cross-examination of supervisors, professors, peer reviewers and readers, internal and external examiners, proofreaders—and all others worldwide whom it will reach or who will seek it out. The damage that a defective scholarly product can do is incalculable. Here is a story about Ernest Hemingway that will illustrate this point.

When I was very young, perhaps in high school or early university, I read Ernest Hemingway’s book, *A Moveable Feast*. Published posthumously in 1964, it is the autobiography of his years as a young writer in 1920s Paris. Hemingway was one of my favorite authors. In those idealistic days I wanted to be a great writer like Hemingway. I thought I had the talent for writing great stories like him (I didn’t). Hemingway came under the influence of the great Russian writers like Dostoyevsky. He read many of his important books, including *The Brothers Karamazov*, as translated into English by Constance Garnett (1861-1946). She was the first English translator to render Dostoyevsky into English, and her translations were the only ones available to Hemingway. But the publication of Dostoyevsky in English caused a sensation—they were something “new,” something that “surprised the world.” I was especially taken by this statement in *A Moveable Feast*: “In Dostoyevsky there were things believable and

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<sup>20</sup> Marilyn V. Yarbrough, “Do As I Say, Not As I Do: Mixed Messages for Law Students” (1996) 100 *Dickinson Law Review* 677, 679-80 notes 6-7 and accompanying text (discussing the affects of plagiarism on the requirement for originality in PhD theses).

<sup>21</sup> Paul Edwards, “Professor Tillich’s Confusions” (1965) 74 *Mind* 192, 206-08.

not to be believed, but some so true they changed you as you read them....”<sup>22</sup> That idea in that sentence changed my life—even as I read it. *Ideas and writing so great they changed you even as you read them!* I hope all of us have had that kind of experience one way or another—with a book, a movie, a poem, music—to pass through an experience and come out at the end a different person from the person we were at the beginning. That’s what something “new” that “surprises the world” is all about.

Over a period of more than 20 years, I taught that idea to my students. I told them, “Always try to associate yourself with the greatest minds, the greatest writings, the greatest music—things that change you as you experience them. Never settle for anything that is petty, paltry, and pedestrian.” I also began to try to live that idea in my own life. I thought, What if *I* could write something that would change someone else even as s/he read it? Being the best is, of course, “high as a mountain and harder to climb,” but it is worth the effort. Follow your bliss, and find your excellence! Do everything you can to distinguish<sup>23</sup> yourself from all the others. Keep climbing! Keep moving toward excellence! I recurred constantly to Hemingway, and through him Dostoyevsky. I read the Garnett translations, too. I had my students read Garnett and Hemingway, and together we read that sentence in *A Moveable Feast* together. Then one day late in 1990, I read a review of a new translation of Dostoyevsky’s book.<sup>24</sup> The book review, written by Andrei Navrozov, praised the new translation and was highly critical of Constance Garnett and her translations of Dostoyevsky—the translations Hemingway had read and said they “changed you as you read them.” The new translators were Richard Pevear and Larissa Volokhonsky. Garnett’s translations, Navrozov said, were lies, emendations, rewritings, camouflage—all without the music of the original. This new information devastated me: Hemingway had based his great statement—the one that

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<sup>22</sup> Ernest Hemingway, *A Moveable Feast* (New York: Charles Scribner’s Sons, 1964), p. 133.

<sup>23</sup> Set apart from, differentiate from, be different from.

<sup>24</sup> Andrei Navrozov, “Dostoyevsky, With All the Music” (Nov. 11, 1990) *New York Times Book Review*, which may be read online at <[www.nytimes.com/1990/11/11/books/dostoyevsky-with-all-the-music.html](http://www.nytimes.com/1990/11/11/books/dostoyevsky-with-all-the-music.html)>.

changed my life—on a falsehood. Therefore, what I had believed and taught my students was based on a falsehood, or a series of falsehoods—both Garnett’s and Hemingway’s—Garnett’s intentional, Hemingway’s unknowing because he did not read Russian and had to rely on a translation.<sup>25</sup> A whole chain of communication, thought, and analysis in my life and profession over a period of several decades, was suddenly without a basis in truth.<sup>26</sup> What had surprised the world with its newness had cloyed. Constance Garnett died in 1946. Ernest Hemingway died in 1961. I eventually lost contact with most of my students, but the moral and scholarly dilemma remained. How could I remediate this? Could I still cling to the *idea* even if the *source* were false? Can I still teach Hemingway? What would you do, if anything? What does this story say about the adjudication of sources?<sup>27</sup> I don’t read Russian, so if I couldn’t trust Hemingway or Garnett, can I trust Navrozov or Pevear and Volokhonsky? Can I really trust Dostoyevsky? At the very least, the experience made me a sceptic, maybe a cynic. I learned to question everything—translators, authorities, sources—everything. These are RPG questions. Science, we are told, is a “history of corrected mistakes”—a “constant and largely successful struggle to overcome confirmatory biases.”<sup>28</sup> Perhaps also the social sciences and the law could be described that way. Surely, that must be the kind of effort we put into making our RPG research product in law.

The modern globalized world is a “knowledge economy” in which knowledge is the high-impact product exchanged in high-impact “knowledge exchange.”<sup>29</sup> These are

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<sup>25</sup> See generally Jacqueline Tavernier-Courbin, *Ernest Hemingway’s A Moveable Feast: The Making of Myth* (Boston: Northeastern University Press, 1991).

<sup>26</sup> This situation no longer surprises me as I have learned that nearly all translators are liars. Robert J. Morris, “Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation” (2006) 51(3) *Journal of Homosexuality* 225.

<sup>27</sup> Susan Šarčević, *New Approach to Legal Translation* (The Hague: Kluwer Law International, 1997), discusses this whole set of problems.

<sup>28</sup> James M. Wood and N. Teresa Nezworski, “Science as a History of Corrected Mistakes: Comment” (Sept. 2005) 60(6) *American Psychologist* 657.

<sup>29</sup> Lee Epstein and Charles E. Clarke, Jr., “Academic Integrity and Legal Scholarship in the Wake of *Exxon*

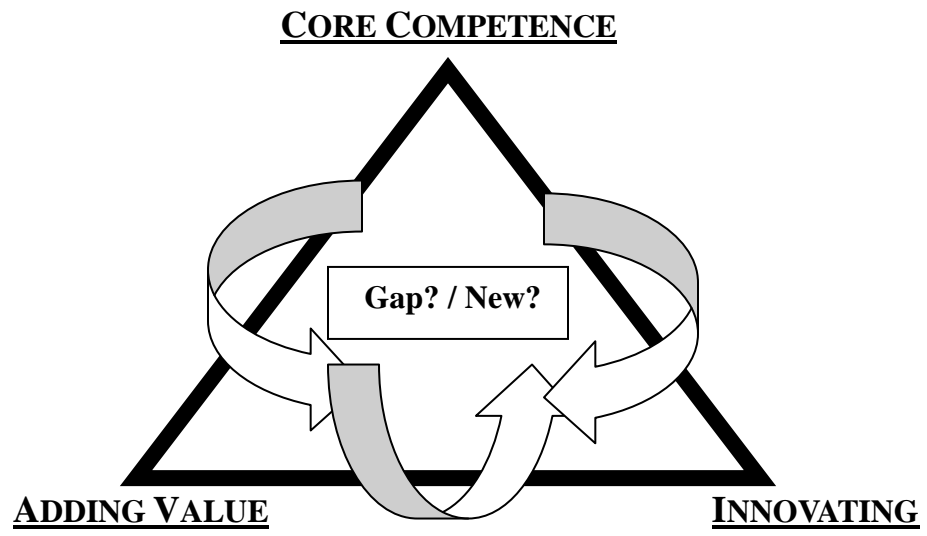
the godwords and mantras of our age. In order to illustrate this complex of ideas, we can borrow a business or corporatist model of education<sup>30</sup> by using this diagram:

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*Shipping, Footnote 17*” (2010) 21(1) *Stanford Law & Policy Review* 33.

<sup>30</sup> Margaret Thornton, “The *Idea* of the University and the Contemporary Legal Academy” (2004) 26(4) *Sydney Law Review* 481 (part of special issue on these subjects); Nickolas James, “Power-Knowledge in Australian Legal Education: Corporatism’s Reign” (2004) 26(4) *Sydney Law Review* 587; Richard Collier, “‘We’re All Socio-Legal Now?’: Legal Education, Scholarship and the ‘Global Knowledge Economy’—Reflections on the UK Experience” (2004) 26(4) *Sydney Law Review* 503; Christine Parker and Andrew Goldsmith, “‘Failed Sociologists’ in the Market Place: Law Schools in Australia” (1998) 25(1) *Journal of Law and Society* 33. A useful comparison with the Australian experience may be made with Sanjeev S. Anand, “Canadian Graduate Legal Education: Past, Present and Future” (2004) 27(1) *Dalhousie Law Journal* 55.

**Figure 1**



In the business world, creating or adding value means creating profitability of shared economic value in the market. In scholarship, sharing the value of profitability means adding value to the knowledge pool—the university, other scholars, other disciplines. This new contribution to knowledge is the profitability of the academic enterprise. It is, both literally and figuratively, what make a “profitable” scholar and a “profitable” academy. The triangle, like all the “parts of threes in this book,” is infinitely rotatable. There is no priority to the top point or to “core competence.” Both “adding value” and “innovating” could be placed there, and rotated from there. In other words, all three are co-equal and co-important. The measurement of success in this academic enterprise is the impact of the new contribution to the knowledge pool and all its stakeholders. The knowledge pool is the marketplace, and the new contribution arrives there by “passing without objection in the trade” because of its quality as measured by global standards.<sup>31</sup> Charles Irish has noted this in arguing that law schools and law professors need to become more “entrepreneurial” in the global marketplace:

“There is no reason to believe that what is so widely accepted in all other areas of economic activity is somehow suspended in the context of legal education. Legal education is, after all, a service, and it seems quite plausible that if legal education is subject to competitive pressures the resulting product will be of a higher quality and lower cost....”<sup>32</sup>

The difficulty is that the “new contribution to knowledge” for RPG legal studies is more complicated, and therefore more problematic—or rather *differently* complicated and *differently* problematic—than for the social sciences, humanities, and sciences.

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<sup>31</sup> See, e.g., the discussion and benchmarks noted in Quality Assurance Council, “Report of a Quality Audit of the University of Hong Kong” (2009), and related documents at <<http://tl.hku.hk/tl/quality-assurance/hku-qac-audit-2009>>.

<sup>32</sup> Charles R. Irish, “Reflections of an Observer: The International Conference on Legal Education Reform” (2006) 24(1) *Wisconsin International Law Journal* 5, 20.



Getting to “new,” staying at “new,” and moving on to a new “new,” present special challenges. Like the law itself, the definition of “new” in legal studies is *almost* unique. This fact arises simply because of the history and nature of the law and of the law school—its necessarily “schizoid” nature because it addresses itself to both the academy and the legal profession. For example, it is common for the law faculty to include a “practice professorate” who come from the practicing bar (barristers and solicitors) and who “are not deeply engaged with the full range of scholarly work required of professoriate staff” of the university.<sup>33</sup> These peculiarities are not due to any intentional effort to “be difficult” or “odd” or “perverse,” but rather to the nature of the subject itself. The idea of “making a new contribution to knowledge” is not traditionally embedded in legal analysis the same way it is in other disciplines. Traditional legal analysis, called “black-letter law,” for example the IRAC model (Issues, Rules, Analysis, Conclusions), begins with “spotting issues” in a legal problem. This works on law school examinations, opinion letters to clients, and court briefs. But “spotting issues” and analyzing them is not entirely coterminous with identifying a “research gap” or “making a new contribution” to knowledge in the academic disciplines. The IRAC process might lead to such a new contribution, but usually not along exactly the same paths or for the same purposes that scholarly research would or as would be required by the university. Mary Daly argues that the disjunction between the legal academy and the legal profession continues to grow, while the boundaries between the law and other disciplines blur.<sup>34</sup> The paths are not mutually exclusive, but they require different kinds of walking shoes.<sup>35</sup>

Because of this reality, the integration of RPG legal studies under the common

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<sup>33</sup> Richard Wu, “Reform of Professional Legal Education at the University of Hong Kong” (2004) 14(2) *Legal Education Review* 153.

<sup>34</sup> Mary C. Daly, “The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization” (2002) 52(4) *Journal of Legal Education* 480.

<sup>35</sup> Richard Johnstone and Sumitra Vignaendra (eds), *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee (AUTC)* (Canberra: Higher Education Group: Dept. of Education, Science and Training, 2003), pp. 167-96 (Ch. 6 – POSTGRADUATE CURRICULA).

rubric of the “new contribution to knowledge” within the university at large has not been entirely without conflict and misunderstanding.<sup>36</sup> These are problems that exist both within the law school and within other faculties and departments which are increasingly turning their attention to the law’s impact on their professions.<sup>37</sup> This study, therefore, targets two distinct but related audiences. The first is, of course, RPG law students themselves. They especially must know what is expected of them in order to get their research accepted in the global academic community. The second audience is those non-law RPG scholars in the social sciences, the humanities, and the sciences who undertake to write in any way about legal matters in relation to their own disciplines (medicine-and-law, history-and-law, etc.).<sup>38</sup> In order for them to do so successfully, they must understand what “thinking like a lawyer” means and how it translates into RPG work. They must understand what their presence in the law academy, albeit partial, will feel like. Both sides of this divide often, and unfortunately, assume that they can undertake studies in the discipline of the other without the proper orientation and training. Nothing could be further from the truth. There is no room for dabblers and dilettantes in RPG law work.<sup>39</sup> The present purpose, therefore, is to raise awareness of these issues and requirements of RPG law studies and to mark a path forward.

The notion of the “globality” of scholarship and the global competition to produce something “new” in legal scholarship<sup>40</sup> may at first sound contradictory for the law.<sup>41</sup>

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<sup>36</sup> Paul A. Samuelson, “The Convergence of the Law School and the University” (1975) 44(2) *American Scholar* 256; Philip C. Kissam, “The Decline of Law School Professionalism” (1986) 134(2) *University of Pennsylvania Law Review* 251.

<sup>37</sup> Mary Keyes and Richard Johnstone, “Changing Legal Education: Rhetoric, Reality, and Prospects for the Future” (2004) 26(4) *Sydney Law Review* 537.

<sup>38</sup> See, e.g., Alexa Z. Chew, “Nothing Besides Remains: Preserving the Scientific and Cultural Value of Paleontological Resources in the United States” (2005) 54(4) *Duke Law Journal* 1031.

<sup>39</sup> Deborah L. Rhode, “Legal Scholarship” (2002) 115(5) *Harvard Law Review* 1325, esp. pp. 1343, 1352.

<sup>40</sup> E.g., the standards of the British Council’s “Going Global” international education conferences at <[www.britishcouncil.org/goingglobal](http://www.britishcouncil.org/goingglobal)>.

<sup>41</sup> Louis F. Del Duca, “Emerging Worldwide Strategies in Internationalizing Legal Education” (2000) 18(3)

After all, there is nothing more local than the law. Like species in evolution, the law colonizes the local niche where it arises. Place has priority, and law is peculiar to place.<sup>42</sup> Place and law reify each other, as do legal research and RPG methodology. Montesquieu famously wrote:

“[The political and civil laws of each nation] should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.

“They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; *in all of which different lights they ought to be considered.*”<sup>43</sup>

Even in seemingly broader endeavors such as comparative law, the points of

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*Dickinson Journal of International Law* 411.

<sup>42</sup> As, indeed, Pierre Legrand argues, is everything else that is claimed to be “global.” Pierre Legrand, “On the Singularity of Law” (2006) 47(2) *Harvard International Law Journal* 517.

<sup>43</sup> Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, *The Spirit of Laws (L'esprit des Lois)*. Thomas Nugent trans. (Kitchener, Ontario: Batoche Books, [1748] 2001), p. 23 (Book 1, Part 3.”Of Positive Laws”); emphasis added.

comparison are two or more sets of law in two or more specific locales. The common law is “common” only to certain countries, and even among them it has different inflections. Science tries to find universal principles in the natural world, but finding universals in law is difficult—maybe impossible, and maybe undesirable. For example, US Supreme Court Justice Oliver Wendell Holmes wrote: “I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction.”<sup>44</sup> Students in traditional black-letter schools may view their competition as wholly local—as being with themselves, the teacher, the examination, the school, and their fellow practitioners in the local legal community. But RPG work flattens those boundaries and expands the field to the world. It is a difference of scale. What constitutes a “new contribution to knowledge” is of truly global concern. Globality is the touchstone of RPG work. RPG students may write about local law, but they must do so in a global way.

Beginning spring 2005 and continuing every spring thereafter, I have taught a course at the University of Hong Kong Department of Law entitled Advanced Research Methodology (ARM) for RPG students.<sup>45</sup> I have taken no part in recruiting or admitting the RPG students or assigning them to their respective supervisors, nor in designing the criteria of admission to either the Graduate School or the law school. The students arrive in my class already matriculated. Most of them arrive in their second semester of study. As part of the semester-long syllabus, I repeatedly stress to the students that they are expected to make a “new contribution to knowledge” in their theses and dissertations. I have taught more than 100 members of the classes, including students from Hong Kong,

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<sup>44</sup> Mark DeWolfe Howe (ed), *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932* (Cambridge, MA: Harvard University Press, vol 2 pt. VI, 1942), p. 36; also in Richard A. Posner (ed), *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* (Chicago: University of Chicago Press, 1992), p. 102 (letter to Frederick Pollock, February 1, 1920).

<sup>45</sup> Description of like-minded courses and approaches may be found in Paul Havemann and Jacquelin Mackinnon, “Synergistic Literacies: Fostering Critical and Technological Literacies in Teaching a Legal Research Methods Course” (2002) 13(1) *Legal Education Review* 65; Terry Hutchinson and Fiona Martin, “Multi-Modal Delivery Approaches in Teaching Postgraduate Legal Research Courses” (1997) 15(2) *Journal of Professional Legal Education* 137; Arlie Loughnan and Rita Shackel, “The Travails of Postgraduate Research in Law” (2009) 19(1-2) *Legal Education Review* 99.

the PRC, the United States, England, the Philippines, Singapore, Indonesia, Thailand, Burma, Greece, Sri Lanka, Pakistan, Vietnam, Nepal, Japan, and South Korea.<sup>46</sup> Most of the students have been full-time, with a few part-time—a special challenge because part-time students have severe constraints of time and work. Input from this representative group over the years gives me confidence to assert that (a) the “new contribution to knowledge” is a concept that is often elusive, and (b) the principles I explicate in this study are of widespread usefulness. The written work and personal information that the students produce have become the accumulated archive on which this study is founded. The course is a one-size-fits-all requirement that homogenizes students seeking the PhD, MPhil, SJD, and any other research postgraduate (RPG) or taught postgraduate (TPG) credential—a not unimportant distinction in itself for some purposes,<sup>47</sup> and a not unimportant homogenization. The class must therefore address, in a single semester, their needs in both black-letter and empirical theory and practice in different curricular settings and demands, including on-campus tenures ranging from one year to four-plus years. Within the limits of the prescribed syllabus, I use the survey documents mentioned above to tailor the class to the peculiar needs of each group—and those needs and groups vary significantly from year to year. The Department of Law itself offers various undergraduate courses in black-letter research, including supplemental library and computer-assisted training, but offers no training in anything like “Empirical Research Methods in Law.” Students who wish to undertake serious empirical research must go to other departments in the university such as the Social Sciences faculty.<sup>48</sup> The Graduate School offers several general short courses, but these are not tailored to the needs of law students or students in other disciplines who are working with law.<sup>49</sup>

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<sup>46</sup> Further information about the classes, including photos, may be seen at <[www.robertjmorris.net](http://www.robertjmorris.net)> and in the Regulations of the University. A table of the University’s postgraduate programs and requirements may be seen at <[www.hku.hk/rss/pp2009/law.html#rese](http://www.hku.hk/rss/pp2009/law.html#rese)>.

<sup>47</sup> But not for my purposes here, where I will use RPG to include both.

<sup>48</sup> Which offers an annual intensive summer course in empirical methods <[www.hku.hk/socsc/ssrm/2011/](http://www.hku.hk/socsc/ssrm/2011/)>.

<sup>49</sup> See the courses offered by the HKU Graduate School in qualitative and quantitative methods at

Before coming into the HKU RPG program, most of the students have received some kind of undergraduate credential in law, and many have intermediate RPG credentials (PhD candidates often have the MPhil). All have had practical experience in the practice of law, teaching law, working in their countries' judicial systems, conducting research, publishing, or combinations of these. Sophistication in research experience is highly mixed, from extensive to novice, but in no case has any student had advanced training or experience in empirical research of the kind known in the social sciences, although some have been in the process of acquiring such skills. All have been, in other words, traditional black-letter lawyers more or less. Of those in compound programs, approximately one-third of the students have been conducting research in the law and social sciences; a handful in law and humanities, and one in law and science.<sup>50</sup> Several are engaged in comparative law. This class, in one form or another, has existed for many years, and many RPG students have passed through it with several instructors.

Each of these classes has been an empirical laboratory in which to observe a mix of international students presenting a whole range of research subjects, and to think about the patterns of pedagogical and theoretical problems that pertain to newly matriculated RPG students in the law. Because of this diversity and the prominent position of Hong Kong in the global academic community, I take these *recurring patterns* to be representative of similar patterns elsewhere. Admittedly, this is something of a homogenization of its own. Anyone who has read my footnotes up to this point will have noticed that I have drawn sources from around the world. Users of the handbook must, of course, localize its principles to their particular situation. During their semester with me in ARM, the students produce many short written assignments, among which are responses to a DIAGNOSTIC QUIZ and a PERSONAL INFORMATION WORKSHEET

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<[www.hku.hk/gradsch/web/student/course/gs/index.htm](http://www.hku.hk/gradsch/web/student/course/gs/index.htm)>.

<sup>50</sup> Yet the sciences would appear to be an increasingly important subject even for practicing lawyers. See, e.g., Sophia I. Gatowski, Shirley A. Dobbin, James T. Richardson, Gerald P. Ginsberg, Mara L. Merlino, and Veronica Dahir, "Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert* World" (2001) 25(5) *Law and Human Behavior* 433 (how judges, most of whom are not trained in the scientific method, approach such evidence).

(Appendices A and B). Both of these are produced during the first week of the semester to assess where the students are academically and mentally and to provide a benchmark as they begin going through the class. It is upon these that I base my observations about their perceptions and needs at the outset of their RPG work, and regarding which I have several personal interviews with each student. In addition, at three stages during the semester, each student prepares a RESEARCH PROPOSAL, each step being more complex and sophisticated than the previous step. I assess these not as writing *per se* (this is not a writing class) but for the quality of research they demonstrate. All these documents collectively comprise the emerging archive of the class on which this study is based. Although this study is rooted in the HKU model, the breadth of the research sources indicates that it can be adapted to the situations of many law and non-law RPG programs elsewhere. Fiona Cownie notes the following regarding RPG legal education in the European Union:

“It is clear from the results of this project that European postgraduate legal education, while sharing some broad similarities, remains diverse. This is clearly true of research degrees, which, while appearing broadly similar in nature at a macro-level, featuring an emphasis on original research contained in a thesis, nevertheless possess considerable local variations, *these being particularly obvious as regards the entry qualifications* which are demanded by different educational systems.”<sup>51</sup>

This diversity is apparent in many places. Indeed, as I travel to other universities and meet RPG students and their supervisors at conferences, the issues discussed here seem to be at least prevalent if not universal. As the demand for a “new contribution to knowledge” is universal, so the path to achieving it in legal studies is, if not entirely

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<sup>51</sup> Fiona Cownie, “Postgraduate Legal Education in the EU: Difference and Diversity” (2002) 9(2) *International Journal of the Legal Profession* 187, 200; emphasis added. Cownie’s article is an exemplary empirical study.

universal, certainly common. But the path lies through many thickets (swamps or labyrinths, if you prefer) that are difficult and fraught. They are in flux. They can be navigated, but here is the caution: Learn the ways of the navigation early. Practice them from the start of your project. When you choose a law school, a university, an RPG program, and a locale, study the thickets and devise a plan of navigation at the outset. There is no string or trail of crumbs to find your way back should you strike off on your own in the wrong direction. In sum, then, and by way of forward direction, we can abstract ten general principles or rules that permeate all that is presented throughout this study.



## THE TEN RULES

*The complicated histories of the law, the law school, and of legal education complicate the nature of any RPG law project.*

*The standards that constitute a viable research question, subject, purpose, thesis statement, research gap, research methodology, and true “new contribution to knowledge” are all objective, not subjective, as determined by global standards.*

*The “new contribution to knowledge” may be paradigm-changing or incremental, but it may not be make-weight or trivial.*

*The “new contribution to knowledge” may be either found or created.*

*In addition to deciding early your subject, purpose, and (hypo)thesis, you must also determine early whether your research project will be primarily directed toward legal practice or legal scholarship.*

*You must be fully credentialed and qualified to study each of the subjects that comprise your research project.*

*In order to deal with the requirements of the “new contribution to knowledge” and all the issues surrounding it, you must develop your own powers of adjudication independent of any other authority or source.*

*As you work through your research project over time, you may have to educate yourself out of certain ideas by unlearning former habits of thought and research.*

*No RPG law project is mere reportage or narrative, but demonstration and analysis.*

*Your RPG research project will go more smoothly and produce greater results if you understand, embrace, and operationalize all of the foregoing nine rules.*

## THE PROBLEM OF THE “NEW CONTRIBUTION TO KNOWLEDGE”

“One way by which educational institutions can contribute to reform [of the legal system] is to mobilize their capacities for generating new knowledge.”

—Derek C. Bok, president of Harvard University<sup>52</sup>

### Introduction & Background

#### Further versus Higher

Education is more than schooling, and higher education is more than further education. These distinctions may be subtle, but they are crucial. Teachers and supervisors of newly matriculated research postgraduate (RPG) students in law observe a common and nearly universal phenomenon that is at once surprising and counterintuitive: I call it the *gap/new conundrum*. It is the requirement of identifying a gap in the existing body of knowledge, conducting research to fill that gap, and thus making a new contribution to existing knowledge—a proposition easy to state, difficult to achieve—and the misunderstanding of that requirement. The “gap/new conundrum” serves as a metonymy for a whole cluster of problems, conflicts, contradictions, and pitfalls that beset the legal RPG project. You would think (or at least hope) that RPG students—already grounded as they are supposed to be in the adventures of research, and already vetted and admitted to an academic system which promulgates that very requirement—would understand this problem and would already have it figured out and clearly articulated in terms of their own intended projects. You would be wrong.

What ought to be the settled *precursor* to application for RPG work turns out to be the major quest of the first year or two of RPG work *after admission*. Numerous post-

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<sup>52</sup> Derek C. Bok, “A Flawed System of Law Practice and Training” (1983) 33(4) *Journal of Legal Education* 570, 581. Bok, a graduate of Harvard Law School, was president of Harvard from 1971 to 1991. He served as Dean of the Harvard Law School from 1968 to 1971.

RPG graduates report in exit interviews that the gap/new conundrum was conceptually the most difficult part of their entire RPG experience—a daunting and discouraging great wall that confronted them on their first day of work. Numerous frustrated thesis examiners bear witness that not every intensive four-year course of RPG work (however well intentioned and bona fide) fills any significant gap worth filling or produces any truly new contribution to knowledge.<sup>53</sup> A moment’s reflection on the universal presence of the university requirement that an RPG student’s work must result in the “production of a substantial original thesis”<sup>54</sup>—that it should be timely and urgent, important and distinct<sup>55</sup>—should suggest that the gap/new conundrum is a universal problem—else why state the requirement in the first place? On this score, many RPG students arrive at the university with an innocence that borders on naïveté. “All I want,” they protest subjectively, “is to study everything about the topic that interests me so that I can make some sense of it. Then I will write up everything that I have studied, and that will be my dissertation.” Or, if they come out of some calling in legal practice (we have many judges and government officials), they believe that their RPG thesis will be merely the familiar appellate brief or client opinion letter pumped up to 400 pages. Long after matriculation, they remain in Column A when they should already be well into column B.

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<sup>53</sup> Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003), reports actual examples.

<sup>54</sup> University of Auckland Faculty of Law, requirements for PhD in Law, which may be seen online at <[www.law.auckland.ac.nz/uoa/home/for/future-postgraduates/fp-study-options/fp-programmes/fp-doctor-of-philosophy](http://www.law.auckland.ac.nz/uoa/home/for/future-postgraduates/fp-study-options/fp-programmes/fp-doctor-of-philosophy)>.

<sup>55</sup> Adam Przeworski and Frank Salomon, “The Art of Writing Proposals,” Social Science Research Council publication, which may be read online at <[www.ssrc.org/workspace/images/crm/new\\_publication\\_3/%7B7a9cb4f4-815f-de11-bd80-001cc477ec70%7D.pdf](http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B7a9cb4f4-815f-de11-bd80-001cc477ec70%7D.pdf)>.

**Figure 2**

<u><b>A</b></u>		<u><b>B</b></u>
Research first to determine—		Determination first of—
Subject/Topic )	→	( Subject/Topic
Purpose )	→	( Purpose
(Hypo)thesis )	→	( (Hypo)thesis
Argument )	<i>OR</i>	( Argument
Gap )	→	( Gap
Research Questions )	→	( Research Questions
Strategy/Method )	→	( Strategy/Method
Theory )	→	( Theory
Timetable )	→	( Timetable
—to discover <i>new</i> research plan		—to guide/control <i>existing</i> research plan
<i>[further education]</i>		<i>[higher education]</i>

The problems that arise when students linger in Column A—or worse, *revert* to Column A—are horrendous. I stay in touch with my advanced research students for the remainder of their tenure as RPG students even after they leave my class. And it is not uncommon for me to receive a dejected message such as this from a student in mid-course of a four-year program: “I had to change my topic and thesis statement, which meant I had to rewrite my entire proposal—and get a new supervisor.” This return to Column A after two years in the RPG program is costly in money, time, and psychological stress. If you don’t come to the first day of your RPG program already in Column B—already having thought through and surveyed the whole list of items in Column B—you need to take all deliberate measures to get to Column B as quickly as possible. This *a priori* question—the gap/new conundrum and its whole cluster of considerations—really is *a priori*. Essential to an understanding of it is Bradney’s all-important insight that “university education means higher, not further, education.”<sup>56</sup> This is what distinguishes the university from the middle school—and the true RPG student from all other students—this notion of *the university*. Bradney writes:

“What, then, *in university terms*, is knowledge about Law? This question is wholly different from the question, what is knowledge about law? The university law department should work within certain confines, search for a particular kind of knowledge.... Knowledge here is *equated with theory* and distinguished from facts.... In this case theoretical work indicates the *attempt to understand processes and structures; to go beyond the immediate*; to do that which might enable us to say, ‘Now we know more’. The accumulation of facts, in contrast, implies a concern with that which is immediate and of the surface. It implies a concern with that which, if

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<sup>56</sup> A. G. D. Bradney, “University Legal Education in the Twenty-First Century” in John P. Grant, R. Jagtenberg, and K. J. Nijkerk (eds), *Legal Education 2000* (Aldershot, Hants: Avebury, 1988), pp. 265-78, esp. pp. 268-69, 272. Bradney relies on the seminal work of N[oa]h E[dward] Feh[er], *The Idea of a University in East and West* (Hong Kong: Chung Chi College, 1962), p. 28.

successful, [might] lead us to say, ‘Now we know differently’. It is not the subject of the pursuit which is the point of concern; it is the form of that pursuit.”<sup>57</sup>

It is this crucial more-different distinction—the distinction between “standing on the shoulders of giants”<sup>58</sup> versus standing side-by-side with our predecessors—that eludes many new (freshly post-middle school) RPG candidates (and indeed many others, including the university itself and sometimes RPG supervisors). It is this that makes the gap/new conundrum so troublesome. The work of column A should already have been accomplished when a candidate applies for admission to an RPG program, but often it is not. And because it is not, students have trouble with all of the subsequent issues and tasks that confront them. When they find out that their familiar practices and expectations from middle school are not sufficient to sustain an RPG project, they often despair and quit. But unless they come to grips with this gap/new conundrum—and solve it—they can never state the true thesis, subject, or purpose of their project. It simply will not gel—they cannot “stake their claim.” The resolution of this problem should already have been achieved by the time the student applies for graduate study, and that resolution should be evident in the RPG proposal for admission. But in many cases it is not, and the reason it is not is a conceptual problem.

### **Objective, Not Subjective**

The quality of a genuine “new contribution to knowledge” is the global benchmark by which RPG work is judged. Scholars make new contributions to knowledge in different ways: (a) the creation of new data, (b) a new organization of

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<sup>57</sup> Bradney, pp. 271-72; emphasis added. A more expansive explanation of Bradney’s ideas may be found in Anthony Bradney and Fiona Cownie (eds), *Transformative Visions of Legal Education* (Oxford, UK: Blackwell Publishers, 1998).

<sup>58</sup> “If I have seen further it is only by standing on the shoulders of giants.” Isaac Newton, letter to Robert Hooke, 15 February 1676.

existing knowledge, (c) a new presentation or analysis or interpretation of existing knowledge or data, (d) a new application of existing knowledge or data, or (e) a combination of these. Finding a gap in the existing knowledge or data, which your research can fill with a new contribution, might come for a variety of reasons:

- An issue or problem makes you angry—offends morality, decency, justice.<sup>59</sup>
- An issue or problem excites you.<sup>60</sup>
- There is something new you want to teach the world.<sup>61</sup>
- You wish to reveal a secret.<sup>62</sup>
- You wish to effect change.<sup>63</sup>
- An issue or problem is on the cutting edge of your subject.<sup>64</sup>
- You want to enter a dispute with a new argument.<sup>65</sup>
- The discussion which you wish existed about your subject doesn't exist.<sup>66</sup>
- Your research is “something that will surprise the world.”<sup>67</sup>

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<sup>59</sup> Christine Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong: Hong Kong University Press, 2006).

<sup>60</sup> Robert J. Morris, “Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture and Values for the Debate About Homogamy” (1996) 8(2) *Yale Journal of Law & the Humanities* 105.

<sup>61</sup> Karen Man Yee Lee, *Equality, Dignity, and Same-Sex Marriage: A Rights Disagreement in Democratic Societies* (Leiden, Boston: Martinus Nijhoff Publishers, 2010).

<sup>62</sup> Andrew J. Nathan and Perry Link (eds), Zhang Liang (comp), *The Tiananmen Papers* (London: Little, Brown & Co., 2001).

<sup>63</sup> Ron Suskind, *The Way of the World: A Story of Truth and Hope in an Age of Extremism* (New York: Simon & Schuster, 2008).

<sup>64</sup> Colin Tudge, *The Link: Uncovering Our Earliest Ancestor* (New York: Little, Brown & Co., 2009).

<sup>65</sup> Bill Moyers, *Moyers on Democracy* (New York: Doubleday, 2008).

<sup>66</sup> Paul Harris, *The Right To Demonstrate: A History of Popular Demonstrations from the Earliest Times to Tian An Men Square and Beyond* (Hong Kong: Rights Press, 2007); Robert J. Morris, “China’s Marbury: Qi Yuling v. Chen Xiaoqi—The Once and Future Trial of Both Education and Constitutionalization” (2010) 2(2) *Tsinghua China Law Review* 273.



- There is a developing area of law-and-\_\_\_\_\_ that is important.<sup>68</sup>

Regardless of the method or the motivation, the standard of what constitutes a “new contribution to knowledge” is *objective, not subjective*. New RPG students often confuse this crucial difference. A topic or an idea is new *to them*, and so it “feels right” because researching it will make a new contribution to *their own* personal knowledge—and they often base their initial RPG research proposal on this subjective evaluation. They are still in section A (Table 2) because this is the comfortable model of “further” education they learned in middle school or undergraduate university. The hard reality they must face is that the standard for RPG work is what constitutes a new contribution to knowledge “out there” in the worldwide community of scholars. It is that worldwide body of knowledge, not their personal body of knowledge, to which they must contribute. This, I take it, is part of the meaning of “regular” in John Adams’s “new, grand, wild, yet regular” that we reviewed earlier. Along the way, their personal body of knowledge will no doubt expand with “further” knowledge, but that is not the “higher” education standard by which their work will be judged by their worldwide community of peers. They often confront this reality well into their research for the literature review, and it can be deflating. It is an even worse deflation than getting through an entire RPG program down to the final oral defense, only to be “scooped” by another scholar’s publication of similar research half a world away. Getting scooped is out of the student’s control. Being ignorant of existing research is not.

Gatekeepers of the postgraduate graduate admissions process may not be able to police this problem well because they are not experts in the particular research question

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<sup>67</sup> John Adams, *Diary and Autobiography of John Adams*. L. H. Butterfield, Leonard C. Faber, and Wendell D. Garrett (eds). (Cambridge, MA: Belknap Press of Harvard University Press, 4 vols, 1961), I:78, 95; quoted in Susan Dunn (ed), *Something That Will Surprise the World: The Essential Writings of the Founding Fathers* (New York: Basic Books, 2006), pp. 3-4.

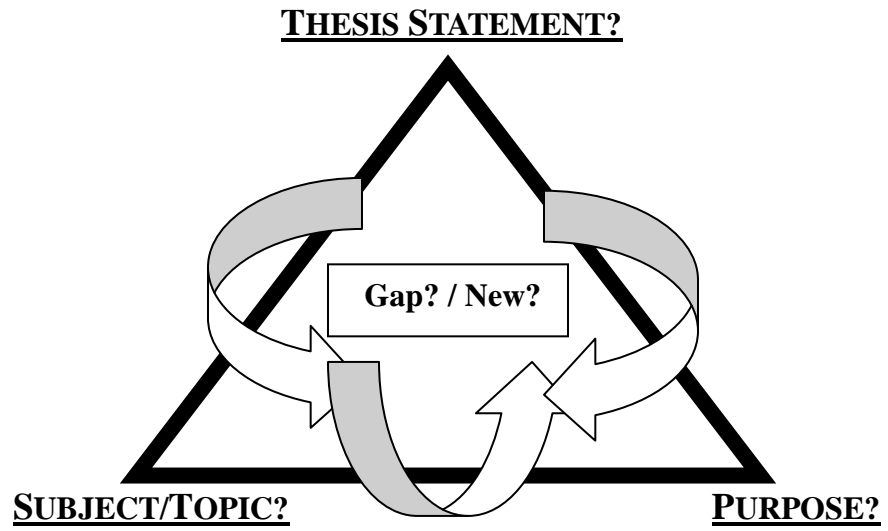
<sup>68</sup> Norman Polythress and John P. Petrila, “PCL-R Psychopathy: Threats To Sue, Peer Review, and Potential Implications for Science and Law. A Commentary” (2010) 9(1) *International Journal of Forensic Mental Health* 3.

which the RPG applicant advances in her proposal. They may not be in a position to adjudicate whether the proposed research project is one that will make an *objective* “new contribution to knowledge.” Supervisors, once assigned, are in a better position to do this, but that means the supervisor’s task for the first year is helping the student to play catch-up getting into section B (Table 2). I have known RPG students who are still shifting about trying to find yet another “gap” to fill with another “new contribution to knowledge” a full two or more years after matriculation—because they keep learning that the “gap” they thought they had found was only personal, not objective. The inventor Thomas Edison was fond of noting that he sometimes conducted thousands of experiments in order to find one invention that worked, claiming that this was not failure because then he knew thousands of ways *not* to do the job.<sup>69</sup> Such knowledge may be useful for a commercial inventor, but this experimental model is not appropriate for RPG legal research. All the experimentation should have been done before the proposal so that the proposal clearly states—.

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<sup>69</sup> Comments as paraphrased in *Proceedings of the Regular Meeting* (1924) by The Association of American Railroads, Car Service Division, p. 23.

Figure 3



Again, this triangle can be rotated—there is no priority of place to Thesis Statement. But why all this worry about preparation? That it is the case is a problem worthy of serious consideration. In legal studies particularly, the situation results from a confluence of special problems and traditions that complicate our understanding. In terms of a familiar business model, it is the problem of defining the “core competence”<sup>70</sup> of the law school, the RPG law student, and the RPG research project—of answering in each case the philosophical questions, Who am I?, Why am I here?, Where am I going?, and What value can I add?<sup>71</sup> What is the special thing I can do better than anyone else? These questions should be answered in a written Mission Statement. The requirement of a “new contribution to knowledge” is a concept from arrives from outside the traditional black-letter law school. Until rather recently, the idea of “legal research” meant only the kind of research in cases and statutes (black-letter law) and secondary texts that practicing lawyers do when they advise clients and write memoranda for the courts, reasoning rather than empirical observation—the kind of traditional legal research traditionally taught in traditional Langdellian law schools.<sup>72</sup> It consists in identifying legal issues, interpreting cases and statutes, “construing” texts. It is not empirical and is not intended to be. It deals with truths which are analytical rather than truths which are grounded in fact.<sup>73</sup> It is judged solely within its own context. This “otherness” is what differentiated the black-letter tradition for other disciplines. As Jack Goldsmith and Adrian Vermeule summarize:

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<sup>70</sup> C. K. Prahalad and Gary Hamel, “The Core Competence of the Corporation” (May-June 1990) *Harvard Business Review* 79. See also, American Association of Law Libraries, “Law Student Research Competency Principles,” draft February 28, 2011 at < <http://researchcompetency.wordpress.com>>.

<sup>71</sup> Michael E. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (New York: Free Press, 1985).

<sup>72</sup> Steven M. Barkan, “Should Legal Research Be Included on the Bar Exam? An Exploration of the Question” (2006) 99(2) *Law Library Journal* 403. The *amicus curiae* brief is an example of legal research that may include several kinds of research but is nevertheless addressed to the court. Johannes Chan, “Amicus Curiae and Non-Party Intervention” (1997) 27(3) *Hong Kong Law Journal* 391. By Langdellian I mean the tradition case-study method which I discuss *infra*.

<sup>73</sup> To follow the taxonomy of W. V. Quine, “Two Dogmas of Empiricism” (1951) 60(1) *Philosophical Review* 20, which takes issue with this “fundamental cleavage” but is a point that, although important, does not require great elaboration here.

“The legal academy supplies vocational rather than scientific training; law schools usually produce lawyers, not graduate students; and legal scholars often write in the lawyer’s style rather than in the empiricist’s because they are participants in, not just students of, the legal system’s practices.

“Work in this vein contains no empirical claims in any important or contestable sense—at least not if ‘contestable’ is defined by reference to the internal consensus of legal academics.”<sup>74</sup>

This is not so different from the rather critical view expressed by Underhill Moore and Gilbert Sussman seventy years earlier:

“Any attempt to define the limits of the field of law and the problems within it, what are and should be the approaches to those problems, and the data and methods for investigation *must begin* with the activities and way of thinking *of the practitioner*. These have established the boundaries of the field and the mode of its cultivation not only for the practitioner *but also for those with scientific curiosity*.”<sup>75</sup>

Indeed, not only do the ways of the practitioner establish these boundaries, but they also exclude from these boundaries any consideration of empirical information because this “grossly inadequate” method of the practitioner (and the traditional law school) is a “failure” which blinds and obscures interaction with other disciplines.<sup>76</sup> This

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<sup>74</sup> Jack Goldsmith and Adrian Vermeule, “Empirical Methodology and Legal Scholarship” (2002) 69(1) *University of Chicago Law Review* 153, 155; emphasis added.

<sup>75</sup> Underhill Moore and Gilbert Sussman, “The Lawyer’s Law” (1932) 41 *Yale Law Journal* 566; emphasis added.

<sup>76</sup> *Ibid.* pp. 570, 575.

is the sort of legal research that more recently Manderson and Mohr compare to the search for dogma in theology—the search to find an existing knowledge rather than contribute to it—and for which they compare the law faculty to a “fundamentalist Christian academy.”<sup>77</sup> It is questionable whether such lawyers (or the courts or clients) would even think in terms of their “research” as filling some sort of “gap” or of making some sort of “new contribution to knowledge” in a global sense. Researchers in this practical part of the world must adjudicate sources such as cases, statutes, and ordinances, the quality and usefulness of which are grounded in the political authority that issued them and in their internal logic.<sup>78</sup> Researchers in this black-letter part of the world must adjudicate sources such as articles and books, the quality and usefulness of which are grounded in the quality of their analysis and the veracity of the sources they in turn quote.

The notion of *academic* legal research leading to the traditional research postgraduate<sup>79</sup> (RPG) degrees<sup>80</sup> such as PhD, SJD, and MPhil, with their universal

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<sup>77</sup> Desmond Manderson and Richard Mohr, “From Oxymoron to Intersection: An Epidemiology of Legal Research” (2003) 6 *Law Text Culture* 165.

<sup>78</sup> See, e.g., Robert J. Morris, “China’s *Marbury*: Qi Yuling v. Chen Xiaoqi—The Once and Future Trial of Both Education and Constitutionalism” (2010) 2(2) *Tsinghua China Law Review* 273 (the political and legal importance of “controlling for education”).

<sup>79</sup> In moving among materials that include the United States and other jurisdictions, the terms “graduate” and “postgraduate” can become confusing. In the US, “graduate” means all schooling past the undergraduate BA or BS. Hence, the MA and PhD are “graduate” degrees, and “postgraduate,” if the term is used at all, often means the same as “postdoctoral.” In other places, “postgraduate” means everything past the undergraduate degrees, and that includes not only those I mention here but also some degrees unknown in the US. See, e.g., Jasper Kim, “Socrates v. Confucius: An Analysis of South Korea’s Implementation of the American Law School Model” (2009) 10(2) *Asian-Pacific Law & Policy Journal* 322; Mayumi Saegusa, “Why the Japanese Law School System Was Established: Co-optation as a Defensive Tactic in the Face of Global Pressures” (2009) 34(2) *Law & Social Inquiry* 365. For this book, because I am writing at the University of Hong Kong, I adopt the terminology common here.

<sup>80</sup> Even this term is problematic because it conflates and homogenizes the “research” done in *research* programs and the “research” done in *taught* programs. See the heading “Postgraduate Programmes” at <[www.hku.hk/rss/pp2009/law.html#rese](http://www.hku.hk/rss/pp2009/law.html#rese)>. The “taught postgraduate” (TPG) versus “research postgraduate” (RPG) distinction can be misleading because even in research programs, students are required to take and pass a small number of largely optional classes. Taught programs prescribe a full range of mandated courses for all students, and the dissertation may be optional or substituted for a required course. See, e.g., the information on the HKU Human Rights Programme at <[www.hku.hk/ccpl/human\\_rights/courseinfo.html](http://www.hku.hk/ccpl/human_rights/courseinfo.html)>.

requirement that the research be measured by its objective “new contribution to knowledge,” was an idea that scholars in non-law fields scoffed at. How, they asked, could the endless intellectual and verbal manipulation of legal doctrines<sup>81</sup>—what Derek Bok called the “pecking at legal puzzles within a narrow framework of principles and precedent”<sup>82</sup>—ever count as “real” research of the kind that paleontologists, historians, sociologists, chemists, anthropologists, and astronomers do—in other words, empirical research (both quantitative and qualitative) and “hard science” backed up by theory, field work, archival research, statistics, and sampling—with, perhaps, a jurisprudential underpinning?<sup>83</sup> Indeed, some called these changes in legal scholarship “so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution.”<sup>84</sup> More specifically, it was argued that “legal scholars today are, in effect, seeking in philosophy and humanistic theory generally something that law cannot offer and *cannot even tolerate*: ‘intellectual authority,’ an external, non-legal source of scholarly legitimacy.”<sup>85</sup>

The difference between these two *Weltanschauungen* is captured nicely in Thomas More’s reply to Cromwell in *A Man for All Seasons*: “The world must construe according to its wits. This court must construe according to the law.”<sup>86</sup> The world’s wits versus

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<sup>81</sup> Richard A. Posner, “The Decline of Law as an Autonomous Discipline: 1962-1987” (1987) 100 *Harvard Law Review* 761, esp. 771-73.

<sup>82</sup> Bok *op. cit.* at 584.

<sup>83</sup> Bradney, *op. cit.* See also Andrew P. Morriss, “Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment-at-Will” (1995) 45(4) *Case Western Reserve Law Review* 999 (economic analysis). I thank Zul Kepli Mohd Yazid Bin for making me aware of this source.

<sup>84</sup> Charles W. Collier, “The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship” (1991) 41(2) *Duke Law Journal* 191, 192.

<sup>85</sup> *Ibid.* at 194; original emphasis.

<sup>86</sup> Robert Bolt, *A Man For All Seasons: A Play of Sir Thomas More* (London: Random House, 1960), p. 97, Act 2.

legal construction: the two worlds seem to be conceptually and semantically “worlds apart.” What works (or used to work) perfectly well within the walls of the law school and the law firm has questionable value on the outside—and vice versa. The advice of Sir Edward Coke (from whom more later) to the King of England in 1608 is still true today:

“[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are *not to be decided by natural reason* but by the *artificial reason and judgment of law*, which law is an act which requires *long study and experience*, before that a man can attain to the cognizance of it: and that the law was the...measure to try the causes of the subjects; and which protected his Majesty in safety and peace....”<sup>87</sup>

The “artificial reason and judgment of law” do not match the reason and judgment of the non-law world, especially within the university. To non-lawyers, the common law often does not make common sense. Even the phrase, “artificial reason” raises alarms. That reality is transferable to RPG studies. Yale law professor Peter H. Schuck observed: “Indeed, if our colleagues in those [other non-law policy-oriented] disciplines caught on to our game, the intellectual stature of the law school in the larger university community might become even more precarious than it already is.”<sup>88</sup> In 1981, Tony Becher

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<sup>87</sup> Edward Coke, “Prohibitions Del Roy” 6 Coke Rep. 280, 282 (1608); emphasis added.

<sup>88</sup> Peter H. Schuck, “Why Don’t Law Professors Do More Empirical Research?” (1989) 39 *Journal of Legal Education* 323, 329.



described traditional legal scholarship as “unexciting, uncreative, and comprising a series of intellectual puzzles scattered among large areas of description.”<sup>89</sup> “Lawyers,” he said, were an “appendage to the academic world”<sup>90</sup> in “valuing professional qualifications and experience in professional practice more highly than a doctorate.”<sup>91</sup> In 1994, William Twining described law as having become “isolated from mainstream academic life because of its peculiar history.”<sup>92</sup> He noted: “General philosophy, political and social theory, literature, religion, and, less confidently, science, were well represented as contributing to the mainstream of the history of ideas, but law and legal theory were not.”<sup>93</sup> Hence, there are at least two dichotomies under surveillance here. One is the dichotomy between law practice and law school—“downtown” versus the “ivory tower.” Another is the dichotomy between black-letter legal research and empirical legal research within the ivory tower.<sup>94</sup> The apparent disjunctions among these categories, despite their all being “law,” reinforces the adage that “the map is not the territory,”<sup>95</sup> theory does not

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<sup>89</sup> Tony Becher, “Towards a Definition of Disciplinary Cultures” (1981) 6(2) *Studies in Higher Education* 109,111. But Becher must be used with caution for two reasons. First, he notes ominously: “There are no grounds for asserting that the sample of just over 120 academics interviewed for the purposes of the present study was typical of the general run”—itself an admission and exemplification of the problems under consideration here. *Id.* p. 118. Second, his study is now dated by thirty years, an eon in the rapidly evolving globalized academy and the theory of pedagogy. A more recent and reliable study is Fiona Cownie, “The Importance of Theory in Law Teaching” (2000) 7(3) *International Journal of the Legal Profession* 225.

<sup>90</sup> Becher *ibid.*

<sup>91</sup> *Id.* p. 113.

<sup>92</sup> William L. Twining, *Blackstone’s Tower: The English Law School* (London: Stevens & Sons/Sweet & Maxwell, 1994), p. xix.

<sup>93</sup> *Ibid.*

<sup>94</sup> Susan Saab Fortney, “Taking Empirical Research Seriously” (2009) 22(4) *Georgetown Journal of Legal Ethics* 1473, provides a useful overview of this problem vis-à-vis empirical research on the legal profession itself—certainly a part of the “legal system” but not coterminous with it.

<sup>95</sup> Alfred Korzybski, “A Non-Aristotelian System and Its Necessity for Rigour in Mathematics and Physics” in Alfred Korzybski, *Science and Sanity: An Introduction to Non-Aristotelian Systems and General Semantics* (Lakeville, Conn.: International Non-Aristotelian Library Publishing Co., 3<sup>rd</sup> ed, 1948), pp. 747-61, at 750-51. Korzybski’s famous dictum occurs in the context of a discussion of the disjunction of semantics (language) and objective reality, with a note that the—

always describe reality. RPG students parachute into these surging debates about the nature and purpose of legal research. Professor Robert Gordon writes:

“So if I had the power...to redirect legal scholarship, I would use it to try to promote more empirical work, institutional description, and law-in-action studies. Sometimes I think I would happily trade a whole year’s worth of the doctrinal output turned out regularly by smart law review editors and law teachers for a single solid piece describing how some court, agency, enforcement process, or legal transaction actually works.”<sup>96</sup>

This one-would-be-better-than-the-other lament is not uncommon, but Professor Gordon also notes the real dilemma:

“Empirical social study—I include history and ethnography—is never going to yield lawlike regularities that can make law practice into some sort of exact predictive science. Social science is a value-soaked, fuzzy, messy, dispute-riddled, political enterprise like any other interpretive activity—like law for instance.”<sup>97</sup>

Writing in a similar vein, George Priest says, “The demands of scientific theory create extraordinary conflict for the lawyer who develops an interest in social science.”<sup>98</sup>

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“problems involved are very complicated and cannot be solved except for a *joint study* of mathematics, mathematical foundations, history of mathematics, ‘logic’, ‘psychology’, anthropology, psychiatry, linguistics, epistemology, physics and its history, colloidal chemistry, physiology, and neurology; this study resulting in the discovery of a general semantic mechanism underlying human behaviour....” *Id.*, p. 751, original emphasis.

<sup>96</sup> Robert W. Gordon, “Lawyers, Scholars, and the ‘Middle Ground’” (1993) 91 *Michigan Law Review* 2075, 2087.

<sup>97</sup> *Ibid.*

<sup>98</sup> George L. Priest, “Social Science Theory and Legal Education: The Law School as University” (1983) 33

Exactly to the contrary is the notion expressed by Richard Posner:

“To me the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully.”<sup>99</sup>

There is hardly an element of Posner’s statement that I personally agree with because I do not believe that law is in any way science, yet he is a weighty authority introducing a collection of essays by weighty authorities. Posner anticipates that some people, like me, will object that law cannot be put on any “scientific basis.”

“But there are bound to be misgivings that the regularities discovered by the economic analyst are due to some underlying cultural uniformity, rather than to the existence of an economic structure to law itself.”<sup>100</sup>

If you do not accept the “scientific” premise, can you still accept Posner’s other premises, or does the subtraction of one premise change the field entirely? Does the application to law of economics (one of the *social* sciences) truly put the study of law “on a *scientific* basis”? Such questions can daunt new RPG candidates, yet each student must

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*Journal of Legal Education* 437, 441.

<sup>99</sup> Richard A. Posner, Forward, in Michael Faure and Roger Van den Bergh (eds), *Essays in Law and Economics: Corporations, Accident Prevention and Compensation for Losses* (Antwerpen-Apeldoorn: Maklu, 1989), p. 5.

<sup>100</sup> *Ibid.*

develop her own adjudicational skills in order to decide such matters independent of outside authority. Within the interstices of these conflicts lie the problematic differences and definitions of “new” and the “new contribution to knowledge.” The more clearly a new RPG student can think and work through these problems *at the beginning of the RPG project*, the better and more productive will be the final research product. There is a stronger guarantee that it will be acceptably “new” in an objective, global, academic way.

“New” has two quite distinct meanings, both applicable to RPG work. First, it means “not old,” not recycled, not plagiarized—your own “fresh stuff” and not somebody else’s. In other words, you “scoop” them. Second, it means something not seen before (by necessity substantial and important) within the global scholarly realm that it seeks to enter. The satisfaction of the first definition does not necessarily imply the satisfaction of the second, and it certainly does not guarantee satisfaction of the second. In fact, it may disguise absence of the second. There is quite a lot of entirely fresh, unplagiarized writing that says absolutely nothing new. It is like the subtle difference between “originality” and making a “new contribution.” The two ideas sound the same, but they are not quite the same. “Originality” often appears as a mere re-shuffling of old ideas and old building blocks in a different way—a kind of shell game. You can write a new arrangement of an old song. But a truly “new contribution” to academic knowledge adds a new idea, a new block, to the mix even while it re-shuffles the old blocks. A truly “new contribution” shifts the paradigm, changes the field, and adds new value. The second definition is harder to satisfy than the first, both conceptually and practically, which is why the rules against plagiarism can be taught in one class session, while the craft of making a genuinely “new” contribution to global knowledge requires a lifetime. As this is the problem of what is “new” in legal research, it is also true that what constitutes a “gap” in existing knowledge is also a problem for similar reasons—“gap” and “new” are inextricably bound together as the Figure shows—the gap/new conundrum. So we never take for granted the meanings of “new,” “contribution,” “knowledge,” and “research.” We question them and define them for ourselves. Generations of first-year contract

students are taught to ask, “What is chicken?”<sup>101</sup>, and “who are Indians [Native Americans]?”<sup>102</sup>, we must ask, *What is research?* The process may ultimately interrogate what “law” is and what “legal education” is. Identifying and working within three dichotomies helps us to answer these questions:

gap/new  
further/higher  
objective/subjective

We must ask early in the RPG project what it means objectively and globally to “think, teach, research, write, and supervise like an RPG scholar.” If we answer this problem correctly, we can further educate ourselves personally *and* raise the education of the world to a higher power. But RPG students live and move and have their being within two institutions: the law school and the university. There is tension between the two institutions (there always has been), and both institutions are these days in great flux. The flux for one does not always match the flux for the other, and so the flux creates new tentions. We now turn to a detailed examination of those processes and tensions, and along the way will do so by looking at three additional dichotomies:

fish/bear’s paw  
that/how  
traditional/new  
parochial/international  
global/local

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<sup>101</sup> *Frigalment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (is frozen chicken “chicken?”).

<sup>102</sup> *United States v. Joseph*, 94 US 614 (1876) (people who are virtuous, peaceable, industrious, intelligent, and honest are not Indians); *United States v. Sandoval*, 231 US 28 (1913) (people who are ribald, cruel, inhuman, immoral, debauched, and unfilial are Indians).

Like the law itself, which is *almost* unique, these dichotomies are *almost* hard-and-fast—but not quite. Sometimes they are *almost* complementary. Their relationship is actually a dialectic. They will help us understand how successfully planned and executed RPG project navigates the institutions themselves.

## **Law School—Fish or Bear’s Paw**

The very idea of a “law school” as a co-equal department within the “larger university community” itself as a collective of scholarly departments is a fairly recent innovation—and one that is both complex and often puzzling.<sup>103</sup> The problem was, and is, what counts as “scholarly.” As James Huffmann pointed out in 1974, “what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists.”<sup>104</sup> He distinguished research *in* law from research *about* law. Thus, a PhD, for example, awarded by a law school for a thesis of traditional black-letter legal research (“doctrinal” research *in* law) is, *a fortiori*, “no PhD at all.” But the gap between these two worlds is a bit more nuanced and more difficult to broach than Huffman’s simple in/about divide, due in part to the “increasing breadth and maturity of legal scholarship.”<sup>105</sup> As Angela Brew has stated, “There is no one thing, nor even one set of things, which research is. It is obviously a complex phenomenon. It cannot be reduced to any kind of essential quality.”<sup>106</sup> What counts, therefore, as “research” is absolutely crucial in the early determination of a whole range of academic questions that affect RPG students and their projects. Peer review is a central example. In the United States, traditional law reviews are student-edited<sup>107</sup>—hence, publication in them by

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<sup>103</sup> Janice C. Griffith, “The Dean’s Role as a Member of the University’s Central Administration” (2003) 35(1) *University of Toledo Law Review* 79.

<sup>104</sup> James Huffmann, “Is the Law Graduate Prepared To Do Research?” (1974) 26 *Journal of Legal Education* 520.

<sup>105</sup> Michael Heise, “The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism” (2002) 2002 *University of Illinois Law Review* 819.

<sup>106</sup> Angela Brew, *The Nature of Research: Inquiry in Academic Contexts* (London and New York: Routledge/Falmer, 2001), p. 21. Ron Griffiths, “Knowledge Production and the Research-Teaching Nexus: The Case of the Built Environment Disciplines” (2004) 29(6) *Studies in Higher Education* 709, 714 *passim*, further problematizes Brew’s notion and provides extensive examples that are relevant to law and what “counts as” a “new contribution to knowledge.”

<sup>107</sup> Franklin G. Fessenden, “The Rebirth of the Harvard Law School” (1920) 33(4) *Harvard Law Review* 493; Charles W. Eliot, “Langdell and the Law School” (1920) 33(4) *Harvard Law Review* 518; John Henry Schlegel, “Langdell’s Legacy Or, The Case of the Empty Envelope” (1984) 36(6) *Stanford Law Review* 1517.

anyone other than law students is not “peer reviewed.”<sup>108</sup> Undergraduate law students are not the “peers” of law professors, lawyers, or RPG students. For non-student legal scholars who want to get their work accepted within the legal academy, the practicing bar, regulators of the legal profession, and lawyer organizations, this does not present a problem—indeed it is a kudo. What counts as “new” is what the student editors perceive as new. But for the same scholars to get their work accepted outside that special hermetic world of the law school presents a different problem. Consider, for example, the prestigious article, “The Chinese Communist Party and ‘Judicial Independence’: 1949-1959,” by Jerome Cohen published in the *Harvard Law Review*.<sup>109</sup> It would be difficult to imagine a more prestigious and unimpeachable author, article, or journal. Yet the *Harvard Law Review* is, and always has been, edited by undergraduate law students, and outside the legal world it is not unthinkable that it could be impeached by scholars in a discipline that demands true peer review. In Professor Cohen’s case, most of his work is incorporated in other materials, such as books and collections, that are truly peer reviewed by his peers. But many other contributors to student-edited law reviews do not enjoy his personal status. Their work, and the work of those who cite their work, can be brought into question outside the hermetic world of black-letter law. Outside the US, law journals are usually edited not by students but by the law faculty.

Unless the law school were to assume arrogantly that the rest of the non-law academic world must assimilate to *its* model of the PhD (“University *legal* education could so easily be the *paradigm* of *university* education”<sup>110</sup>), rather than vice versa, this

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<sup>108</sup> For a full brief and summary of the issues and sources surrounding this peer review, see Frank Cross, Michael Heise, and Gregory C. Sisk, “Above the Rules: A Response to Epstein and King” (2002) 69(1) *University of Chicago Law Review* 135, 147-49, esp. note 97 and accompanying text. The reference in the title is to Lee Epstein and Gary King, “The Rules of Inference” (2002) 69(1) *University of Chicago Law Review* 1, about which more later.

<sup>109</sup> Jerome Alan Cohen, “The Chinese Communist Party and ‘Judicial Independence’: 1949-1959” (1969) 82(5) *Harvard Law Review* 967.

<sup>110</sup> Peter Wesley-Smith, “‘Neither a Trade Nor a Solemn Jugglery’: Law as a Liberal Education” in Raymond Wacks (ed), *The Future of Legal Education and the Legal Profession in Hong Kong* (Hong Kong: University of Hong Kong Faculty of Law, 1989), pp. 60-76, at p. 60, quoting Philip Allott; emphasis added.



state of affairs must be interrogated. Otherwise, the standards and definitions of a law PhD are assailable by others in the non-law academic community—it might be “no PhD at all.” In attempting to come to grips with the issues and problems that exist within this gap, we will discover that every substantive term under consideration—legal, research, new, contribution, knowledge, research postgraduate, and gap—is contested. The idea of the “new contribution to knowledge” is repeated endlessly, often passing without much critical examination as if everyone knows what it means but shouldn’t talk about it. Like pornography, “we know it when we see it.”<sup>111</sup> The formula is so commonplace and so glib that it conceals the difficult questions of *what* it consists of and *how* it is to be accomplished. More importantly, it conceals the fact that the definition is controlled by the institutions themselves—the law school and the university, and beyond them the global academic community and/or the legal profession. RPG students are often left to define it for themselves, and often they are wrong. The answer, of course, is that all of the contested elements of the “new contribution to knowledge” must be *taught* to them, and in being taught must be *problematized* for them. The students cannot simply be abandoned to the assumed and passive “I know it when I see it” formula. But it may be unfair and unwise to compare law RPGs with other departments because it can be argued that scholars other departments don’t face the same scholarship-practice dilemma (ivory tower versus downtown) in quite the same ways—law is *almost* unique. Paul Chynoweth notes:

“This long-overdue move [by the law school] into the intellectual mainstream has been accompanied by dramatic changes in both the form, and the variety, of published legal scholarship. Although doctrinal work remains the defining characteristic of the discipline its emphasis is now

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<sup>111</sup> Paraphrasing US Supreme Court Justice Potter Stewart concurring in *Jacobellis v. Ohio*, 378 US 184, 197 (1964) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.....”).

less on the immediate needs of the practitioner and far more on longer term policy and law reform considerations.

“As legal scholars have increasingly focused on society’s wider needs and concerns they have become ever more willing to adopt the methods and approaches of the social sciences. This has given birth to perhaps the greatest change in legal scholarship in recent decades: the ongoing shift from doctrinal work to socio-legal scholarship whereby the role of law in society is examined from an external viewpoint, often through the collection and analysis of empirical data.”<sup>112</sup>

Yet even after making these celebratory remarks, Chynoweth notes that “peer-reviewed doctrinal scholarship must be distinguished from the day-to-day doctrinal analysis undertake[n] by the practicing lawyer, or the practitioner journal.”<sup>113</sup> The dichotomy remains—as does the dilemma. In sum, then, my purpose here is not to argue that either one of the two worlds—academics or practice, black-letter or socio-legal, doctrinal or empirical—is greater or more important than the other. Indeed, the dichotomy and the dilemma may be both intractable and desirable, even productive and creative. The purpose is, rather, to suggest that the two worlds do and should exist as discrete spaces (with overlap). When the two worlds and the standards that should apply in each of them respectively become muddled and conflated, this serves neither practice nor academics.<sup>114</sup> Each should therefore be acknowledged and celebrated for what it is.<sup>115</sup> Like Robert Frost’s two roads diverging in the forest, in most cases choosing the

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<sup>112</sup> Paul Chynoweth, Editorial, “Legal Scholarship: A Discipline in Transition” (2009) 1(1) *International Journal of Law in the Built Environment* 1.

<sup>113</sup> *Ibid.*

<sup>114</sup> I base this statement not only on the research presented here, but also on my own experience of twenty years of law-firm practice followed by fifteen years of academics.

<sup>115</sup> I am grateful to Professor Douglas Arner for giving me the germ of this idea in a lecture he presented to

one or the other makes “all the difference.”<sup>116</sup> In a similar vein, the philosopher Mencius famously said, There is fish and there is bear’s paw, but you probably cannot have both at the same time even though you might want to.<sup>117</sup> While it may be possible to have both (Mencius says, “*If* I cannot keep the two together”), each RPG student must early interrogate the issue of whether it is wise to do so. These are decisions to be made with

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my ARM class in 2008.

<sup>116</sup> Two roads diverged in a yellow wood,  
And sorry I could not travel both  
And be one traveler, long I stood  
And looked down one as far as I could  
To where it bent in the undergrowth.

Then took the other, as just as fair,  
And having perhaps the better claim,  
Because it was grassy and wanted wear;  
Though as for that the passing there  
Had worn them really about the same.

And both that morning equally lay  
In leaves no step had trodden black.  
Oh, I kept the first for another day!  
Yet knowing how way leads on to way,  
I doubted if I should ever come back.

I shall be telling this with a sigh  
Somewhere ages and ages hence:  
Two roads diverged in a wood, and I—  
I took the one less traveled by,  
And that has made all the difference.

—Robert Frost, “The Road Not Taken” (1915)

<sup>117</sup> “鱼，我所欲也，熊掌，亦我所欲也；二者不可得兼，舍鱼而取熊掌者也。生，亦我所欲也，义，亦我所欲也；二者不可得兼，舍生而取义者也。” The sentence, which occurs in part 10 of the quoted chapter, introduces a passage from the philosopher Mencius 孟子, the point of which is that to choose something includes the choice to forego something else. The passage bears quoting at length because it gets at the core idea of the legal scholarship versus academic scholarship problem:

Gaozi Mencius said, I like fish, and I also like bear's paws. If I cannot have the two together, I will let the fish go, and take the bear's paws. So, I like life, and I also like righteousness. If I cannot keep the two together, I will let life go, and choose righteousness.

English translation by The Chinese Text Project 中國哲學書電子化計劃, <<http://chinese.dsturgeon.net>>.

counsel from teachers and supervisors, and with a careful eye on the intended audience for the RPG product. Roads diverging in a wood ultimately end up in very different places, and very different audience await at the end of each.

## Audiences

Traditionally, common-law lawyers were trained and qualified for practice not at university but by “reading law” (like John Adams) in the offices and chambers of senior practitioners—Dickens’s Sidney Carton with C. J. Stryver, for example. Law school, to the extent that it existed at all, was a vocational school<sup>118</sup> and its professors were the “teaching branch of the legal profession.”<sup>119</sup> Those law students and lawyers who wanted to pursue academics apart from the practicing legal profession were often relegated to residency in other departments of the university in “law-and-\_\_\_” or so-called “double degree” programs. While such interdisciplinary work is viewed as valuable, this meant that they were often supervised by academics who were not trained in the law. As Bruce Kimball has shown by reviewing personal letters and human resources records, law school professors were recruited based upon narrowly defined but traditional “academic merit”—grades, class rank, school rank, law review membership—and/or professional experience and reputation in practice.<sup>120</sup> Eventually, law schools and law students who were interested in academics more than practice began to catch on to the fact that some kind of field work *within the legal discipline itself* was necessary to lend credibility and *gravitas* to their theses and dissertations. Eventually, this would come to mean the dichotomizing of legal research into the study of THE LAW on the one hand, and THE LEGAL SYSTEM on the other—or as Steven M. Barkan puts it, the

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<sup>118</sup> Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), is a major study of this history. James W. Ely, Jr., Book Review (1984) 59 *Notre Dame Law Review* 485, reviews Stevens’s book and provides additional non-American sources for a more international perspective.

<sup>119</sup> Donna Fossum, “Law Professors: A Profile of the Teaching Branch of the Legal Profession” (1980) 1980 *American Bar Foundation Research Journal* 501.

<sup>120</sup> Bruce A. Kimball, “Law Between the Global and the Local: The Principle, Politics, and Finances of Introducing Academic Merit as the Standard of Hiring for ‘the Teaching of the Law as a Career,’ 1870-1900” (2006) 31 *Law and Social Inquiry* 617 (revealing a “more complicated and divisive process” of hiring than even the already problematic view could accommodate). Kimball’s article is an excellent example of archival research as a way of making a “new contribution to knowledge” and thus changing the main view of a subject.

difference between *legal research* and *legal scholarship*.<sup>121</sup> Roscoe Pound famously called it the difference between law in books and law in action.<sup>122</sup> As we noted earlier, it is the choices that lie between the two worlds—academics or practice, black-letter or socio-legal, doctrinal or empirical—that are the dilemma. But the dilemma seems odd because, although Barkan and Pound are absolutely correct to make the distinction, the circumstances that require it must give any non-lawyer academician pause.<sup>123</sup> For a long time this dichotomy did not appear—law school was all black-letter “legal research” all the time—and the emergence of the dichotomy in latter times is still somewhat tenuous. As a result, what could count for a new contribution in the law became, and still is, contested ground. The new contribution may be, we are told, incremental and not massive, but it nevertheless must be substantial and material, not make-weight—and it really must be new, and it really must be a true contribution in an objectively and globally verifiable way.<sup>124</sup> It can never mean that you strike off into subjects for which you have no qualification or credential—you do not become “original” by being a dilettante. Something may be genuinely new and either incremental or massive, but its contribution may be negligible or trivial—it may lack *gravitas*. Lengthy volumes of restatements of

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<sup>121</sup> Steven M. Barkan, “Should Legal Research Be Included on the Bar Exam? An Exploration of the Question” (2006) 99(2) *Law Library Journal* 403, 407. Bridget M. Hutter and Sally Lloyd-Bostock, “Law’s Relationship with Social Science: The Interdependence of Theory, Empirical Work, and Social Relevance in Socio-Legal Studies” in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (Oxford: Clarendon Press, 1997), pp. 19-43, further problematizes this dichotomy.

<sup>122</sup> Roscoe Pound, “Law in Books and Law in Action” (1910) 44(1) *American Law Review* 12.

<sup>123</sup> Timothy J. Berard, “The Relevance of the Social Sciences for Legal Education” (2009) 19(1-2) *Legal Education Review* 189; Thomas S. Ulen, “The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship” (2004) 79(2) *Chicago-Kent Law Review* 403; Anthony Bradney, “Law as a Parasitic Discipline” (1998) 25(1) *Journal of Law and Society* 71.

<sup>124</sup> See, e.g., Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Maidenhead: Open University Press, 2005), pp. 34-35 *passim*. Neither of these excellent works contains any section specifically addressed to lawyers or law students—a not insignificant fact. However, Professor Liu Nanping, formerly of HKU, takes up Phillips and Pugh for the emphasis on the thesis statement in 刘南平 / Liu Nanping, “法学博士论文的‘骨髓’和‘皮囊’—兼论我国法学研究之流弊 / The ‘Marrow’ and ‘Appearance’ of Doctorate Dissertation—Also on the Abuses of Present Legal Studies in Mainland China” (2009) 1 《中外法学》 / *Peking University Law Journal* 101.

law generally fall within this category. The elements of a true contribution, therefore, are that:

It must be a real advance in the body of knowledge;  
It must have an evident *gravitas*; and  
It may be both incremental yet paradigm-changing at the same time.<sup>125</sup>

As Whitehead says of science, the mere proof of an idea is not worth much unless we also “prove its worth.” He says: “We do not attempt, in the strict sense, to prove or to disprove anything, unless its importance makes it worthy of that honour.” This, for Whitehead, is what distinguishes true understanding from a mere collection of “inert ideas”—the avoidance of which is the “central problem of all education.”<sup>126</sup> But different audiences consider different things to be “important.” What counts as *gravitas* to the legal profession may be “no *gravitas* at all” to the academic world—and vice versa. If the law school’s RPG program were to confine its research product exclusively to a parochial audience of lawyers, then this might not matter so much. But if the law school, in the context of the larger academy of which it is now a part, wishes to have its research output accepted among the global academic community generally, then it needs to provide what that global academic community—not the local community—defines as a “new contribution to knowledge.” A “contribution to knowledge” is a product, just as its producer is a product. When, at the end of a long RPG program, the RPG student’s (now graduand’s) teachers, advisers, supervisors, deans, examiners, law school, and university finally certify her as worthy of an RPG degree, and her dissertation or thesis as worthy of acceptance, binding, and deposit in the university’s archives, they are certifying both her and her academic product to a worldwide audience that is the consumer of that product.

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<sup>125</sup> J. D. Watson and F. H. C. Crick, “Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid” (April 25, 1953) 171 *Nature* 737.

<sup>126</sup> Alfred North Whitehead, “The Aims of Education” in Alfred North Whitehead, *The Aims of Education and Other Essays* (New York: The Free Press/Maxwell Macmillan, 1967), pp. 1-14, esp. pp. 1-5.

In this relationship we may borrow an image from the Uniform Commercial Code of the United States.

The Model Uniform Commercial Code (UCC) is a document originally promulgated in 1952 by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) with the purpose of recommending a uniform law that would create a harmonious national system of commercial practices to would make business easy and fluent across state borders. All 50 states have adopted Model UCC, but each state has modified it to suit local conditions. In other words, there are fifty slightly different *variora* of the model text. Nevertheless, it facilitates a fairly uniform approach to commerce that gives confidence and stability to the market nationwide. It is relevant to our discussion. Part 3 of Article 2 on Sales (“General Obligation and Construction of Contract”) contains several provisions about warranties. Section 2-312 “Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement” sounds very much like the warranty against plagiarism that RPG students make about their products. Section 2-313 “Express Warranties by Affirmation, Promise, Description, Sample” sounds akin to the representations that RPG scholars make about the quality of their products within the products themselves. But it is Article 2-314 “Implied Warranty; Merchantability; Usage of Trade,” and Article 2-315 “Implied Warranty; Fitness for Particular Purpose,” that are special interest here. Here are the texts of these two Sections:

**§ 2-314. Implied Warranty: Merchantability; Usage of Trade.**

- (1) [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind....
- (2) Goods to be merchantable must be at least such as:
  - (a) pass without objection in the trade under the contract description;
  - (b) in the case of fungible goods, are of fair average quality within the description;



(c) are fit for the ordinary purposes for which goods of that description are used;

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promise or affirmations of fact made on the container or label if any.

(3) [O]ther implied warranties may arise from course of dealing or usage of trade.

**§ 2-315. Implied Warranty: Fitness for Particular Purpose.**

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is...an implied warranty that the goods shall be fit for such purpose.

For a worldwide standard of academic excellence as required by globalization, we can easily analogize this language to the RPG research situation. The “goods” are the research product (thesis, dissertation, conference paper, article). The “merchant” or “seller” is the RPG student and by extension his law school and university. The “buyer” is the audience or any member of the audience worldwide. The “agreement” or “contract” is the accepted understanding among the academic community worldwide as to what constitutes “quality” as regards a “new contribution to knowledge” and the exchange of scholarly information (the “trade”). The RPG product can be considered acceptable (“merchantable”) to this worldwide audience if it can “pass without objection in the trade under the contract description.” That is, the RPG product should pass across borders and be accepted among scholars anywhere with equal dignity for no other reason than the fact that it is RPG work. These are the ordinary and customary promises and usages implied in the postgraduate academic community everywhere. In addition, every RPG product makes implied warranties about its fitness for a particular purpose, meaning

the particular gap/new problem it addresses. It warrants that what it calls “new” is truly new and substantive within the worldwide body of knowledge. The above text is the recommended ideal. Each state has adapted it, just as each law school and each university will adapt these notions of RPG quality to its own local needs.

Many new RPG students, if they possess a traditional undergraduate law degree, have little or no background in empirical research, field work, quantitative or qualitative analysis, or statistics and sampling (with their concomitant archival research).<sup>127</sup> Even those new RPG students who have published in traditional law journals face this problem.<sup>128</sup> When President Bok of Harvard called for “generating new knowledge” in legal education, he was addressing this problem. His examples of “generating new knowledge” comprise a long list of empirical projects in the “legal system.” His conclusions bear quoting at length:

“Although these points seem obvious enough, law schools have done surprisingly little to seek the knowledge that the legal system requires. Even the most rudimentary facts about the legal system are unknown or misunderstood. We still do not know how much money is spent each year on legal disputes and services in the United States. We still hear law professors and eminent jurists refer to ‘the litigation explosion’ and ‘our litigious society,’ even though the factual basis for such assertions is shaky at best. In part, perhaps, this ignorance results from the *lawyer’s skepticism about the usefulness of academic research*. Over a century ago, Christopher Columbus Langdell was fond of asserting that law is a science

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<sup>127</sup> For an excellent example of legal scholarship using archival materials to make a “new contribution to knowledge,” see Simon Hing-yan Wong 黃慶恩, “Reconstructing the Origins of Contemporary Chinese Law: The History of the Legal System of the Chinese Communists During the Revolutionary Period, 1921-1949” University of Hong Kong PhD Thesis (2000), available online at <<http://sunzi1.lib.hku.hk/hkuto/record/B31241207>>.

<sup>128</sup> E.g., Richard Delgado, “How To Write a Law Review Article” (1986) 20 *University of San Francisco Law Review* 445, is a good example setting forth the traditional model.

and ‘that all the available materials of that science are contained in printed books.’ More recently, a witty law professor is said to have remarked: ‘All research corrupts, but empirical research corrupts absolutely.’<sup>129</sup>

This crucial difference in *audiences*—that of “the law” and that of “the legal system”—makes all the difference in the whole paradigm of what qualifies as “legal research” and what qualifies as a “new contribution.” The first audience deals in persuasion, the second in discovery. Suddenly, the Legal System looms as large as, if not larger than, The Law itself, and many new traditionally trained RPG students are not comfortable with this fact. They are used to acting *within* the Legal System but not studying it as an *object* of academic research. To traditionally trained lawyers, The Law is everything, and the Legal System merely its by-product. For them, the Penal Code is the central inquiry—not the operations of the prisons themselves.<sup>130</sup> The statutory product of the legislature is far more important than the political operation of the legislature itself. But this view has increasingly come under fire as being too narrow and unproductive. Academic lawyers have increasingly shown that law in practice, applied law, is not only important but is the key litmus test of the validity of the law itself. The pedagogical challenge, then, is how to accommodate this expanded notion of “legal research” for the training of modern RPG students in the law school so that their concept of the “new contribution to knowledge” conforms more closely to the expectations of the academy at large—the greater audience. Students whose former experience in interviewing has been only work with clients will now be asked to conduct far-ranging interviews, including the use of questionnaires, in the field. Students who may have no

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<sup>129</sup> Bok, *op. cit.* at 581, emphasis added. Langdell was the founder of the “case study method.” The “witty” quotation is a paraphrase of John Emerich Edward Dalberg Acton, first Baron Acton (1834–1902), the historian and moralist, who was otherwise known simply as Lord Acton, and who expressed this opinion in a letter to Bishop Mandell Creighton in 1887: “Power tends to corrupt, and absolute power corrupts absolutely.”

<sup>130</sup> See, e.g., Frank Dikötter, *Crime, Punishment and the Prison in Modern China* (Hong Kong: Hong Kong University Press, 2002).

experience whatsoever in statistical modeling or analysis will now be asked to undertake RPG-level work in these areas. Much of this activity will likely follow the models developed in the social sciences as being the closest by analogy to studies of the legal system, but that does not exclude the “pure” sciences and technology,<sup>131</sup> and it does not exclude the humanities and other non-law disciplines. To list a taxonomy of the different kinds, forms, methods, and approaches to modern legal scholarship—in other words the choices available to the RPG scholar—would be inordinately long and would likely omit someone’s favorite. A useful source is Philip Kissam<sup>132</sup> and the sources he cites. Mathias Siems discusses these as well but cautions against any kind of attempt to rank them.<sup>133</sup> Many of the most important of these are discussed or implicit in this Guide.

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<sup>131</sup> See, e.g., the activities of The Law and Technology Centre; <[www.chinaitlaw.org.hk](http://www.chinaitlaw.org.hk)>. See also, for example, Ding Chunyan 丁春艳, “Medical Negligence Law in Transitional China: A Patient in Need of a Cure,” University of Hong Kong PhD Thesis (2010).

<sup>132</sup> Phillip C. Kissam, “The Evaluation of Legal Scholarship” (1988) 63(2) *Washington Law Review* 221, 230, 236-37 and accompanying citations.

<sup>133</sup> Mathias M. Siems, “Legal Originality” (2008) 28(1) *Oxford Journal of Legal Studies* 147.

### A Case Study: *That versus How*

An RPG student asked me to edit his PhD thesis prior to the oral examination. The student's thesis was approximately 250 pages long, and his topic was an aspect of human rights law in Africa. It was intended, so it said, for a global academic audience, and the author told me he intended to publish it as a book. The thesis was a well-finished work according to the standards and regulations for format and content of the University and its Graduate School. It had passed all the required written and oral examinations by both internal and external examiners up to the final point. It was a substantial piece of traditional black-letter legal research in four chapters with extensive footnotes and bibliography—a law review article or court brief writ large. The first three chapters each set forth a literature review of a particular aspect of the topic, and then analyzed the collected laws, rules, regulations, statutes, articles, chapters, and books of the literature review in standard black-letter fashion, adjudicating each for its respective quality. Each of the chapters contained a bit of the history of the topic, but none was “history” or “historiography” as professional historians understand those terms.<sup>134</sup> It was, rather, the “history” of legal texts and doctrines. The final chapter included the author's own recommendation that the primary solution to human rights abuses in Africa was better political leadership and a more “participatory democracy” in all areas. This was its “new contribution to knowledge.” The thesis contained no empirical research or analysis and no archival materials except as they were discussed in the author's primary sources by the authors of those sources. In sum, the topic, purpose, and thesis of the entire work were derived from, and were intended to augment and restate, the printed (published) body of black-letter legal knowledge. The work in this state presented rather little editorial challenge and would have required little additional work by the author.

However, in his final chapter the author included some materials, largely from other authors, that provided an opening for me to interrogate the adequacy of the book-to-

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<sup>134</sup> George Chauncey, “What Gay Studies Taught the Court: The Historians’ Amicus Brief in *Lawrence v. Texas*” (2004) 10(3) *GLQ: A Journal of Lesbian and Gay Studies* 509. *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating sodomy laws as unconstitutional).

be in terms of its “new contribution to knowledge” in a global context. I first pointed out my opinion that for him to conclude there was a need for more “participatory democracy” as a solution to human rights problems in Africa was unremarkable, mundane, certainly nothing new, and probably false. Anyone even superficially acquainted with the endless discussions of human rights in Africa has read or heard these ideas before. I pointed out that not only were these suggestions old and worn, but that indeed in most instances they had not worked—and the evidence for this lay within the very sources which my author had cited in his own research. In his final chapter he had applied the traditional IRAC model (Issues, Rules, Applications, Conclusions) of black-letter legal analysis by noting the key international covenants and other human rights laws that arguably applied to the situations he described, and then by arguing that these “should be applied” and that “if they were applied,” the situation would likely improve. He had no empirical evidence to substantiate those counterfactual assertions. He had also assembled perhaps a dozen other scholarly sources all of which said that some “new thinking” or “better ideas” were needed and “would solve” the problems. They argued that “someone” needed to provide “more creative solutions” and “greater advocacy” (including “participatory democracy”) if true answers were only to be found. He had, in other words, put together an impressive and convenient assemblage of somebody else’s “stuff” in a single volume with the counterfactual and hortatory hope that that would provide a platform for “others” to do the work that eventually “would solve” the problems.

At each of these points, I wrote: *Will you?* *Will you OPERATIONALIZE this?* *Will YOU now provide this new thinking—these better ideas—these new data—this empirical research?* *What are YOUR more creative solutions?* *What is YOUR greater advocacy?* For at each of these points, my author had raised the provocative point but had not answered it. Neither, in fact, had his many sources—at least in the portions of their works quoted in his manuscript. Each of them, my author included, had done a good job of defining *that* human rights problems existed perennially in Africa, and *that* a solution was needed, but all of them had come up short in putting forth any concrete ideas about *how* to solve the problems “on the ground” or how specifically *they* would

solve the problems. Everything was, in other words, hortatory and aspirational—*ought* instead of *what* and *how*.

I suggested to my author that for *him* to rise to these challenges would indeed be his “new contribution to knowledge.” *This* was the gap he needed to fill—to devise ways in his research to *operationalize* his thesis. Unfortunately at this point, he had no solutions and offered no leadership, only derivative theory and reasoning rather than observation, and without them the statements he adduced from the sources were mere truisms. He had thought it through enough merely to demonstrate *that* the problems existed and *that* leading scholars in the field knew this—all as demonstrated by his masterful bringing together and intellectual manipulation of primary and secondary legal texts including a literature review with analysis and theory. This, he believed, should be enough to “get others thinking” about creative solutions to the problems he had identified. In other words, he viewed his scholarly task as being that of *provocateur*, of “identifying the issues” and leaving it to “others” to work them out in practice. He would provide the theory within The Law (the bringing together or *assemblage* like a big book report), but leave it to others to manipulate and reify that theory within The Legal System (the putting together or *fusion*). He was still very much invested in the “book report” mindset of a middle-school student—the teacher assigns the student to read a book and “report” on it to the class. The student then stands in front of the class and gives a “report” that goes something like this:

This is the title of the book I read. It was written by this author. It is “about” this subject. This report is evidence of the fact of reading—of the fact that I read the book. That is the end of my report. Thank you.<sup>135</sup>

My author believed that if he simply assembled enough of these book reports into

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<sup>135</sup> An exercise taken to task admirably in Chris Hart, *Doing a Literature Review: Releasing the Social Science Research Imagination* (London: Sage, 1998).

a chapter called his “literature review,” with a little further adjudication and analysis, he was thereby making a “new contribution to academic knowledge.” This mindset is not uncommon. He was, in short, thinking more like a traditional practicing lawyer assembling case and statutory authorities for a court or a client than as an RPG academic hoping to make a new contribution to knowledge on a global bases. He was not making a new contribution to *academic* knowledge in an *academic* format with an *academic* model and methodology. He was creating further education, not higher education. Despite the academic façade of his writing, by the mere marshalling of sources, without more, he was still (in Bok’s words) “pecking at legal puzzles within a narrow framework of principles and precedent” in the manner of practicing lawyers, yet all the while thinking he was doing what academicians do. He had produced nothing that would “surprise the world.” As we noted earlier in the discussion of the two distinct meanings of “new,” the satisfaction of the first definition (dealing with “stuff”) does not necessarily imply the satisfaction of the second (providing analysis), and it certainly does not guarantee satisfaction of the second. *In fact, it may disguise absence of the second.* Indeed, my author’s writing exemplified Barkan’s insight that “[w]hat might initially be perceived as poor writing often is actually a manifestation of inadequate research.”<sup>136</sup> In other words, merely working within the academy using scholarly trappings and formats does not add up to “legal scholarship” as Barkan distinguishes it from “legal research.” So long as the writer’s mindset is “legal research,” that is what the product will be, and it will make no “new contribution to knowledge” as scholars in other disciplines worldwide understand that idea. It will be further but not higher. Its audience and purpose are still largely the practicing profession. An expansion of that “legal research” to include empirical research and archival research<sup>137</sup> could verify Macdonald’s observation that “some of the most

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<sup>136</sup> Barkan *op. cit.* at 407.

<sup>137</sup> See, e.g., Michael DeGolyer, “Comparative Politics and Attitudes of FC Voters versus GC Voters in the 2004 LegCo Election Campaign”, in Christine Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong: Hong Kong University Press, 2006), pp. 155-99. See also my review of the book and of his chapter in Robert J. Morris, Book Review Essay, (2008) 38 *Hong Kong Law Journal* 309.



interesting legal scholarship is being undertaken by... [scholars] in departments of history, sociology, anthropology, criminology, political science, women's studies, native studies, communications, and so on."<sup>138</sup> Mike McConville has produced decades' worth of valuable and original empirical research in several legal systems throughout the world, focusing often on various aspects of criminal justice, and stresses the value of empirical-*cum*-archival work,<sup>139</sup> as well as on the topic of empirical research itself.<sup>140</sup> Archival research is often overlooked even more than empirical research, yet the two combined can add up to a double "new contribution to knowledge" if used in conjunction with each other and in coordination with black-letter research.<sup>141</sup> I suggested to my author that he consider additional work in these areas in order to substantiate and give *gravitas* to the theoretical work he had produced so far. My suggestion comes in the order of a strong impetus in current academic work toward such kinds of interdisciplinary, and especially empirical, substantiation to go along with traditional black-letter research.<sup>142</sup> New RPG students would do well to consider these matters at the *outset* of their RPG projects so that all kinds of research can be carried on simultaneously rather than *seriatim*.

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<sup>138</sup> Roderick A. Macdonald, "Still 'Law' and Still 'Learning'? / Quel 'Droit' et Quel 'Savoir'?" (2003) 18(1) *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 5, 31.

<sup>139</sup> Mike McConville and Chester L. Mirsky, *Jury Trials and Plea Bargaining: A True History* (Oxford: Hart, 2005).

<sup>140</sup> Mike McConville and Wing Hong Chui (eds), *Research Methods in Law* (Edinburgh: Edinburgh University Press, 2007).

<sup>141</sup> Louise Craven (ed), *What Are Archives? Cultural and Theoretical Perspectives: A Reader* (Aldershot, England & Burlington, VT: Ashgate, 2008).

<sup>142</sup> Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-First Century* (Burlington, VT : Ashgate, 2007).

### **“Jack-of-All-Trades” Academicians**

The problems described above are, if not universal or even identical in all places, widespread enough to warrant concern, and they are often potentiated by another related problem: practicing or academic lawyers (and RPG students) who think that a traditional law degree (JD, LLB, PCLL, etc.) qualifies them to research, write about, and pontificate upon, any and every subject that may interest them or that the law may touch and concern. I call this the Jack-of-All Trades Theory of legal research. It is the problem of the dilettante: “As a Legal Jack-of-All-Trades, I can and will undertake anything and everything I want to.” It is a failure to define one’s “core competence” and avoid anything that it does not include. It is an arrogance that assumes that one does not have to be qualified in the same ways that other academicians in other disciplines need to be qualified. Literally, it is “talking out of school.” Suzanna Sherry writes:

“The move toward interdisciplinary scholarship, without the check provided by peer review [as is the case with student-edited law reviews], encourages the ‘law professor as astrophysicist’ model of legal academics: one can master any field in the time it takes to research and write an article.”<sup>143</sup>

You cannot be an astrophysicist without a degree in astrophysics. Harry Edwards notes this problem: “Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it.”<sup>144</sup> There are two cautions here. One is that the RPG

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<sup>143</sup> Suzanna Sherry, “Too Clever by Half: The Problem with Novelty in Constitutional Law” (2001) 95(3) *Northwestern University Law Review* 921, 929.

<sup>144</sup> Harry T. Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession” (1992) 91 *Michigan Law Review* 34, 36; original emphasis. See the strong rebuttal to Edwards in Derrick Bell and Erin Edmonds, “Students as Teachers, Teachers as Learners” (1993) 91(8) *Michigan Law Review* 2025.

student is astute enough to identify the jack-of-all-trades syndrome in others and adjudicate their materials for what they are--mediocre; the second is that she does not slip into simulating that mediocrity herself. I think that such "scholarship" is worse than mediocre; it is dishonest. It claims for itself a characteristic that it does not possess. In other words, it is not scholarship at all.

It is no wonder, therefore, that it is only with the greatest difficulty that new RPG students learn to grasp the necessity and skills—let alone the *duty*—to adjudicate such materials as Judge Edwards describes. Within the huge volume of legal literature that is their source material, they find a plethora of writings by authors (some of them "big name" authorities) on subjects for which they have no visible qualifications or credentials whatsoever,<sup>145</sup> yet these are the (sometimes peer-reviewed, sometimes not) writings of the uncredentialed "masters" whom the students are supposed to emulate. This difficulty often occurs in the "law-and-\_\_\_" fields (such as law and astrophysics), but is also common in studies with names like "The History of Chinese Commercial Law" or "Ancient Greek Jurisprudence." A similar problem occurs when authors untrained in empirical research undertake to do empirical research, especially with a statistical component, on a self-taught, on-the-job-training basis, or take courses outside the law school on a random, unstructured basis. The result can only be amateurish. Socio-legal research, which encompasses all forms of empirical and archival research, is itself a

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<sup>145</sup> Lee Epstein and Gary King, "The Rules of Inference" (2002) 69(1) *University of Chicago Law Review* 1, collects numerous examples of such writings. Several other articles in the same issue augment or dispute Epstein and King, as do articles published in other venues. See, e.g., Richard L. Revesz, "A Defense of Empirical Legal Scholarship" (2002) 69(1) *University of Chicago Law Review* 169. This and other responses are noted in Lee Epstein and Gary King, "A Reply" (2002) 69(1) *University of Chicago Law Review* 191. Indeed, the literature (and the disputations) in this area of research are vast—not surprising in such a field which defines itself somewhat in opposition to tradition. Frank B. Cross, "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance" (1997) 92(1) *Northwestern University Law Review* 251, remarks on the mutual ignorance of lawyers and political scientists regarding each others' disciplines. In reading these sources, the reader must keep in mind that US law reviews are edited by students, not faculty members or lawyers. See, e.g., Elizabeth Chambliss, "When Do Facts Persuade? Some Thoughts on the Market for 'Empirical Legal Studies'" (2008) 71 *Law & Contemporary Problems* 17.

complex discipline that requires expert training and credentialing.<sup>146</sup> In any of these situations, a traditional black-letter law degree, without more, is not enough. These skills require special training to acquire. Yet, this is a common attitude among new RPG students. Just because the law itself touches and concerns something (it touches and concerns everything), *they* believe they can, too. They see others do it, so they do it. They become amateur “astrophysicists”—or paleontologists. The Harvard paleontologist Stephen Jay Gould (1941-2002) confronted this problem when he responded to a book entitled *Darwin on Trial* by Berkeley (Boalt Hall) law professor and Christian “philosophical theist” Phillip E. Johnson. The book purported to enter the science-creation debate that is rampant in the United States. Gould’s criticism is pungent:

“Now, I most emphatically do not claim that a lawyer shouldn’t poke his nose into our [the scientists’] domain; nor do I hold that an attorney couldn’t write a good book about evolution. A law professor might well compose a classic about the rhetoric and style of evolutionary discourse; subtlety of argument, after all, is a lawyer’s business. *But, to be useful in this way, a lawyer would have to understand and use our norms and rules, or at least tell us where we err in our procedures; he cannot simply trot out some applicable criteria from his own world and falsely condemn us from a mixture of ignorance and inappropriateness....* I see no evidence that Johnson has ever visited a scientist’s laboratory, has any concept of quotidian work in the field or has read widely beyond writing for nonspecialists and the most ‘newsworthy’ of professional claims.”<sup>147</sup>

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<sup>146</sup> Without which witness the problems, for example, surrounding the “Chinese” linguistics studies of Alfred Bloom, which I summarize in Robert J. Morris, Book Review Essay (2001) 8(2) *China Review International* 396. During my tenure teaching ARM at HKU, most RPG students who undertake sociolegal work associate with the social sciences, and a few with the humanities. I have yet to encounter a student involved in law-and-science work.

<sup>147</sup> Stephen Jay Gould, “Impeaching a Self-Appointed Judge” (July 1992) 267(1) *Scientific American* 118-21; reprinted in Liz Rank Hughes (ed), *Reviews of Creationist Books* (Berkeley, CA: National Center for Science Education, 2<sup>nd</sup> ed, 1992), pp. 79-84, 79; emphasis added. A concise biography of Johnson may be

To Johnson's "false and unkind accusation that scientists are being dishonest when they claim equal respect for science and religion," Gould offers the ultimate retort: "Speak for yourself, Attorney Johnson."<sup>148</sup> New RPG students often manifest these kinds of problems when they declare their intended subject of research, and their problems often arise out of an excess of ambition and energy. For example, a student will declare her intention to write a thesis on the comparative law of China, the European Union, Brasil, and South Korea. (A surprising number of students get admitted on the strength of such proposals.) When I eventually see her in my Advanced Research Methodology (ARM) class, I will ask her the most fundamental question of all: "Do you have command of the languages of each of the areas you intend to study (i.e., China, the European Union, Brasil, and South Korea)—and not just the language generally, but the special 'covenant language of the law' as it is inflected in each of those locales?" After all, whatever else globalization may imply for legal research, language is surely a first principle. There is no "international" anything, whether law or scholarship, merely by translation. Furthermore, "globalization" and "international" and "interdisciplinary" must not be allowed to homogenize the world. The world is multi-everything: multi-polar, multi-jurisdictional, multi-legal, multi-ethnic, multi-lateral, multi-problematic, multi-valuate, multi-cultural. Each locus in that series of "multis" is a specific point. So, RPG candidate, are you trained to think like a lawyer in each of those systems? Is your supervisor? The answer, sadly, is almost invariably no. I then ask: "If you do not have those languages and that training, how then can you make a 'new contribution to knowledge'? If you don't have the languages, you must work from translations, and the discipline of translation studies tells us that translations, like translators and interpreters,

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found in Randy Moore and Mark D. Decker, *More Than Darwin: The People and Places of the Evolution-Creationism Controversy* (Berkeley: University of California Press, 2009), pp. 193-95.

<sup>148</sup> Gould, *ibid.* at p. 82.

are notoriously unreliable (remember Hemingway, Garnett, and Dostoyevsky?).<sup>149</sup> That will not be good enough for RPG work, especially if you need to conduct empirical research in each of those languages in any of those places.” Any purported “new contribution to knowledge” that might come from such a project would be immediately suspect in the global scholarly community. As the Chinese proverb says, one key opens one lock; a different key opens a different lock (一把鑰匙開一把鎖). As Professor Hugh Nibley observed, you must either get all the tools, and precisely the right tools, necessary to your research project, or move on to some other project.<sup>150</sup>

If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years— *or else shift to some other problem.*<sup>151</sup>

One implication of Nibley’s paradigm is that there is a difference between a lawyer writing about science (or a scientist writing about law) on the one hand, and a lawyer who *is* a scientist (or a scientist who *is* a lawyer) on the other. Gould, I think, would require something more of the latter than the former. To push the examples further, suppose another matriculating RPG student, who has practiced commercial law, declares his subject to be “A History of Chinese Commercial Law,” the next relevant question is, “In addition to being qualified as a lawyer and specialist in Chinese commercial law and perhaps an economist, are you properly credentialed as a historian?” Or the reverse: “If you are properly qualified as a historian, do you also have the necessary credentials in the

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<sup>149</sup> Robert J. Morris, “Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation” (2006) 51(3) *Journal of Homosexuality* 225.

<sup>150</sup> Robert J. Morris, “Globalizing and De-Hermeticizing Legal Education” 2005(1) *Brigham Young University Education & Law Journal* 53, discusses Nibley’s ideas. We shall return to Nibley later.

<sup>151</sup> Hugh Nibley, “A New Look at the Pearl of Great Price, Part I: Challenge and Response (Continued)” (Feb. 1968) 71 *Improvement Era* 14 (emphasis added).

law with a specialty in Chinese commercial law and economics? If your answer is no, then a la Nibley, you must shift to some other topic. If you do plan to get the necessary qualifications so that you can proceed properly with your chosen topic, how do you plan to get them—and when?” Have you factored the time and the cost of doing so as part of your RPG timetable? Part of the problem of the Jack-of-All-Trades Syndrome arises out of the continuing conflation of the differences between legal research in practice on the one hand, and academic legal research on the other. Lawyers in practice confront a bewildering array of subjects and problems, even within their own areas of specialization. In many ways, their research for clients and the courts must be generalist in nature and must allow for the constantly shifting mix of facts and law in actual cases. They must be masters not only of substantive law but of procedure, evidence, rules of conduct, and so on. What a medical malpractice lawyer knows about medicine often rivals that of a physician. A barrister whose only language is English may be called upon to represent a Muslim client and necessarily to work through translators and interpreters. In any case, the “new contribution to knowledge” in legal practice may be the winning argument in an appeal that becomes a new case precedent. The problem arises when this model of generalism in legal practice crosses over into academic work, especially if the RPG student has a background in practice before crossing into the academic sphere. It also follows that a professor trained and working solely in black-letter law is not qualified alone to guide an empirical or archival RPG project.<sup>152</sup>

An example of the difficulty that arises when the two spheres get conflated can be seen in the book, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* by Michael Salter and Julie Mason,<sup>153</sup> written primarily for use in British-style educational and legal systems. The title contains two confusions, one

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<sup>152</sup> Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (London: Oxford University Press, 2010), deals with the subject of qualifications.

<sup>153</sup> Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Harlow, England and New York: Pearson/Longman, 2007). Despite my criticisms here, the book provides some useful insights regarding empirical research, especially in chapters 5 and 6.

explicit, the other implicit. The explicit confusion is the “writing” preceding the colon with the “research” following the colon. Writing and research are two distinct disciplines with two distinct sets of requirements and skills. The implicit confusion is between writing in the academy (dissertations) and what the bulk of the book really addresses, which is methods of writing for the courts (practice). It homogenizes the two as if they were interchangeable. They are not. Because the text itself conflates these two purposes throughout, it is necessary for readers to parse the text on a page-by-page basis in order to tease apart the materials that apply to the one or the other kind of research and writing. Although the authors pay lip-service to the conduct of socio-legal and empirical research, all of the sources they cite are *published* articles and books. They do not adduce any empirical or archival research of their own, nor do they cite any actual theses or dissertations. This might seem odd in a book on the subject of “writing law dissertations” until we recall that it is odd only within the context of the *global* academic community. It is all too common in law review writing. This is a model of the conceptual problems under review here as well as of the research structures of many law schools with both traditional black-letter degrees and RPG degrees.<sup>154</sup> An RPG student and supervisor trying to work with this kind of confusion would find it difficult to produce something that is truly “new.”

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<sup>154</sup> T. C. Daintith, “Postgraduate Legal Education—the EUI Example” in John P. Grant, R. Jagtenberg, and K. J. Nijkerk (eds), *Legal Education 2000* (Aldershot, Hants: Avebury, 1988), pp. 279-85



## What Counts as “New”

Problematic as the term “research” is when law and other fields are compared, it is not as contested as the question of what constitutes “new” in a “new contribution to knowledge.” In Delgado’s traditional model, the problem is simple:

“find one new point, one new insight, one new way of looking at a piece of law, and organize *your entire article* around that. One insight from another discipline, one application of simple logic to a problem where it has never been made before *is all you need.*”<sup>155</sup>

This is to be accomplished by reading everything that bears on your subject—“every significant idea, book, or article that is out there.”<sup>156</sup> After you have “read everything” and documented that work so that you will be able to prepare adequate footnotes, *then* you are “ready to write.”<sup>157</sup> There is no intervention here of empirical work “in the field,” no consultation of unpublished archives, and the finished product is envisioned as a sort of lengthy literature review—a book report—in which only one single new theoretical angle need be demonstrated. This is the basic traditional model for legal research and writing for practicing lawyers, and it is the reason that (a) the adjective “legal” needs to be appended before the word “writing,” and (b) other disciplines such as the sciences and social sciences do not recognize “legal research” as “research at all.” Merely figuring out “one new insight” in literature that already exists does not, for them, qualify as “new.” This traditional form of “thinking like a lawyer” may be sufficient for RPG work intended only for an audience strictly within the practicing legal community<sup>158</sup>,

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<sup>155</sup> Delgado, *op. cit.*, p. 448; emphases added.

<sup>156</sup> *Ibid.* p. 450.

<sup>157</sup> *Id.* p. 451.

<sup>158</sup> Robert J. Morris, “Not Thinking Like a Nonlawyer: Implications of ‘Recognition’ for Legal Education” (2004) 53(2) *Journal of Legal Education* 267, explores the meanings of “thinking like a lawyer” in the traditional black-letter sense.

but as we have seen, it will not serve for any kind of interdisciplinary “law-and-\_\_\_” work that is intended to be examined, read, and accepted globally by scholars in other fields.<sup>159</sup> The issue for RPG candidates is where their RPG program is positioned between these two choices, or along their overlap, and how they will be trained and supervised in “thinking like a lawyer who is also thinking like a \_\_\_.”<sup>160</sup>

Computer-assisted searchable databases have revolutionized legal research. The forms and structures of published legal information, and the fact that they can be searched as a concordance, have influenced and changed how lawyers think about the law<sup>161</sup>—in other words, what counts as “thinking like a lawyer.” The implications for both the law and the academy of this in terms of what counts as “new,” as well as how something new is identified and structured, are vast. Anthropologist Allan Hanson, among others, discusses the contrasting worldviews of “classificatory” and “indexical” approaches to law and other subjects. The older classificatory approach prefers to learn or to make a “new contribution to knowledge” within structures of established knowledge—of “what is out there.” On the other hand, the newer indexical approach (the concordance, the searchable database) organizes what is out there in terms of what they want to know.<sup>162</sup> This represents the difference between a “new contribution to

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<sup>159</sup> The discussion, including the bibliography, in Mathias M. Siems, “The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert” (2009) 7 *Journal of Commonwealth Law and Legal Education* 5, is particularly useful on this point. See also Felix S. Cohen, “Field Theory and Judicial Logic” (59 *Yale Law Journal* 238, for an Einsteinian view of legal analysis.

<sup>160</sup> Richard Mohr (ed), “Legal Intersections” (2002) 6 *Law Text Culture*, Special Issue, which collects a group of articles that “discuss and critically assess the diverse research methods which can be employed in law-related research from ‘conventional’ legal doctrinal analysis to methods of empirical data collection and analysis drawn from other disciplines.”

<sup>161</sup> Richard A. Danner, “Legal Information and the Development of American Law: Further Thinking about the Thoughts of Robert C. Berring” (2007) 99 *Law Library Journal* 193, summarizes the literature and analyzes these ideas.

<sup>162</sup> F. Allan Hanson, “From Key Numbers to Key Words: How Automation Has Transformed the Law” (2002) 94 *Law Library Journal* 92; F. Allan Hanson, “From Classification to Indexing: How Automation Transforms the Way We Think” (2004) 18(4) *Social Epistemology* 333.

knowledge” that is *found* and one that is *made*. It is not a hard and fast dichotomy, and in fact many creative researchers combine “what is out there” and “what they want to know.” Arguable the best and most exciting new contributions are those that both find and make something new at the same time. Hanson argues that the shift to the indexical approach provides “greater flexibility and creativity” in legal research. He explains:

“The person who would learn something, or make a new contribution to knowledge, must relate it to the structure of established knowledge. Established knowledge is taken to be certain, which is why proposed paradigm shifts provoke stiff resistance and why those that are ultimately successful are considered to be momentous developments. The certainty built into this view of things also means that when people encounter ways of thinking and behaving different from their own, their typical reaction is to assume that the alien ways are at best misguided, and at worst heretical and evil. Divergent notions about the structure of reality mean that many different worldviews are included within the classificatory type, and they often find themselves at odds with each other.”<sup>163</sup>

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“Non-automated techniques such as encyclopedias, treatises and the key number system are classified indexes. Much as other encyclopedias and library cataloging systems, they organize the law in a hierarchical system of categories that also serve as devices for finding legal information. For those imbued with such research techniques [using classified indexes], the classificatory scheme underlying them reveals what the structure of the law really is. A good example is legal positivism: the view that the law

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<sup>163</sup> Hanson, “From Classification,” p. 346.

exists in its own right and is out there, waiting to be discovered.”<sup>164</sup>

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“Legal research of any sort, be it in case law, regulatory law, or the academic literature, is being weaned away from the hierarchical categories embedded in the traditional research tools. As a result, lawyers are coming to think of the law as a collection of facts and principles that can be assembled, disassembled and reassembled in a variety of ways for different purposes. This could call into question the notion that the law actually *has* an intrinsic, hierarchical organization, and that would signal a basic change in the perception of legal knowledge and of the law itself.”<sup>165</sup>

This is more than a mere argument for computer and Internet literacy. If a scholar, through *concordanced thinking*, is free to assemble, disassemble, and reassemble legal facts and principles for new and different purposes, then the possibilities for “thinking like a lawyer” and making a “new contribution to knowledge” expand exponentially—but in ways different from the traditional models. Earlier I cited the example of my editing a book manuscript of the author who raised a series of suggestions about participatory democracy in Africa from the existing literature, to whom I replied: *Will YOU now provide this new thinking—these better ideas? What are YOUR more creative solutions? What is YOUR greater advocacy?* A moment’s thought will reveal that even if this author undertakes to provide his own answers to these questions, but does so only by manipulating existing ideas from his literature review as suggested by Delgado and similar writers, his offering will not count for much in the larger academic community as a “contribution” of anything “new,” for it is grounded in nothing more than his own

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<sup>164</sup> *Id.* at 348.

<sup>165</sup> *Id.* at 348-49; original emphasis.

abstract theory-making. It will still largely be only classificatory thinking. In reality, it will be nothing better than the existing suggestion of the need for more “participatory democracy” and will merely reify that truism. A truism reified is still a truism—a cliché reified is still a cliché. What the student produces in this case will not be a true RPG global-worthy product but merely the “research paper” or “book report” of the middle-school kind. This is not to say that such a product is bad or wrong. It depends on the audience for the product. If the audience (say the court or a client) is expecting such a report as the result of legal “research,” with a legal conclusion and recommendation for action, then that is what it paid for and that is what counts as “new.” However, if the audience is the larger global RPG and academic community that includes humanists, scientists and social scientists, it will not count as a “new contribution.” An RPG scholar who does address the expectations of this global audience will distinguish herself as a truly global scholar by distinguishing the two types of scholarship.

This is what I call a “distinguished scholar.” As every common-law lawyer knows, “distinguish” has two distinct (i.e., distinguished!) meanings. In everyday parlance, it means outstanding, excellent, eminent, special, famous—to be set apart from others. It means this in the law, too. But lawyers also speak of “distinguishing two cases,” meaning to point out (to a court, for example) the sometimes subtle differences between the case at bar and a decided case (a possible precedent).<sup>166</sup> Even though there are apparent similarities between the two, the principles of law and the fact may not be the same. This ability of a distinguishing thinker makes a distinguished thinker. The greater the skill with which an RPG scholar can do this, the greater will be her ability to negotiate the gap/new divide and make a truly new contribution to knowledge. This is how such research “stakes a claim.”

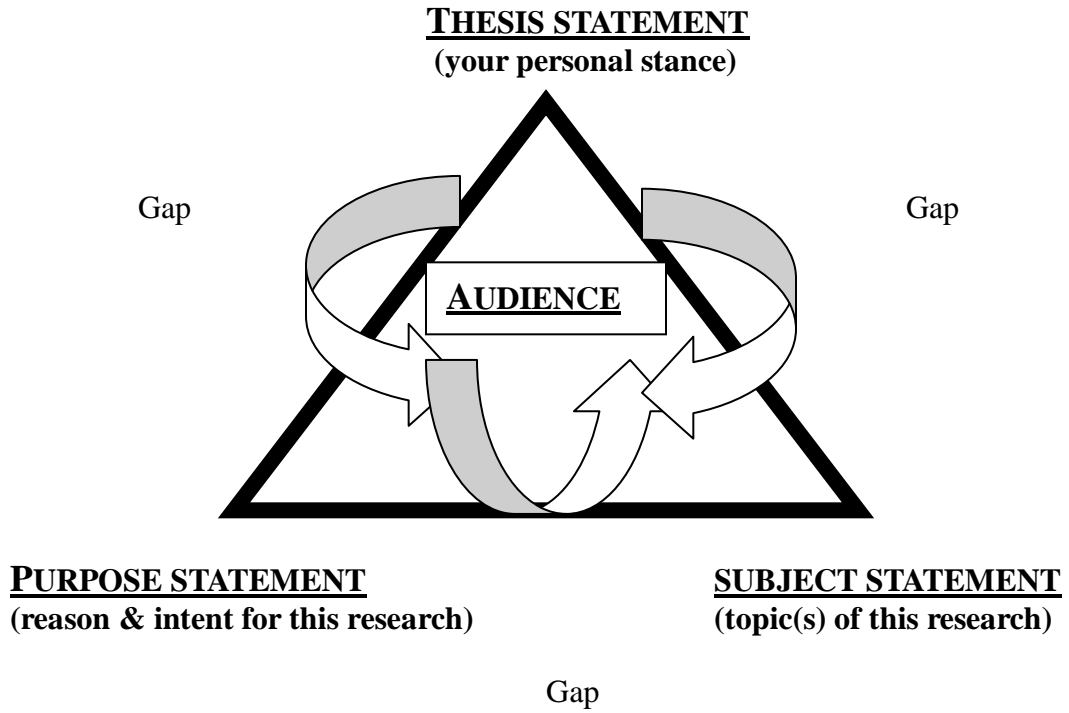
“Staking a claim” is an image from the Old West of the United States. Maybe you have seen the idea in cowboy movies. An old prospector is searching the wilderness for

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<sup>166</sup> Patrick Chan (ed), *Hong Kong English-Chinese Legal Dictionary/香港英漢雙解法律詞典* (Hong Kong : LexisNexis, 2005), pp. 596-97.

gold. Suddenly, he finds gold, and on that spot he “stakes his claim” to the gold. Once he does this, he can legally say, “This is mine. This is where I stand. This what I can and will defend to the death—against all comers.” We also use “staking a claim” figurately. “With the publication of her PhD dissertation, she has staked her claim to greatness as a scholar.” Creating a work of original scholarship that makes a new “contribution to knowledge” is the primary task of every RPG student. It is like creating a road map of the territory you wish to explore and roads by which you will explore it. In order to do this, you must early “stake your claim” to the scholarly territory (and its gold) which you intend to research and report. There are four (4) main parts of the task:

**Figure 4**



Staking a claim for yourself and your research is like getting a patent on a new invention. If you work were a mechanical invention, would it be patentable? Does it have the quality of patentability? The task begins with choosing a claim, which you should be able to state in a single sentence.<sup>167</sup> This is the “thesis statement” of your thesis, dissertation, research project, or article. For example:

“This law is unconstitutional because.....”

“My research shows that this law.....”

“Viewing this law from a Marxist perspective leads us to conclude that.....”

“I will argue that....”

As you can see above, there are two different meanings of the word “thesis.”<sup>168</sup> The first refers to the research project that you write for your postgraduate degree. “My PhD thesis was over 300 pages long.” This document is the entire record of a process of research to be read by examiners, teachers, and supervisors.<sup>169</sup> It may consist of several hundreds of pages. When finished, it will be deposited in the library. The second meaning of the word “thesis” refers to the central idea of your project that reflects your own special viewpoint, opinion, reasoned argument, theoretical points, and contribution to your subject. “The main thesis of my paper is that this statute is unconstitutional.” This thesis statement often shows the solution, answer, clarification, and way forward regarding a specific question or problem. It is usually only one or two sentences in

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<sup>167</sup> The material on this page is taken from Eugene Volokh, “Writing a Student Article” (1998) 48 *Journal of Legal Education* 247. This excellent article is recommended reading for all RPG students. You will also find help in Geraldine Woods, *Research Papers for Dummies* (New York: Hungry Minds, 2002), and Anthony Weston, *A Rulebook for Arguments* (Indianapolis/Cambridge: Hackett Publishing, 3<sup>rd</sup> ed, 2000).

<sup>168</sup> See generally the discussions in Adrian Holliday, *Doing and Writing Qualitative Research* (London: SAGE, 2<sup>nd</sup> ed, 2007), and Karen Golden-Biddle and Karen D. Locke, *Composing Qualitative Research* (Thousand Oaks: Sage Publications, 2<sup>nd</sup> ed, 1997).

<sup>169</sup> Elizabeth Wager, Fiona Godlee, and Tom Jefferson, *How To Survive Peer Review* (London: BMJ Books, 2002).



length. *Thus, the thesis statement is different from your statement of purpose, intent, subject, or summary.* The development of this thesis statement is where you tease out the real light from your data, identify a research gap, and add something new, exciting, and special to your discipline. This carries your reader along and gives your reader something valuable to take away from reading your research. Without a proper thesis statement early in your research to guide your research, your efforts will not be properly focused but will be scattered like the charge from a shotgun. Patentability prevents this by focusing the direction of the research and writing. This is Volokh's test of patentability:

Good legal scholarship should meet the requirements of PATENTABILITY: it should make (1) a claim that is (2) novel, (3) nonobvious, (4) useful, and (5) sound. It should also (6) be seen by the reader(s) (supervisor, external examiners, editors) to be novel, nonobvious, useful, and sound.

Everything about staking your claim is directed to satisfying your audience, for it is always the audience you must satisfy. You must explain and clarify everything about your research and writing to the satisfaction of the various members of your audience, remembering that in most cases, your audience is—

INTELLIGENT  
but  
UNINFORMED.

On the matter of identifying a research gap, narrowing your topic, defining your purpose, developing your thesis statement, please consider the following statement from literature:

"Cheshire Puss," she began, rather timidly, as she did not at all know

whether it would like the name: however, it only grinned a little wider. "Come, it's pleased so far," thought Alice, and she went on. "Would you tell me, please, which way I ought to go from here?"

"That depends a good deal on where you want to get to," said the Cat.

"I don't much care where—" said Alice.

"Then it doesn't matter which way you go," said the Cat.

—Lewis Carroll, *Alice's Adventures in Wonderland*

Let us see how a popular musician distinguished himself and staked a unique claim to fame. We have all seen a philharmonic orchestra perform a classical concert, either on television or in person. These are very formal occasions. All members of the orchestra, including the conductor, are uniformly dressed in black--the men in black "tails" (black tailcoat or cutaway with white shirt and bow tie), and the women in black full-length gowns in order to present a uniform and stately appearance consistent with the dignity of classical music. A single unified appearance equals a single unified sound and purpose—the orchestra working together as one—the *symphony*. Because of this appearance, however, some people jokingly refer to the orchestra members as "penguins". Often the orchestra will invite a guest artist, such as a pianist or a violinist, to perform a special musical selection with the orchestra. These are important occasions because the guest artists are world-renowned musicians. They are not members of the orchestra but appear only on this special occasion. The guests are also dressed in black like the members of the orchestra. All are perfectly matched and formal.

One of the most famous pianists in the United States was Liberace (1919-1987). He was both a popular and a classical artist. He achieved great fame and wealth during his lifetime because he was able to distinguish himself in ways that were unique. It is therefore useful for us to study him and his technique for what he can teach us as RPG students. First, Liberace really had great musical talent. He could play with excellence.

But he was also a flamboyant personality and a real showman. He liked to entertain. So when he came to the stage for the first time dressed entirely in white, with a lot of lace and flourishes in his costume that were not formal, he caused a sensation. No one had ever seen this before. It was truly something that “surprised the world” because no one could take their eyes off the man dressed in all white, against the backdrop of the orchestra dressed in all black. Like John Adams, Liberace had devised a way to do something “new, grand, wild, yet regular” that “raised him at once to fame.” It was a masterstroke. This 11-minute video shows Liberace performing a medley of classical music with the London Symphony Orchestra, including portions and combinations of classical works by Tchaikovsky, Beethoven, Chopin and others. It is a *medley*—in other words, he works from within the classical model to create his own unique brand of music.

[www.youtube.com/watch?v=odyz0xWAWEU&feature=PlayList&p=69E561B4417065E3&playnext=1&playnext\\_from=PL&index=22](http://www.youtube.com/watch?v=odyz0xWAWEU&feature=PlayList&p=69E561B4417065E3&playnext=1&playnext_from=PL&index=22)

The image is riveting. You simply cannot watch anybody or anything else. Liberace remains the center of attention at all times, even when he is not playing and the orchestra takes over. The moment is singular. Like the model Uniform Commercial Code, he has adapted it to himself but kept the basic form. Liberace was very much his own unique, patentable brand. If we would have a counterpart visual image from the sciences, we can recall the famous paper published in 1953 by James Watson and Francis Crick that contained their simple line drawing of the famous double-helix representing DNA.<sup>170</sup> “This figure,” they wrote, “is purely diagrammatic.” It was something new that “surprised the world.” They noted that the idea of DNA structure had already been proposed by several other scientists. All, they found were unsatisfactory. “We wish to put forward a radically different structure,” they wrote. They went on to discuss “the

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<sup>170</sup> J. D. Watson and F. H. C. Crick, “Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid” (April 25, 1953) *Nature* 737-38.

novel feature of the structure” which they proposed, and then discussed the limitations of their idea and how it could be tested experimentally. But it was their striking visual concept—the double-helix—that gave it flesh.<sup>171</sup> It was, indeed, an *annus mirabilis* for science. Their simple drawing has become the lyrical symbol for all sorts of images worldwide, and their scientific insight is the foundation for the modern science of molecular biology. This one-page article of theirs changed the world. We can think of many such moments in the sciences, the social sciences, the arts, the humanities—and the law. RPG contributions to knowledge can—and should—do the same.

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<sup>171</sup> James D. Watson, *The Double Helix: A Personal Account of the Discovery of the Structure of DNA* (London : Weidenfeld & Nicolson, 1997).

## **What Counts as “Knowledge”**

If there are two contingent spheres of legal inquiry—practice and academics—then the preliminary question must be, Which knowledge are you talking about—the knowledge of the law, or the knowledge of the legal system? In his discussion of the evolution of the meaning of “knowledge” in the law and the law school, John Henry Schlegel quotes these words from a report on “Law and Learning” in Canada”

“The twentieth century has seen, in many disciplines, the passing of the centuries-old assumption that reality could be reduced to fixed and certain knowledge, which could be explained by demonstrable laws. We now realize that the expansion of knowledge consists in continually revising and reinterpreting what we know, as new data and new explanations emerge. *The relatively recent term ‘research’ means doing this purposefully: seeking better understand through the rediscovery , the reinterpretation and the revision of current knowledge.*”<sup>172</sup>

Legal scholars who miss this point, the report argues, cannot be “truly well-informed.” This understanding of the “expansion of knowledge,” or perhaps this *continuum* of knowledge, between fixed laws new explanations, frames the environment in which RPG students operate. Black-letter law itself gives us some help on definitions of fixed laws. One knowledge system is the common law rules of evidence. These have been pruned and developed over long years of experience to include and exclude information based on its probity. Under the rules of evidence, “knowledge” means the information provided as credible evidence by a percipient witness. This, and only this, counts as knowledge. All else is opinion, speculation, faith, hearsay—and is usually

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<sup>172</sup> Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: The Council, 1983), quoted in John Henry Schlegel, “Langdell’s Legacy Or, The Case of the Empty Envelope” (1984) 36(6) *Stanford Law Review* 1517, 1529; emphasis added.

inadmissible except under special circumstances. The most notable exception to this rule is the opinion of “expert” witnesses, but even that is based upon the expert’s special empirical and scientific training and experience in practice, not mere textual exegesis.<sup>173</sup> A medical expert can give expert testimony only on her own area of personal expertise. “What do you know, and how do you know it?” is the key question—not the “grandiose reflections about political philosophy, legal history,<sup>174</sup> and social order” noted by Ely, written primarily for other professors and the occasional judge.<sup>175</sup> If an RPG student wishes to become this kind of expert, then the only way to make a real contribution of “knowledge” is to participate in substantial empirical and archival research—in other words, to become a percipient witness of something and then to “bear witness” of that something in a written thesis or dissertation. This creates something that did not exist before. There is no way around this reality. But as Peter Shuck notes, empirical work is “grunt work,” costly in time and money, and it is uncertain:

“The payoff from empirical work is substantially contingent in a way that most traditional legal scholarship is not. Until one gathers and analyzes the data, one cannot know whether one will make important new findings or ‘merely’ confirm what everybody (especially in retrospect) ‘already knows.’ In contrast, the [black-letter] articles that we typically write [for law reviews] exhibit a kind of predestination; once we have thought our ideas through, we know where we are headed.”<sup>176</sup>

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<sup>173</sup> A precise example may be read in Eugenie C. Scott, *Evolution vs. Creation: An Introduction* (Berkeley, Los Angeles & London: University of California Press, 2<sup>nd</sup> ed, 2009), pp. 221-22 (“Science and the Law”) (survey of how well judges understand scientific evidence regarding evolution).

<sup>174</sup> Michael Lobban, “Introduction: The Tools and the Tasks of the Legal Historian” in Andrew Lewis and Michael Lobban (eds), *Law and History: Current Legal Issues 2003* (Oxford New York: Oxford University Press, vol 6, 2004), pp. 1-32, notes at p. 1 that the “position of legal history as a discipline has long been problematic....”

<sup>175</sup> Ely *op. cit.* at 491.

<sup>176</sup> Peter H. Shuck, “Why Don’t Law Professors Do More Empirical Research?” (1989) 39 *Journal of Legal*

This somewhat unsettling reality defines the crucial difference. The audience in “the law” expects and accepts such “predestination.” The audience in “the legal system” does not. This difference can arise with shocking surprise early in the career of any RPG law student who thinks about undertaking the contingency of empirical research, and it might send that student fleeing to the comforting arms of black-letter predestination. Increasingly, examinations of RPG proposals, theses, and dissertations, are seeing questions about empirical and archival research being raised in what the candidate proposed only as a black-letter subject. Conversely, some proposals that are strongly empirical or archival are challenged as to the lack of robustness in their black-letter underpinnings. What seems to be perceived as the strongest approach to many research projects is a robust combination of the two. Either way, in addition to new questions of methodology and theory, the inclusion of empirical work implicates a whole set of ethical concerns. In “predestinated” black-letter research, we usually teach the prohibition against plagiarism and its cognates as the greatest ethical problem. Plagiarism is also the greatest enemy of innovation; you cannot be “new” if you are stealing from others. In empirical research, the study of human subjects implicates an additional cluster of regulations and precautions (informed consent, privacy, invasiveness, insurance, liability) that apply only in that arena.<sup>177</sup> And the regulations caution:

**“Competence**      Researchers should undertake only such research that they and their fellow researchers and research students are competent to, so that the safety of all research participants, and the ethical integrity of the research, might not be compromised for reasons of incompetence.<sup>178</sup>

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*Education* 322, 331.

<sup>177</sup> See, e.g., the HKU Graduate School’s research page on research ethics at <[www.hku.hk/gradsch/web/student/ethics.htm](http://www.hku.hk/gradsch/web/student/ethics.htm)>; as well as the information and forms published by the HKU department of Research Services at <[www.hku.hk/rss/HREC.htm](http://www.hku.hk/rss/HREC.htm)>.

<sup>178</sup> The full list of requirements for such “Research Ethics” may be read at

Of course, this automatically excludes the jack-of-all-trades and the dilettante that we discussed earlier. As Nibley says, one must get “whatever it takes” to solve a research problem. But competence requires much more than that. The ensuring of “competence” is the first ethical responsibility, and lack of it is as serious as plagiarism.<sup>179</sup> Only such competence can generate acceptable real “knowledge.” Phillips and Pugh tell RPG students that they are on their way to becoming full-fledged members of a worldwide peer group of scholars, membership in which confers upon them the status to examine other people’s theses and dissertations with authority.<sup>180</sup> It is therefore essential for such scholars-to-be to understand fully the respective “rules of the game” that apply to that part of the club they are joining, and to understand them in the incipiency of their candidature. This combination of ethics and competence forms the essential character of a quality RPG candidate. The knowledge that such a character generates can be relied upon as genuine. The story of Charles Darwin and Alfred Russel Wallace is a story of such character.

Darwin is, of course, most famously known for this understanding, published in 1859 in *On the Origin of Species*, of evolution by natural selection. Wallace, who was a naturalist and explorer working in Asia, arrived at a virtually identical understanding at the same time. He sent his ideas to Darwin, and they exchanged correspondence. They were engaged in a race, and whoever was first to publish his ideas would “scoop” the other. They had a rivalry such as scholars in the same field always have—a creative rivalry that led each to work harder on his research. Their colleagues arranged for their papers to be read together at the Linnean Society of London on July 1, 1858—thus

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<[http://web.edu.hku.hk/research/research\\_ethics/Policies\\_&\\_Principles.pdf](http://web.edu.hku.hk/research/research_ethics/Policies_&_Principles.pdf)>.

<sup>179</sup> Marilyn V. Yarbrough, “Do As I Say, Not As I Do: Mixed Messages for Law Students” (1996) 100 *Dickinson Law Review* 677, 679-80 notes 6-7 and accompanying text (discussing the affects of plagiarism on the requirement for originality in PhD theses).

<sup>180</sup> Phillips and Pugh, *How To Get a PhF*, pp. 20-23.



launching the idea of evolution officially.<sup>181</sup> So indeed, Darwin and Wallace are the co-founders of evolutionary theory by natural selection. Their correspondence, even collaboration or competition, continued years after publication of Darwin's *Origin*.<sup>182</sup> Out of the tensions and competitions of their relationship, both men sharpened their ideas. The real gains in knowledge that flowed from this were and are enormous. Darwin and Wallace lived worlds apart in every way. Darwin was in England, Wallace in various parts of Asia, in a time when communications and travel were difficult. Yet independently they, and others as well, were approaching the same conclusions based upon their observations. It is lucky that these two were in communication. In a way, as they were looking after themselves, they looked after each other. In today's global world, when communications and travel are easier, it would be dangerous and naïve for the RPG researcher ever to assume that s/he alone in the world is the only one working on a particular problem in a particular way. Ideas today easily spread epidemically and contagiously<sup>183</sup>, and it is easy to get scooped by someone anywhere in the world. What is "new" right now can become second-hand in a moment.

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<sup>181</sup> Adrian Desmond and James Moore, *Darwin's Sacred Cause: Race, Slavery and the Quest for Human Origins* (London & New York: Allen Lane/Penguin, 2009), p. 305.

<sup>182</sup> *Ibid.* pp. 343-47.

<sup>183</sup> Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (New York & Boston: Back Bay Books/Little, Brown, 2001).

## Non-Law Law

A special situation arises when a law teacher is employed in a non-law department such as business, education, architecture, building and real estate, medicine, dentistry, business, agriculture, management, and so on—even medicine and nursing. This often occurs at universities which have no law school. The primary purpose of these important programs is not to create amateur barristers but to provide both non-law undergraduates and postgraduates with a sufficient knowledge of the law in order to (1) reduce the incidence of liability due to malpractice, (2) know when a true legal problem exists, and (3) improve ability to work more effectively with lawyers when legal problems cannot be avoided. Increasingly such departments are offering and often requiring their students to take basic classes in the law that applies to their disciplines.<sup>184</sup> In addition to these concerns, it is obvious that the students who graduate from such programs will someday hopefully contribute to the interdisciplinary scholarship of the law in their own non-law fields published in non-law journals.<sup>185</sup> I taught such classes with such students in the Department of Building and Real Estate (BRE) at the Hong Kong Polytechnic University for two years. The “Poly U” does not have a law school; the BRE is a department faculty comprised of architects, surveyors, management specialists, business specialists, and the like. During that process I published several academic papers, including a “pure” law paper on a Hong Kong statute,<sup>186</sup> plus a conference paper regarding the pedagogy of

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<sup>184</sup> Points noted and problematised in Roderick A. Macdonald, “Still ‘Law’ and Still ‘Learning’? *op. cit.*..

<sup>185</sup> For examples of such scholarship, see, e.g., Edwin H. W. Chan and Liyin Shen, “Scoring System for Measuring Contractor’s Environmental Performance” (2004) 5(1) *Journal of Construction Research* 139, 141, which suggests the importance of measuring such factors as “environmental control law and environmental education.” This would, of course, implicate both practitioners and future practitioners (our present students). See also Edwin H. W. Chan and Esther H. K. Yung, “Is the Development Control Legal Framework Conducive to a Sustainable Dense Urban Development in Hong Kong?” (2004) 28 *Habitat International* 409; and Edwin H. W. Chan, M. W. Chan, David Scott, and Antony T. S. Chan, “Educating the 21<sup>st</sup> Century Construction Professionals” (2002) 128(1) *Journal of Professional Issues in Engineering Education and Practice* 44.

<sup>186</sup> Robert J. Morris, “The Hong Kong Lands Resumption Ordinance: Implications of Law and Public Policy for International Construction Projects” in Edwin H. W. Chan (ed), *Contractual and Regulatory Innovation in the Building and Real Estate Industry* (Hong Kong: Pace Publishing, 2008), pp 88-94.

teaching law outside the law school, which included a small amount of empirical data.<sup>187</sup> Despite the different nature of both articles, each was addressed to a practical concern of working with the law *within the building professions* and did not target legal professionals or other law scholars or law students as its primary audience.

In such departments it is common nowadays to require all faculty members to record the data regarding their scholarly publications in some sort of uniform database that provides a weight and value to each publication which is then included as part of the professor's performance-review dossier for purposes of promotion, salary increases, ranking, and so on.<sup>188</sup> RPG students who co-author articles with their professors participate in the program.<sup>189</sup> The matrix compares all faculty members and their publications within their department, with the larger faculty or school of which it is a part, and with the university as a whole. The program is designed to evaluate publications according to the standard criteria of the disciplines based on their accepted standards and methodologies that define what "research" is for them. Among other functions, it ranks publications according to the fame and importance of the journals themselves. What, then, of the law professor who records a "pure" law paper in such a system within a non-law department where all faculty members but himself are evaluated on the basis of criteria and methods of, say, the social sciences—where "what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists."<sup>190</sup>—while his research and publications conform to the traditional law-school pattern of "legal research"? What of the RPG students who are his co-authors?

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<sup>187</sup> Robert J. Morris, "Improving Curriculum Theory and Design for Teaching Law to Non-Lawyers in Built Environment Education" (2007) 25(3-4) *Structural Survey* 279; Robert J. Morris, "The Teaching of Law to Non-Lawyers: An Exploration of Some Curriculum Design Challenges" (2010) 2(3) *International Journal of Law in the Built Environment* 232.

<sup>188</sup> See, e.g., the databases of the HKU Department of Research Services at <[www.hku.hk/rss](http://www.hku.hk/rss)>.

<sup>189</sup> John Seely Brown, Allan Collins, and Paul Duguid, "Situated Cognition and the Culture of Learning" (January-February 1989) *Educational Researcher* 32.

<sup>190</sup> James Huffmann, *op. cit.*.

Aside from questions of fairness and equity, how can such publications truly be compared at all? Is it in the interest of the university and the departments to attempt such homogenization? Should the law teacher be required to publish only those materials that conform to the norms of the non-law disciplines? Obviously, these questions concern what counts as a “new contribution to knowledge.”

A recent empirical study in the Netherlands addressed some of these issues.<sup>191</sup> Questionnaires were distributed to scholars in “four larger Flemish universities” in order to assess general academic activities and specifically publication lists (“bibliometric indicators”) as methods of evaluating the job performance of law academics (“juridical research”)—what many universities call “performance review” or “performance review and development” (PRD). Two committees were involved—a peer-review committee of all research activities in law at the four universities, and a committee of deans of Flemish law departments. Among the theoretical underpinnings of the study was the acknowledgement that “[m]any scholars, particularly those in the USA, may argue that law is not a typical humanities field”<sup>192</sup>—an departure from the law-as-social-science model discussed earlier. It also recognized that the “main impediment to such a ranking [of law journals] was that most law journals show large variations in the quality of the papers published.”<sup>193</sup> Furthermore, the “role of journals”<sup>193</sup> was found to be less prominent in communicating research results in juridical research than it is in many fields in natural and life sciences.” The “role of journals” is important for several reasons. First, they count because that is where academicians publish articles and thereby accumulate a “list of publications” for their resumes. Secondly, journals are where citations are counted. The study of “cytology” counts up the number of times and places that a scholar’s works

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<sup>191</sup> Henk F. Moed, “A Case Study of Research Performance in Law” in Henk F. Moed (ed), *Citation Analysis in Research Evaluation* (Dordrecht, The Netherlands: Springer, 2005), pp. 159-66.

<sup>192</sup> As noted earlier, in the United States all law study is (post)graduate, i.e., after the student first obtains an undergraduate degree (BS or BA) from the university. In many other jurisdictions, law study is undergraduate with students entering law school directly out of middle school.

<sup>193</sup> Epstein and King, “The Rules of Inference” *op. cit.*

are cited by other scholars, and assesses the relative weight and importance of those other scholars and the journals in which they publish. It is a form of empirical research using statistical analysis—as assembling meta-research or “knowledge about knowledge.” It is reasonable to assume that different doctrinal and ideological—and even political—visions underpin methodology in different languages and cultures whenever the definitions of words are at stake, as they almost always are.<sup>194</sup> But Professor Liu Lei of Suzhou University notes:

The methodological basis of legal cytology is empirical positivism [经验实证主义], i.e., the social empirical [= positivist] investigation method [社会实证调查方法] is employed to make a quantitative analysis on legal research papers. Cytology has [several] limitation[s] in methodology, behind which a complicated “knowledge-power” structure exists. Considering the matter [that] in China’s present legal citation researches [there are a large number of abuses], therefore the real quality [真正品质] of legal papers shall not be evaluated by the citation rate simply, but [by] establishing a localized [本土化的] academic evaluation system [= mechanism 机制] to scale it comprehensively.

法学引证学的方法论基础是经验实证主义,即以社会实证调查方法对法学科研论文进行数量化分析。引证学在方法论上有若干局限性,其背后可能存在复杂的“知识—权力”结构。鉴于中国目前的法学引证研究存在诸多弊端,因此法学论文的真正品质不能简单地以引证率来衡量,而应该通过建构本土化的学术评价机制来综合衡量。<sup>195</sup>

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<sup>194</sup> Edgar Bodenheimer, “Modern Analytical Jurisprudence and the Limits of Its Usefulness” (1956) 104(8) *University of Pennsylvania Law Review* 1080; Nicola Lacey, “Analytical Jurisprudence versus Descriptive Sociology Revisited” (2006) 84(4) *Texas Law Review* 945.

<sup>195</sup> Liu Lei, “Deliberation on Legal Research Citation in China” (2009) 4(1) *Frontiers of Law in China* 102; translated from 刘磊, “我国法学引证研究之省思” 2008 (2) 《法商研究》 / *Studies in Law and Business* 135–139, which may be read online at <[www.docin.com/p-51556099.html](http://www.docin.com/p-51556099.html)>; (original text and original

Liu warns that merely adopting for legal studies the “mathematic or numerical management (数目字管理)” of the sciences and social sciences (playing the “competitive game of papers (论文竞技游戏)”) is the “‘abstracted empiricism’ of American sociology (美国社会学中的‘抽象经验主义’)” that creates the appearance of empirical scholarship but often masks the weakness in theoretical and introspective analysis and hinders independent thinking—emphasizing the “micro-process rather than the objective of evidence (微观的证明过程而证明目的).” Liu rightly insists that “legal scholars all have their own research domains and academic expertise (法律学人均有各自所属的研究领域与学术研究专长)”—a point paralleled by Moed in distinguishing “juridical scholars” from “practitioners.”<sup>196</sup> This sort of inflection must surely be desirable and must surely permeate the entire empirical legal project, especially in qualitative research where cultural sensitivities and ethical concerns must above all be respected (pp. 926-40).<sup>197</sup> The results of the Netherlands study further problematize these issues:

... the [peer review] Committee stressed that attempts should be made to distinguish between ‘genuine’ scholarly contributions on the one hand, and *informative publications aimed primarily at providing social services, on the other*. Genuine scholarly publications conform to criteria of methodological soundness, thoroughness and significance. In the Committee’s view, it is the first category of publications that *distinguishes between a juridical scholar and a practitioner or a professional legal*

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translation). Liu has contributed much to research in this field, and his article cites a substantial body of related scholarly literature. A decade before Liu, Robert C. Ellickson, “Trends in Legal Scholarship: A Statistical Study” (2000) 29(1) *Journal of Legal Studies* 517, 540, called citation analysis “one of the latest fads in legal scholarship.”

<sup>196</sup> Henk F. Moed, *op. cit.*, pp. 159-66.

<sup>197</sup> Lee Epstein and Charles E. Clarke, Jr., “Academic Integrity and Legal Scholarship in the Wake of *Exxon Shipping*, Footnote 17” (2010) 21(1) *Stanford Law & Policy Review* 33 (the need for reliability, validity, and transparency in law as in the sciences).

*expert.* Academic scholars should primarily be evaluated according to their contribution to *scholarly progress, rather than to their practical activities.*

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The relationship between juridical research and practice was also addressed in a second report by a committee of Deans of Flemish Law Departments. However, this Committee stated that juridical research primarily serves the ‘practice’, a basic characteristic that creates difficulties in distinguishing between fundamental and applied juridical research. *It is worth noting that the two committees apparently did not have fully coinciding viewpoints.*<sup>198</sup>

The report concluded by noting that the peer-review Committee “stated that it would continue to work on the development of criteria for measuring research performance in the field of Law, and that it would be unfortunate if findings from the report were to be applied ‘in a premature way’ in university research policy.”<sup>199</sup> If two such committees cannot agree on policy or criteria for evaluating research activities among law scholars, it might also be premature to expect that universities and their non-law departments that include a law component can do so in any kind of meaningful way? Amid the lack of “fully coinciding viewpoints” of the two committees, it is difficult to know where my own two Poly U publications might properly be located or evaluated, being as they are mixed in both law and non-law journals and addressed to both law and non-law audiences. The dichotomy between “scholarly progress” and “practical activities” is alive and well. And this dichotomy applies full-force to supervisors everywhere.

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<sup>198</sup> Moed *ibid.* at 160; emphasis added.

<sup>199</sup> *Id.* at 166.

## Supervisors

Earlier we considered in part the dictum of Professor Hugh Nibley regarding the necessity of obtaining all the languages, skills, and tools necessary for any research project. His whole idea is much more thorough and complex, and it now deserves extended quotation.

The ever-increasing scope of knowledge necessary to cope with the great problems of our day has led to increasing emphasis on a maxim that would have sounded very strange only a few years ago: ‘There are no fields—there are only problems!’—meaning that one must bring to the discussion and solution of any given problem *whatever is required to understand it*: If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years—or *else shift to some other problem*. *Degrees and credentials are largely irrelevant where a problem calls for more information than any one department can supply or than can be packaged into any one or a dozen degrees.*<sup>200</sup>

This prescription, now almost fifty years old and yet more important and “global” than ever, is focused on the requirements for the student, the RPG candidate, and is a statement about “core competence.” Today, of course, we would add: *If the research calls for mastery of new and emerging technologies and research platforms, one must get them*. If the RPG candidate is working across disciplines and departments, then s/he must assemble the necessary cluster of interdisciplinary skills needed to address that body of recombinant information in order to address the gap/new conundrum. Yet its reverse application has important implications for the RPG law program as well: Who will

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<sup>200</sup> Hugh Nibley, “A New Look at the Pearl of Great Price, Part I: Challenge and Response (Continued)” (Feb. 1968) 71 *Improvement Era* 14 (emphasis added).



supervise the RPG student whose project needs empirical research in the academic mode with multiple languages and other-than-law skills?<sup>201</sup> Certainly it cannot be a faculty member whose sole training, orientation, and reward structure are to black-letter “legal research.” If the student needs multiple languages, credentials, skills, and degrees, plus the skills for good field research and statistical analysis, *so also does the supervisor*. A supervisor adept only at doctrinal legal research in English cannot supervise an RPG student conducting a project of empirical and archival legal scholarship on comparative law between France and Bangladesh. Some individuals bridge the gap between both worlds—they not only teach doctrinal subjects and supervise RPG research in the law school, but they also serve the practicing community—the “practice professorate” we discussed earlier. But individuals who are not qualified to do both must not be pressed into service from one sphere into the other without further qualification a la Nibley. To do so would cheat the supervisor, the student, the law school, and the academic community. Ron Griffiths sums up the complexity of the situation:

“In any department, the supervision of dissertations usually draws on a wide range of staff, often with different perspectives on what counts as a ‘proper’ research question and approach. Students can, therefore, find themselves caught between conflicting lines of advice, some insisting on conventional, value-neutral, exploration-oriented, ‘scientific’ questions and methods; others happy to accept more context-specific, problem-focused, value-engaged and methodologically eclectic projects.”<sup>202</sup>

Typically in the sciences, the humanities, and the social sciences, the supervisor

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<sup>201</sup> Desmond Manderson, “FAQ: Initial Questions About Thesis Supervision in Law” (1997) 8 *Legal Education Review* 121.

<sup>202</sup> Ron Griffiths, “Knowledge Production and the Research-Teaching Nexus: The Case of the Built Environment Disciplines” (2004) 29(6) *Studies in Higher Education* 709, 724. See also Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton, NJ: Princeton University Press, 2003).

assumes a large managerial role<sup>203</sup>, and she and the supervisee become collaborators. They go on an intellectual journey together, working on the same projects, publishing papers sharing the same by-line along with other RPG students and other faculty colleagues. The list of co-authors on publications is truly an ensemble. This is how students learn to write and how they get their first professional publications. The professor's project is the student's project. Felix Frankfurter recognized this need for the law academy as early as 1930. He wrote:

“The ultimate concern of the social sciences, law among them, is the conquest of knowledge leading, one hopes, eventually to new and important insights into the good life of society. [For that we need] a very small number of rigorously selected graduate students.... Graduate work implies a personal relation between two students, one of whom is a professor. If there is not common intellectual enterprise between professors and graduate students, there may be facilities for giving degrees but not graduate work in any fruitful meaning of the term.”<sup>204</sup>

However, this is not the usual case in traditional law school “supervision,” where such collaboration is the exception.<sup>205</sup> Law professors may have research assistants, but they are not the RPG students, and if they are credited at all, they often do not share the author's by-line. Supervisors and supervisees are generally assigned to each other because their respective projects share a common subject (i.e., commercial law), not because they will collaborate on a common project. Frankfurter would not have accepted

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<sup>203</sup> Tricia Vilkinas, “The PhD Process: The Supervisor as Manager” (2002) 44(3) *Education & Training* 129.

<sup>204</sup> Felix Frankfurter, “The Conditions for, and the Aims and Methods of, Legal Research” (1930) 15 *Iowa Law Review* 129, 139. Frankfurter (1882-1965) was a justice of the US Supreme Court from 1939 to 1962.

<sup>205</sup> But see David M. Eagleman, Mark A. Correro, and Jyotpal Singh, “Why Neuroscience Matters for Rational Drug Policy” (2010) 11(1) *Minnesota Journal of Law, Science & Technology* 7, which is a joint effort of a neuroscientist, a practicing lawyer, and a law student, respectively, in a multidisciplinary journal.

this state of affairs. One of his great scholarly models was Charles Darwin and his exemplary empirical study, *On the Origin of Species*. Frankfurter celebrated the empirical methods and aims of the social sciences but lamented the gap between them and the law:

“We are mostly only talking about collaboration, and have as yet hardly begun to experiment on the processes by which to integrate or coördinate or collaborate with one another. We have hardly got over the discovery that we are members of the same family; we have not yet acquired family habits with one another.”<sup>206</sup>

That Frankfurter articulated these admonitions as early as 1930 is perhaps as astonishing as the lack of “family habits” that still remains eighty years later. One possible way to explain the apparent lack of “familiality,” especially among the law and other disciplines, is to note what some writers have called the fear of “reductionism” when one discipline is “colonized” by another or wishes for the kind of certainty or methodology of another.<sup>207</sup> Different disciplines have different kinds of certainty, different powers and paradigms of explanation, different rules of causation and effect, and different scales of what counts as evidence and general theory—of what counts, in other words, as “new,” “contribution,” and “knowledge.” The proximate and general explanations that lead to theory in the different disciplines may conflict and thus disrupt each other.<sup>208</sup> Michael Ruse argues that the fear of degrading one discipline by another’s methods is a “rape,”<sup>209</sup> and this might be said to be true even of “the law” and “the legal

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<sup>206</sup> *Ibid.* at 133.

<sup>207</sup> See the discussion generally in Jim McKnight, *Straight Science? Homosexuality, Evolution and Adaptation* (London and New York: Routledge, 1997), pp. 173-77 *passim*.

<sup>208</sup> Richard D. Alexander, “The Search for A General Theory of Behavior” (1975) 20 *Behavioral Science* 77-100,

<sup>209</sup> Michael Ruse, “Are There Gay Genes?” (1981) 6 *Journal of Homosexuality* 5, 29.

system.” Where disciplines claim to be special or unique, and to have sole control of themselves, their practitioners must surely sense a reason for caution here—they don’t want to get “raped” by an alien discipline. They may fear the overreaching tendency to “jump disciplines” as a kind of poaching or trespassing that leads to disciplinary drift and dilution. Darwin wrote of collaboration and of comparison with other disciplines in the light of the intellectual values under consideration here:

I have no great quickness of apprehension or wit which is so remarkable in some clever men.... I am therefore a poor critic: a paper or book, when first read, generally excites my admiration, and it is only after considerable reflection that I perceive the weak points.

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Some of my critics have said, ‘Oh, he is a good observer, but he has no power of reasoning!’ I do not think that this can be true, for the 'Origin of Species' is one long argument from the beginning to the end, and it has convinced not a few able men. No one could have written it without having some power of reasoning. I have a fair share of invention, and of common sense or judgment, *such as every fairly successful lawyer or doctor must have, but not, I believe, in any higher degree.*

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As far as I can judge, I am not apt to follow blindly the lead of other men. I have steadily endeavoured to keep my mind free so as to give up any hypothesis, however much beloved (and I cannot resist forming one on

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every subject), as soon as facts are shown to be opposed to it. Indeed, I have had no choice but to act in this manner, for with the exception of the Coral Reefs, *I cannot remember a single first-formed hypothesis which had not after a time to be given up or greatly modified.* This has naturally led me to distrust greatly deductive reasoning in the *mixed sciences*. On the other hand, I am not very skeptical,—a frame of mind which I believe to be injurious to the progress of science. A good deal of scepticism in a scientific man is advisable to avoid much loss of time, but I have met with not a few men, who, I feel sure, have often thus been deterred from experiment or observations, which would have proved directly or indirectly serviceable.<sup>210</sup>

The implications of these principles for RPG students and their supervisors, where assimilation to (an)other discipline(s) in “sociolegal studies” occurs, are profound. They must manage what I call the *parallax view* of interdisciplinary and comparative scholarship. As Paul Chynoweth notes, supervision, peer review, methodology, theory, research outputs, communications between disciplines, and almost every other aspect become problematized.<sup>211</sup> This fact can become especially poignant when the RPG project tries to join the law with another, more determinate discipline. In an informal seminar of RPG students from several disciplines at my university, a disagreement arose over the interpretation of secondary-source commentaries on religious texts regarding extramarital sex. A Hong Kong sociology student wrote this account of his exchange with a law student:

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<sup>210</sup> Charles Darwin, *The Life and Letters of Charles Darwin Including An Autobiographical Chapter*. Francis Darwin (ed) London: John Murray, vol 1, 3<sup>rd</sup> ed, 1887), pp. 102-04; emphasis added.

<sup>211</sup> Paul Chynoweth, “Legal Research” in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Oxford, UK: Wiley-Blackwell, 2008), pp. 28-38, esp. p. 37.

“I noted that I put myself into *a very dangerous situation* in which I am easily criticized by researchers from Law. Meanwhile, my research would not be able to go further from sociological viewpoint. I would take [\_\_\_\_\_]’s view to go back to look at how the [\_\_\_\_\_] and [\_\_\_\_\_] [primary-source texts] say about extramarital relations. This suggestion helps to avoid any confusion from some second-hand resources.”<sup>212</sup>

The student acknowledges that he is largely bound by the constraints of his discipline’s norms (the “sociological viewpoint”), and that a legal corrective of black-letter recourse to the original sources is the way forward. A PRC student from my ARM class noted:

“In my opinion, the problem is the classic knowledge/power problem. We Chinese researchers keep learning from the west, using their terms and methodologies. But it's difficult for us to discuss with western colleagues equally, because we don't quite understand them and they don't care about us either. If they want to know about China, they have their own experts and all they want is a brief conclusion. Actually this is the same for Chinese scholars.”<sup>213</sup>

This acknowledges the institutional, disciplinary, and personal boundaries that exist even within the same discipline, and it also acknowledges the disjunctive frames of reference that intervene in interdisciplinary or intercultural attempts at understanding. Such acknowledgement is perhaps the best rapprochement the two disciplines or fields of study can achieve—a bridgehead rather than a bridge. Using Einstein’s theory of relativity, Felix Cohen developed the idea of a “value field,” which includes frames of reference, and he argued that it is possible to “translate” a thought from one social

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<sup>212</sup> Personal communication on file with author; emphasis added.

<sup>213</sup> Personal communication on file with author.

perspective into any other social perspective:

“The definition of a value field makes the contents of the field exportable. That is to say, if we understand a proposition in the context of its own field we can translate the proposition into language that will convey the same informational content in any other value field we understand.”<sup>214</sup>

Yet even granting the fact that here Cohen uses “translation” here with reference to ideas rather than words, anyone familiar with modern translation theory must recognize that this states a bit too much—exact equivalence between words, fields, or ideas cannot be achieved.<sup>215</sup> A reduction of the indeterminacy to a minimal may be “good enough.” Supervisors must be keen to guide their RPG students carefully between and around the different mindsets that exist in different disciplines. We have already discussed some of these. Ken Kress observes, “Law is indeterminate to the extent that legal questions lack single right answers.”<sup>216</sup> This probably strikes non-lawyers as odd (the mere idea that the question, “What is chicken?”<sup>217</sup>, can be asked at all), but black-letter practitioners and scholars within the common-law tradition are at ease with this lack of “single right answers” and with Coke’s “artificial reason and judgment of law”—indeed they glory in it. Its process has been aptly compared to the growth and stability of a coral reef. The metaphor was coined by Judge Learned Hand in his review of Benjamin Cardozo’s *The Nature of the Judicial Process* in the 1922 *Harvard Law Review*.<sup>218</sup> Hand wrote that the common law is not a “machine” that operates automatically but that its

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<sup>214</sup> Felix S Cohen, “Field Theory and Judicial Logic” (59 *Yale Law Journal* 238, 265.

<sup>215</sup> Robert J. Morris, “Translators, Traitors, and Traducers” *op. cit.*

<sup>216</sup> Ken Kress, “Legal Indeterminacy” (1989) 77 *California Law Review* 283.

<sup>217</sup> *Frigalment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

<sup>218</sup> Learned Hand, Book Review (reviewing Benjamin Cardozo’s *The Nature of the Judicial Process*) (1922) 35(4) *Harvard Law Review* 479.

whole structure “stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.” But to non-lawyer ears, this sounds more like evolution than academics: the common law moves like a “glacier,” and it is, of course, judge-made law<sup>219</sup> As Robert Gordon noted earlier, social science is a “value-soaked, fuzzy, messy, dispute-riddled, political enterprise like any other interpretive activity—like law for instance,<sup>220</sup> but the respective fuzzinesses appear to differ in their characteristics.

Other disciplines are not ease with these concepts as a basis for “scholarship” or “research,” and their malaise increases moving from the humanities to the social sciences to the sciences. RPG students in interdisciplinary and comparative projects often feel caught uncomfortably in the middle of these discontinuities. Brent Kilbourn writes of the “radical-conservative continuum” of RPG research proposals:

“What is considered profound innovation in one field may be regarded with skepticism, if not derision, by another, and where a field (or supervisor) lies along the continuum will naturally have a significant steering effect on the nature of the dissertation proposal.”<sup>221</sup>

Kilbourn goes on to note that the crucial importance of the research proposal is that all these issues must be *worked out in advance* of the student’s embarking on the dissertation project itself.<sup>222</sup> Hence, the confrontation and management (if resolution is

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<sup>219</sup> *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawai‘i 1061), *aff’d*, *Chapman v. Brown*, 304 F.2d 149 (9th Cir. 1962). See the discussion of these cases and these images in Robert J. Morris, “Products Liability in Hawai‘i” (1979) 14(4) *Hawai‘i Bar Journal* 127, esp. n. 73 and accompanying text.

<sup>220</sup> Gordon, *op. cit.*

<sup>221</sup> Brent Kilbourn, “The Qualitative Doctoral Dissertation Proposal” (2006) 108(4) *Teachers College Record* 529, 536.

<sup>222</sup> *Ibid.* p. 572.



too much to expect) of the continuum—the parallax—is an essential first step for the new RPG student, and yet it is one of the most theoretically and methodologically difficult in addressing the gap/new conundrum. This early understanding is crucial also if the RPG project is to manage Bradney’s “more/different” divide and truly end up with a “new contribution to knowledge” in the *university* sense without skepticism or derision on any side. Finding the way to do this may itself become the student’s “new contribution to knowledge” and the supervisor’s most interesting challenge.

### **A Bit of Retrenchment**

Up to this point we have pretty much said that your RPG research project must be new and that newness is an unalloyed good. We have said that globality is absolutely a good thing because globalization demands universal standards of quality work. It's time now to step back a bit and do what the common law wisely teaches us to do: *Audi alteram partem*. Listen to the other side. Newness for the sake of newness, globality for sake of globality, can get out of hand. They must be banked and cooled by the tug of tradition and wisdom. The Wise Man said: "Do not remove the ancient landmarks that were set up by your forebears."<sup>223</sup> These tensions of traditional/new and global/local are two more of our important dichotomies.<sup>224</sup> John Adams said that he wanted to do something "new, grand, wild, *yet regular*." The coral reef of the common law is regular; the double-helix of DNA is new, grand, and wild. Liberace was both, working flamboyantly from within the classical tradition, but RPG students cannot afford to be "too Liberace." Students who research traditional cultures—like students who come from traditional cultures—encounter the dichotomies of traditional/new and global/local all the time, not only in the subject matter they study, but in the performance expected of them in the classroom (to teach and be taught), the ways they are taught to think and to think of themselves, and the nature of the academic product they are expected to produce. Indeed, these dichotomies often define what is acceptable as "new" and "knowledge."<sup>225</sup> Suzanna Sherry, who deplored the dilettante "law professor as astrophysicist," also deplores "a phenomenon that has come to pervade legal scholarship: the idea that novelty

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<sup>223</sup> *Old Testament*, Proverbs 22:28.

<sup>224</sup> Mayumi Saegusa, "Why the Japanese Law School System Was Established: Co-optation as a Defensive Tactic in the Face of Global Pressures" (2009) 34(2) *Law & Social Inquiry* 365, 368-69.

<sup>225</sup> John Charlot, *Classical Hawaiian Education: Generations of Hawaiian Culture* (La'ie, Hawai'i: The Pacific Institute/Brigham Young University—Hawai'i, CD-ROM, 2005), pp. 247-73, which may also be found online at <[www2.hawaii.edu/~charlot/CHE%20post/che.pdf](http://www2.hawaii.edu/~charlot/CHE%20post/che.pdf)>; original Italics for the Hawaiian. Charlot relies heavily, *inter alia*, on the works of Jerome Bruner and Jonathan Baron, among them: Jonathan Baron, *Thinking and Deciding* (Cambridge: Cambridge University Press, 1988); Jerome Bruner, *Actual Minds, Possible Worlds* (Cambridge, MA: Harvard University Press, 1986).

is the ultimate test of an idea's worth.”

“It often seems today that proposing counterintuitive ideas is the fastest way up the academic ladder. As one young scholar puts it: ‘It is the intellectually innovative candidate who is most likely to get hired and succeed professionally, and ingenuity is not the same as dependable judgment.’ The more *radically* an article departs from conventional wisdom, the more likely it is to be published in a prestigious law review. This *perverse incentive* is likely to create exactly the sort of scholarship we now see so often in [American] constitutional law: original, creative, even brilliant, but quite obviously wrong.<sup>226</sup>

Sherry notes that “good arguments are seldom more than *one step* beyond existing arguments” (the coral reef image), and that scholars who reject gradual change in favor of wholesale adoption of first principles (ignoring precedent, the coral reef), operate in an academic milieu that “creates incentives to *climb out on limbs.*”<sup>227</sup> The key to understanding this argument is that *radical* departure from the existing wisdom is usually perverse. Good arguments, good research, usually make their “new contribution to knowledge” one step at a time. Watson and Crick did this with their double-helix when they located their research within the existing body of work. *The Federalist Papers* did this by carefully couching the arguments in legal and political history. The “new, grand, wild” must be tugged back by the “regular.” One way to achieve this balance is to retain the local within the global.<sup>228</sup> Earlier we noted that place has priority, and law is peculiar

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<sup>226</sup> Suzanna Sherry, “Too Clever by Half: The Problem with Novelty in Constitutional Law” (2001) 95(3) *Northwestern University Law Review* 921, 926; emphasis added, citations omitted.

<sup>227</sup> *Ibid.*, p. 927; emphasis added, citations omitted.

<sup>228</sup> Alexander Loke, “Forging a New Equilibrium in Singapore Legal Education” (2006) 24(1) *Wisconsin International Law Journal* 261.

to place.<sup>229</sup> Each RPG student and each RPG project must be firmly grounded in the particular university, law school, culture, and locale where the project is undertaken. I call this the *sine qua non* factor. I require my RPG students to ponder this question:

Why are you here? What is the *sine qua non* of your presence at this University? What aspect of being at *this* University, in *this* city, in *this* RPG program, at *this* time, is necessary to your RPG project and could not be obtained anywhere else?

This grounds the global in the local. It leverages the local in the same way the 50 states adapt the Model Uniform Commercial Code to the specific needs of their people. The law remains local while working toward a national standard. In the same way, RPG projects conform to the rules of their graduate schools, law departments, and universities in all respects, while at the same time working toward a “new contribution to knowledge” that is of global excellence. While standards of excellence are global, RPG programs are not fungible. Like Liberace, universities, professors, programs, and law schools usually distinguish themselves in specific and important, sometimes unique, ways. That is why their RPG credential is so valuable. You need to leverage that distinction. Even though much research can now be done by computer anywhere in the world, some research—like archives, field work, interviews, and observations—are entirely grounded in the locales where they exist. *You have to be there*. The American state of Hawai‘i is a good example. For centuries the Hawaiian people had an oral culture; their language was not written. Everything linguistic about their culture, its history, religion, genealogies, and stories, were transmitted orally by memory. Only in the early 1800s was their language “reduced” to writing by foreign missionaries.<sup>230</sup> During all the 19<sup>th</sup> Century, many

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<sup>229</sup> As, indeed, Pierre Legrand argues, is everything else that is claimed to be “global.” Pierre Legrand, “On the Singularity of Law” (2006) 47(2) *Harvard International Law Journal* 517.

<sup>230</sup> Albert J. Schütz, *The Voices of Eden: A History of Hawaiian Language Studies* (Honolulu: University of Hawai‘i Press, 1994).

Hawaiians used the newly written language to record their cultural materials, although many chose to keep them in memory only. They published books and Hawaiian language newspapers, and many recorded their lore in diaries, journals, and Bibles. Except for the Hawaiian language newspapers, most of this material has remained unpublished and untranslated. It exists only in the university and museum archives in Honolulu or in the living memories of Hawaiian people—and *nowhere else in the world*. A small percentage of it has been digitized and made available to researchers online, but most of it remains in storage facilities—unphotographed, uncopied, and undigitized. So anyone wishing to conduct an RPG research project in these Hawaiian materials must, a la Nibley, do several things: get a research-level knowledge of the Hawaiian language; obtain research skills to examine archives in that language; and obtain empirical skills to interview and collate qualitative materials from living witnesses who hold the key to understanding the archive materials—and who themselves are living archives.<sup>231</sup> And all of this must be done—can only be done—in Honolulu. It cannot be accessed remotely. A finished global-worthy RPG product of this kind would, of course, have to meet global standards of academic excellence, but it would by definition be utterly local in its subject—and in this case, not just new but unique. This is the kind of thoroughness required of an RPG project. There is a tradition in Hawaiian culture that teaches this crucial rule: only complete knowledge (“all the bits of knowing”) is worthy of graduation. It is the famous story of Kalapana:

“In the story of Kalapana or Kaipalaoa, a major point is that the father failed because of the incompleteness of his knowledge: *ua ao ia no, aole nae i ailolo* he was taught, but in fact had not graduated.... The son’s

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<sup>231</sup> John Charlot, *Classical Hawaiian Education: Generations of Hawaiian Culture* (La‘ie, Hawai‘i: The Pacific Institute/Brigham Young University—Hawai‘i, CD-ROM, 2005), pp. 247-73, which may also be found online at <[www2.hawaii.edu/~charlot/CHE%20post/che.pdf](http://www2.hawaii.edu/~charlot/CHE%20post/che.pdf)>. Charlot’s encyclopedic book, although firmly grounded in a specific educational milieu and period, contributes much about the modern educational project.

mother and aunt therefore wanted to train him thoroughly. The mother Wailea taught him all she knew: *ao iho la laua a pau ko Wailea ike* the two followed a course of instruction until Wailea's knowledge was exhausted. She then sent him to his aunt, *nana e ao ia oe a pau loa* hers it will be to teach you completely. Once with his aunt, *ao iho la me ka makuahine a pau na mea a pau loa, o ko luna o ko lalo; o ko uka o ko kai; o ko ke ao o ko ka po; o ka make o ke ola; o ka hewa o ka pono; lolo iho la a pau . . .* with the older woman relative he learned thoroughly every last thing, the things belonging to above, the things belonging to below, to the land, to the sea, to the day, to the night, death and life, wrong and right; he became expert in all . . . .

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*“A hala kekahi wa loihi o ke ao ana, a pau hoi na ike, na hana, ame na mele hoopapa apau i ka paanaau ia Kalanialiiloa, alaila, i aku la na kumu i ke alii, ‘E ke alii, ua pau loa ae la no ko maua wahi ike, nolaila, ina he ike hou aku kekahi, e pono ke alii e hele ilaila, no ka mea, aia no ka pono o keia hana o ka pau mai o na ike apau, o pa auanei i ka hoa hoopapa* After a long time had passed in learning, and all the different pieces of knowledge, the works, and all the chants of *ho ‘opāpā* [intellectual and poetic contest of wits] had been memorized by Kalaniali‘iloa, then the teachers said to the chief, ‘O chief, our little knowledge has indeed been exhausted. Therefore, if you want some new knowledge, it is right for the chief to go there [where he can find it], because the correct procedure of this work lies in the exhausting of all the different pieces of knowledge, lest one be hit/defeated perhaps by one’s companion in the contest of

wits.”<sup>232</sup>

This is the very definition of education itself—Nibley in another culture. The “contest of wits” is global, the “competition with each other.” You must go where the knowledge is to get it—above and below, land and sea, night and day. The global and the local stand in strong counterpoise and meet Adams’s test of being at once “new, grand, wild, *yet regular*”—the global grounded in the local. Appendix C is the teaching materials I use in the ARM class to demonstrate these research challenges with a Hawai‘i detective story.<sup>233</sup>

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<sup>232</sup> Charlot, pp. 126-27.

<sup>233</sup> The outcome of the exercise reported there is noted in Robert J. Morris, “Same-Sex Friendships in Hawaiian Lore: Constructing the Canon” in Stephen O. Murray (ed), *Oceanic Homosexualities* (New York & London: Garland Publishing, 1992), pp. 71-102 at p. 82 note 5.

## **Summary, Conclusions, & Recommendations**

In the 1990 thriller movie *Flatliners*, there is a marvelous scene with a tough professor and her medical students in the gothic dissecting room of a medical school pathology class. They are standing about, scalpels in hand, ready to begin a hands-on examination on the cadavers laid out before them. The teacher, bless her heart, lays it out for them in plainness and truth: “Today’s exam will be scaled. Three A’s will be given, five B’s, ten C’s, and the remaining four will get D’s and F’s. Once again, as in life, you are not in competition with me, yourself, or this exam, but with each other.”<sup>234</sup>

So it is. Competition with *each other*, and today that means the whole world. Does having neither fish nor bear’s paw mean that you cannot have some of each? Mencius thought not (“*If I cannot keep the two together*”). The choices to be made are not based on a simplistic either-or binary nor a zero-sum game. In defining its “core competence,” if the law school chooses to dichotomize itself between the professional and the academic, between legal research and legal scholarship, it should not homogenize the two but neither assume that the two are mutually exclusive. In fact, the almost-dichotomy should be widened. Both missions of the law school are important in the globalized world, each should have its own special preserve, and both should stand on equal footing.<sup>235</sup> There is nothing wrong with researching and writing in either mode or both modes so long as what one is doing is clearly acknowledged and exploited for its particular strengths and methods—so long, in other words, as one is not assumed naïvely to be the other. Audience is all-important. Bok’s “pecking at legal puzzles within a narrow framework of principles and precedent” is precisely the value-added *desideratum* which the legal profession needs and wants—in other words, it *is* the very “new

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<sup>234</sup> Columbia Pictures, *Flatliners* (1990), screenplay by Peter Filardi.

<sup>235</sup> Gregory C. Sisk, “The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making” ((2008) 93 *Cornell Law Review* 873, takes this position, particularly with regard to the “content” versus the “outcome” analysis of case law. *Id.* at 885, citing Mark A. Hall and Ronald F. Wright, “Systematic Content Analysis of Judicial Opinions” (2008) 96 *California Law Review* 63, 121-22, for the proposition that “content analysis” is the best bridge between (to “cross-pollinate”) “traditional” legal knowledge” and “social science knowledge.”



contribution to knowledge” as defined in that community. It is how the “coral reef” of the common law is built up case by case, generation by generation. On the other hand, if the audience is the global scholarly community in law and all other non-law disciplines that law touches and concerns (the Legal System), then *their* definition of the “new contribution to knowledge” must prevail. The two spheres should not greatly overlap lest the Jack-of-All Trades Syndrome emerge. Neither sphere of legal research or legal scholarship can abide a dilettante. The differences between the two spheres of legal research and legal scholarship, the law and the legal system, should be recognized and embraced. One is not privileged over the other. If the difference between legal research and legal scholarship is at present perceived as odd, the solution is for the law school to embrace them both, to celebrate the differences, and to give full support to both worlds without conflating or homogenizing them. Students on either track should not have to “go outside” the law school to get the training they need. This is the conclusion reached by Manderson and Mohr, who note that—

“If legal advocacy is based in argument for a foregone (or pre-financed) conclusion, then the training of the advocate *cannot be reconciled with that of the legal scholar*. No graduate program has yet acknowledged the paradoxical implications of this position. A masters or doctoral program that wishes to take the idea of legal research seriously...*must look very different* from a law degree which trains outcome-oriented advocates, either at masters’ or undergraduate level.”<sup>236</sup>

They recommend dedicated and separate programs for each track where traditional legal researchers are not pressed into service for legal scholarship. Barkan reaches the same conclusion and notes that perhaps this is the reason “why so few faculty members are willing to teach legal research, and why the subject has traditionally

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<sup>236</sup> Manderson and Mohr, *op. cit.* at 5 *passim*, emphasis added.

suffered in status.”<sup>237</sup> Tracey E. George argues that a truly successful empirical movement in the law school must necessarily be “faculty-based as opposed to program-based” for the permanence, longevity, and funding they imply.<sup>238</sup> If “what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists,”<sup>239</sup> and if a PhD or other RPG credential awarded by a law school for traditional black-letter legal research is “no credential at all,” then the gap between these two worlds should be spanned by acknowledging the unique place of each in the legal world and ensuring that each receives the support and the legitimacy it needs to recognize its own special nature in its own unique sphere. In other words, their differences should be accentuated, not homogenized—and those differences should be made known to, and understood by, all newly entering RPG candidates. It may be too extreme to suggest that a student must choose between “thinking like a lawyer” and “thinking like a scholar,” but if Nibley is right, the student must understand the requirements of both worlds in order to make any choice. The coin of the realm in one sphere is of partial value in the other—and that is all right. RPG students who expect to get their research accepted within the global community of scholars must understand what they must do to compete in that larger context. These subjects should be the subject of at least annual in-house training conferences involving all the local stakeholders as well as invited guests from other jurisdictions concerned with the RPG community. And finally this must include the personal and institutional willingness on the part of faculty supervisors to co-supervise and to co-publish with members of non-law faculties and with their RPG supervisees in order to avoid the jack-of-all-trades problem. But as Professor Fortney notes:

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<sup>237</sup> Barkan, *op. cit.* at 407.

<sup>238</sup> Tracey E. George, “An Empirical Study of Empirical Legal Scholarship: The Top Law Schools” (2006) 81 *Indiana Law Journal* 141, 149-50. I thank Zul Kepli Mohd Yazid Bin, one of my RPG students, for making me aware of this source.

<sup>239</sup> Huffmann, *op. cit.*

“Many academics work in universities housing numerous experienced empiricists. Unfortunately, law professors who want to recruit the assistance of social scientists may face *institutional barriers* to doing so, such as internal accounting and grant administration practices that complicate such collaboration. A network of empirical researchers may provide information on models of collaboration and joint ventures between law professors and researchers in different parts of the university.”<sup>240</sup>

A way to help address these problems of barriers or impediments for RGP students is to see combinations of empirical, jurisprudential<sup>241</sup>, and archival research as three methods to identify, supplement, and potentiate more clearly their research questions, goals, strategies, “gaps,” and “new” contributions—particularly if the basic research program is black-letter law. The jurisprudential component suggests the possibility of choosing research questions that engage the moral and ethical senses beyond the purely textual problems of the canons of construction. One current example of this is the rapidly developing area of “savior siblings”—children specifically conceived in a kind of “genetic supermarket” to benefit a living sibling with a genetic disorder.<sup>242</sup> The choices among all these possibilities need not be binary. A properly designed research project can have both fish and bear’s paw. The idea can be diagrammed thus:

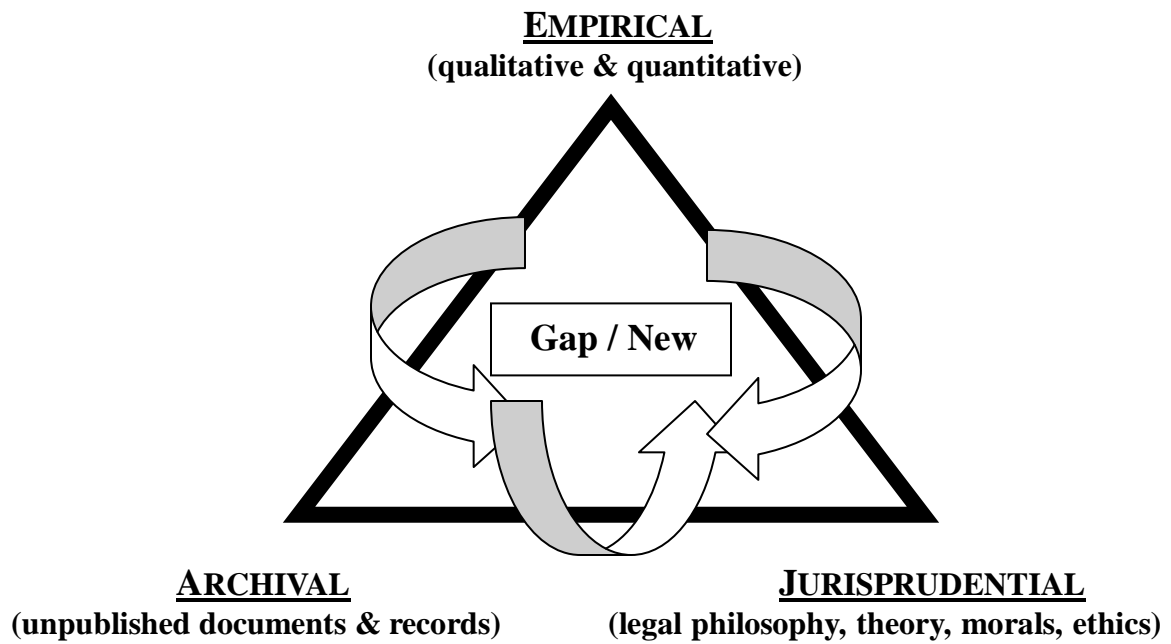
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<sup>240</sup> Susan Saab Fortney, “Taking Empirical Research Seriously” p. 1482 (emphasis added). Daintith, *op. cit.*, also addresses this question of impediments.

<sup>241</sup> For example, the work of such writers and John Rawls, Lon Fuller, H. L. A. Hart, Ronald Dworkin, Joseph Raz, and others. Jurisprudence examines such questions as justice, equality, fairness, ethics, political philosophy, virtue, natural law, and the like, and attempts to theorize them into systems of analysis about “what is law?”, “what ought law to be?”, and “what is the ideal society under the rule of law?”

<sup>242</sup> M. Spriggs, “Is Conceiving a Child To Benefit Another Against the Interests of the New Child?” (2005) 31(6) *Journal of Medical Ethics* 341; Colin Gavaghan, *Defending the Genetic Supermarket: The Law and Ethics of Selecting the Next Generation* (Abingdon: Routledge-Cavendish, 2007).

**Figure 5**



But it must also now be apparent that all of the key terms under consideration here—gap, new, contribution, knowledge, and the several dichotomies—have application beyond the subject of any particular RPG research project. They apply as well to the RPG program and to the academy itself. As for the academy, it should constantly be striving to fill the gaps in areas of study and expertise where it is weak. Instead of admitting new RPG students who propose to research yet again the same topics as their predecessors with only minute differences, students should be sought whose proposals truly predict that they will make a significant breakthrough in the global body of knowledge. Every RPG student should be required to demonstrate the *sine qua non*—how s/he plans to leverage his/her presence in *this* program, at *this* university—to demonstrate what gap s/he can fill and what new contribution s/he can make only *here*. It may be indicative of the lack of a truly “new” thesis if the proposed project could be accomplished somewhere else at a lesser cost.

For many legal scholars, myself included, law really is a discipline unto itself. It is not “one of” the humanities, the social sciences, the sciences, the arts, or anything else.<sup>243</sup> It is the sea that touches and concerns all of these islands, and many more besides. In this metaphor we see a definition of “the legal system” that is much more expansive than the courts, the prisons, the legislature, the legal profession, and so on. It includes everything that the law touches and concerns—which is everything: medicine, sex, broadcasting, shipping, football, astrophysics, hot dogs, ships, shoes, sealing wax—everything. The law is not the legal system (“the map is not the territory”), but they are related. Sir Edward Coke, who spoke of the “artificial reason and judgment of law,” gave in the *Institutes of the Laws of England* this most enduring metaphor about an ideal law student: “Our student shall observe, that the knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding.”<sup>244</sup> This

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<sup>243</sup> Interdisciplinary work might bring the fields together in a comparison between cause and effect in tort and in science using, for example, Ernst Mayr, “Cause and Effect in Biology” (1961) 134 *Science* 1501.

<sup>244</sup> Edward Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary Upon Littleton, Not the Name of the Author Only but of the Law Itself* Vol 1 (London: Clarke, Pheney and Brooke, 2 vols,

much is famous and is taught by rote to new law students even today. But the rest of Coke's paragraph also bears quoting at length:

“He that reacheth deepest, he seeth the amiable and admirable secrets of the law, wherein, I assure you, the sages of the law in former times...have had the deepest reach. And as the bucket in the depth is easily drawn to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawne up but with great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, *so long as he keepe himselfe in his own proper element.*”<sup>245</sup>

In this study we have defined THE LAW and THE LEGAL SYSTEM (as well as the other dichotomies) as the two such equal and “proper elements.” Surely the great company of the sages of the law, in their deepest reaches, admit no dilettante there. In this lies the challenge of crafting appropriate ways to make a “new contribution to knowledge” in RPG legal studies without forcing one element into another, nor being forced into a mold which legal scholarship cannot abide—in other words, of keeping each RPG student herself within her own proper element so as to draw the bucket “without any heavy burthen.” Like the Flemish peer-review committee which we discussed earlier, we should “continue to work on the development of criteria for measuring research performance in the field of Law.” It is an unfinished task. At the same time, the traditional law school will not be abandoned, either—of course. The two must stand on

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rev ed, 1823), “Of Escuage” L.2.C.3. Sect. 96 [71.a.]

<sup>245</sup> *Id*; original Italics for the Latin, final emphasis added for the English. The Latin means, “No element is heavy in its own proper place.” “Escuage” (scutage) is an ancient property term of Medieval usage meaning the chief form of feudal tenure, in which personal service in the field was required for forty days each year.

equal footing as we draw the buckets up. In the quest for something “new, grand, wild, yet regular,” curricula and classes cannot provide everything. Ultimately, as Nibley says, each student must assume responsibility for acquiring the requisite tools and skills—“*one must get them.*” There is a point after which they cannot be *given*. We are nowhere near that point yet. The Teacher said: “There is nothing new under the sun.”<sup>246</sup> RPG students should never be in the position of thinking they have produced something objectively new, when in reality they have only produced something subjectively analytical.

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<sup>246</sup> *Old Testament*, Ecclesiastes 1:9. “What has existed before will exist again, and what has been done before will be done again.”

## THE TEN RULES REDUX

(with notes)

*The complicated histories of the law, the law school, and of legal education complicate the nature of any RPG law project.*

**Each RPG law program is embedded with a larger law program, school, university, and community. This makes each one unique or at least special in some ways. The most successful RPG student will learn the special nature of her school and program in which she, in turn, is embedded, and will figure out the best ways to navigate that milieu. This means cobbling together from this Guide and other sources—the “deepe well” of everything that is available to you—those materials and ideas that are useful, and disregarding the rest.**

*The standards that constitute a viable research question, subject, purpose, thesis statement, research gap, research methodology, and true “new contribution to knowledge” are all objective, not subjective, as determined by global standards.*

**The competition for the RPG “product”—both the student and her research—are global, and it is that total marketplace that determines their ultimate value. Learning to think globally this way is a core skill of successful RPG students.**

*The “new contribution to knowledge” may be paradigm-changing or incremental, but it may not be make-weight or trivial.*

**Even if something is new, it may not be important. The contribution must be substantive in terms of value and quality. It must really *add* value.**

*The “new contribution to knowledge” may be either found or created.*

**This expresses something of the traditional difference between legal “research” and “research” in the sciences and social sciences. “Found” knowledge may be existing information put forward or analyzed in a new way.**



*In addition to deciding early your subject, purpose, and (hypo)thesis, you must also determine early whether your research project will be primarily directed toward legal practice or legal scholarship.*

**Some people manage both, but generally these paths diverge in ways that make the research projects for each substantially different. Most RPG student prefer not to try to keep a foot in each arena. If you do combine the two, you must be absolutely clear about your purpose and methodology.**

*You must be fully credentialed and qualified to study each of the subjects that comprise your research project.*

**A “jack-of-all-trades” dilettante brings discredit to herself and the legal profession. The global academic marketplace demands true qualification for all subjects. Otherwise, your product will not “pass without objection in the trade.”**

*In order to deal with the requirements of the “new contribution to knowledge” and all the issues surrounding it, you must develop your own powers of adjudication independent of any other authority or source.*

**It is not sufficient to accept on authority the quality of someone else’s work just because it is authored by a powerful name or published in an influential peer-reviewed journal. You must decide for yourself what is or is not quality and be able to articulate the reasons for your decision. When you can recognize and explain quality in the work of others, you are more likely to produce it your own work.**

*As you work through your research project over time, you may have to educate yourself out of certain ideas by unlearning former habits of thought and research.*

**Legal thought and analysis are in some ways unique, and the mental processes of other disciplines, schools, and programs may not serve you well in the law. The adjustments you make inside these interstices are an essential skill for**

## **RPG students “of law.”**

*No RPG law project is mere reportage or narrative, but demonstration and analysis.*

**A mere “book report” does not qualify as true RPG work. Part of producing something new that will “pass without objection in the trade” is to analyze it properly. Real scholarly analysis is the hallmark of RPG work.**

*Your RPG research project will go more smoothly and produce greater results if you understand, embrace, and operationalize all of the foregoing nine rules.*

**Each of the Rules grows out of experience and study of what works in the modern academic marketplace, and following the Rules will help bring you on board as a fully qualified postgraduate and, ultimately, a credentialed member of the worldwide community of scholars.**

## APPENDIX A – DIAGNOSTIC QUIZ

### **ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)**

#### **DIAGNOSTIC QUIZ**

The following questions are not to be graded or marked. They are simply designed to test (or rather to reveal) your general knowledge of some basic research matters as we embark upon our study together this semester. Hopefully, they will help us all understand our various strengths, weaknesses, and desires in research skills and lead to further discussion. If you wish, you may work with another classmate on this Quiz. You will give me the original of this Diagnostic Quiz, which I will keep, so make a copy for yourself to place in your course binder.

1. Go to the Law Library and choose one book and one journal article that interest you. For the book, make a Xerox copy of the book's title page and its publication data (place and date of publication, publisher, copyright notice). For the article, copy the journal's title page (including volume number and issue number) and table of contents page. From these data construct two footnotes that would be suitable for inclusion in your research paper, thesis, or dissertation using the style of the *Hong Kong Law Journal* for footnotes. This can be found online and inside the back cover of any issue of the *Hong Kong Law Journal*. Write your footnotes in the space on the last page.

2. It can be safely assumed that if a scholarly article has been published in an established peer-reviewed scholarly journal, it has been properly vetted and is of guaranteed high quality and reliability.

TRUE

FALSE

3. “Plagiarism” can be most properly defined as—

- I Taking someone else’s words as your own
- II Taking someone else’s ideas as your own
- III Representing that you wrote something which you did not
- IV Writing an erroneous footnote

A. I and II only

B. I, II, and III only

C. IV only

D. I and IV only

4. Explain in one or two sentences the relationship between legal research and “thinking like a lawyer.”

5. Regarding primary sources:

I Published material is the most important primary source for legal research.

II Archival material is the most important primary source for legal research.

III Quantitative material is the most important primary source for legal research.

IV Qualitative material is the most important primary source for legal research.

A. All of the above

B. None of the above

C. I and IV only

D. II and III only

6. What is a “thesis statement”?
7. The primary purpose(s) of a footnote is/are—
- I To demonstrate your scholarship and erudition
  - II To impress your supervisor, editor, professor, and/or colleagues
  - III To help you avoid plagiarism
  - IV To assist others in finding your sources
- A. All of the above
- B. IV only
- C. I only
- D. I, III, and IV only
8. What is a “research gap”?
9. In doing postgraduate research work, as in your professional life generally, it is most correct to say that you are in competition with whom:
- A. The professor
  - B. Yourself
  - C. The exam
  - D. Each other
10. Go to the law library and find the following book, which is on reserve at the

circulation counter:

Jon Meacham, *American Lion*.

When you have the book, do the following two things:

(1) Write a complete and accurate footnote for the book using *Hong Kong LawJournal* style; AND

(2) Go to p. 128 of the book and read the penultimate paragraph that begins, "Images of war were on everyone's mind." Read the quotation inside that paragraph about "moral gladiatorship" from Mrs. Smith, and make a Xerox copy of the page. Then go to p. 405 in the Notes section at the back of the book and find the shorthand reference to the source of that Smith quotation from p. 128. Make a Xerox copy of that also. Then go to the Bibliography section at the back of the book (after the Notes section) and find the complete reference for that source. Make a Xerox copy of the correct source there and also copy that complete reference from the Bibliography section in this space here and bring it to our next class session for discussion:

Be prepared to explain your experience in completing this assignment, including any problems you may have encountered and how you solved them. By making Xerox copies of each step of your research, you thus create a permanent record of your research history to keep in your files. Why do you think I suggest this?

11. In most major pieces of RPG research (research papers, dissertations, theses), the most common, repetitive, and pervasive problem is:

- a) Poor English
- b) Poor logic and argument
- c) Poor footnotes and bibliography
- d) Poor format and structure

12. What is justice?

13. Do you love the law?

14. Will your research serve the cause of truth and justice?

APPENDIX B – PERSONAL INFORMATION WORKSHEET

**ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)**

**PERSONAL INFORMATION WORKSHEET**

Name & Student Number:

Name to use in class:

Complete contact information:

Have you confirmed that you are properly registered for this class?

When did you first matriculate at HKU?

What is your anticipated date of completion of your work and graduation?

RPG Degree Programme or Study Path (i.e., PhD, LLM, SJD, etc.):

Is your study programme a research programme or a taught programme?

Country of origin & native language:

Name of Supervisor(s), Principal Faculty Contact(s), or Mentor(s):  
:



Would you recommend your Supervisor, Principal Faculty Contact, or Mentor to be a guest speaker in this class?

Why have you chosen the HKU Law School?

What do you expect to get from this class?

How do you plan to leverage your residence at HKU in your research project? How will you operationalize that unique experience so that your finished product demonstrates “Hong Kong characteristics” / 香港特色? How will you take advantage in your research of Hong Kong’s freedoms of press, speech, research, and education?

Research Topic, Title, or Project:

Why have you chosen this topic, title, or project?

Will your research project be—

- \_\_\_\_\_ Black-letter/doctrinal
- \_\_\_\_\_ Empirical (Quantitative, Qualitative)
- \_\_\_\_\_ Archival
- \_\_\_\_\_ Theoretical, Jurisprudential, Philosophical
- \_\_\_\_\_ Other (specify)

The Research Gap to be filled:

The Thesis Statement:

Reason(s) for being in this class; desired help or results from this class; special needs.  
(Don't write "because it's required." Your answer must be substantive, not cursory.)

Why are you here? What is the *sine qua non* of your presence at this University? What aspect of being at *this* University, in *this* city, in *this* RPG program, that *this* time, is necessary to your RPG project and could not be obtained anywhere else? How will your being here add value to your RPG project?

Assignment: Identify and get to know at least two (2) RPG students who are ahead of you here at HKU by at least a year. These two students will be your mentors in assisting you with your research work. In turn, you will assist them by sharing with them new information from this class and other sources which they have not yet received.

Provide the names of these two RPG students here in the required format:

You are welcome to write on the back of this page or attach additional pages if your substantive answers require more space.

Attach to this Worksheet a complete paper copy of research proposal which you submitted to the HKU Graduate School as part of your application for admission to your RPG programme.

## **ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)**

### **TRANSLATIONS, COPIES, MICROFILMS, & NEWSPAPERS: A TRUE RESEARCH DETECTIVE STORY FROM HAWAI‘I**

A few years ago, when I was still living and practicing law in Hawai‘i, I was conducting some research on Hawaiian legends and stories as part of my preparation of a scholarly article.<sup>247</sup> In the library of the Bishop Museum in Honolulu, I had found an English translation of an ancient Hawaiian story that contained some elements which were perfect for the subject of my research. However, I first wanted to read the story in the original Hawaiian language—that, not the translation, would be the primary source. I do not trust translators. Through much sad experience, I have learned that many translators are liars. They leave things out; they change things; they add things. They have their own agendas; they often interpret instead of translate. And I don’t like being lied to. Furthermore, *translations are secondary sources while the original language is the primary source.*<sup>248</sup> Hence, I prefer to read things in the original language.<sup>249</sup> In any case, for scholarly research I was obligated to read the original source. And since I read Hawaiian, going to the primary source of the story in the original language would be easy.

According to the translator’s notes, the original publication of the story had

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<sup>247</sup> Robert J. Morris, “Same-Sex Friendships in Hawaiian Lore: Constructing the Canon” in Stephen O. Murray (ed), *Oceanic Homosexualities* (New York & London: Garland Publishing, 1992), pp. 71-102.

<sup>248</sup> Unless, of course, the subject of your study in the translation itself or the translation process itself. In that case, it would be the primary source.

<sup>249</sup> Robert J. Morris, “Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation” (2006) 51(3) *Journal of Homosexuality* 225.

occurred in a Hawaiian-language newspaper in the 1860s. There were many such newspapers published in those days. However, the original copies of these newspapers are old and in very fragile condition. Many have been destroyed through neglect. The paper on which they were printed is rapidly disintegrating. They cannot be replaced. The newspapers that have survived are therefore stored in a special vault in the Bishop Museum<sup>250</sup> in Honolulu where the atmosphere and temperature are carefully controlled. They are not available to the general public. If they were brought out of their special vault into the open air and touched by many hands, they would quickly disintegrate and be lost forever. Only the Hawaiian translator who made the English translations had ever been permitted to work from those originals, and that was 50 years ago. She has long since died.

Therefore, those who wish to study the materials contained in those newspapers must do so using microfilms. Some years ago, in a massive project that took several years, all the Hawaiian-language newspapers were microfilmed with copies of the films being placed in all the libraries and museums in Hawai'i. They are readily available to the public and easy to use. In my case, I purchased my own microfilm reader plus copies of the films I used the most.

The microfilming was done at the Bishop Museum by a group of trained microfilmmers. It works this way: The microfilm camera sits atop a frame and looks straight down at the table on which the document to be filmed is placed lying flat. The microfilmmer snaps the picture of a page, turns the page, snaps that picture, and so on through each page of the document. Each frame of film contains the image of one page of the document. Each roll of microfilm may contain hundreds or thousands of images. All the master negatives and master microfilms are kept at the Bishop Museum.

Microfilms are nearly indestructible and can be used by many people with little or no damage. If one does become damaged, it is easy to replace it from the film's original

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<sup>250</sup> Information about the Museum may be read online at <[www.bishopmuseum.org](http://www.bishopmuseum.org)>. The English translations mentioned are housed in a collection entitled Hawaiian Ethnological Notes (HEN), information about which may be read at <<http://libweb.hawaii.edu/hnp/FAQ.html>>.

negative. So readings of the newspapers are made using only the microfilms on microfilm-reading machines. This is what I did. My intent was to make paper copies from the microfilm so that I could have my own permanent records for my files. Printing paper copies from the film is easy on modern microfilm reader-printers.

Since the English translation from which I was working gave a reference to the specific title, date, page, and edition of the newspaper from which it had been taken, I easily found the microfilm that contained that edition of the newspaper, and I eagerly began looking for the original Hawaiian-language article. *But it wasn't there!* I rolled the microfilm to the next page of the newspaper but found only other stories and advertisements. I rolled it back and found the same kinds of things. I looked and looked throughout that edition of the newspaper. There was no trace of my precious story. Maybe, I thought, the story was not printed on consecutive pages but was broken into several parts. Perhaps it was serialized in several editions of the newspaper. I checked and checked several previous and subsequent issues, but I could find nothing. I went back again and again to the English translation to see if I could find any clue as to where the story had come from. I found nothing more to help me. Then I thought that perhaps the translator had inadvertently written the name of the wrong newspaper. Maybe the article actually occurred in some other newspaper on that same date. So I searched other microfilms of other newspapers and found that they not only did not publish editions on that same date, but the article did not appear in any of them on nearby surrounding dates.

In desperation, I went to other libraries and museums in Honolulu to check their microfilms, but I still found the same thing. All of them had the same copy of the same film, and all had the same problem. I asked their staffs for help—all to no avail. I even went to the Bishop Museum itself to check their master microfilm, and I found the same thing. So where had the translator got this story?

I felt sick at heart (and sick to my stomach). The situation was serious because I had included a reference to this story in the manuscript of my article that an editor had accepted for publication in a scholarly journal, but the acceptance was conditional upon my confirmation of the accuracy of the translation. The editor was not satisfied with a

footnote referring to the secondary (English-language) source. He wanted me to verify the original text and footnote that. The story was central to my article. The deadline was fast approaching, and if I could not confirm the story's accuracy, the editor said I would have to delete it entirely from my manuscript. This would create a serious deficiency in my article. So time was of the essence, and I was starting to panic. I had to find a way to confirm the story—the whole story in the original Hawaiian text. The substance of my article absolutely depended on it.

### **WHAT WOULD YOU DO AT THIS POINT?**

As you consider these problems and your solutions to them, keep in mind this Hawaiian proverb: *Ma ka hana nō ka 'ike, a ma ka 'ike nō ka mālamalama*—Knowledge comes through hard work, and wisdom<sup>251</sup> comes through knowledge.

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<sup>251</sup> *mālamalama* = the light of knowledge, clarity of thinking.

## Afterword

What, then, must we do? How do you sort through all the questions, problems, dichotomies, and pitfalls we have discussed here? It can seem like a dense thicket. Professor Llewellyn wrote about the undergraduate study of law in such terms, but his words apply to RPG work as well:

So, gentlemen, the prospect: the thicket of thorns.... Details, unnumbered, shifting, sharp, disordered, unchartable, jagged. And all of this that goes on in class but an excuse to start you on a wilderness of other matters that you need. The thicket presses in, the great hooked spikes rip clothes and hide and eyes. High sun, no path, no light, thirst and the thorns.—I fear there is no cure. No cure for law but more law. No vision save at the cost of plunging deeper. But men do say that if you stand these thousand vicious gaffs, if you fight through to the next bush, the gashing there brings sight.<sup>252</sup>

“No cure for law but more law.” No cure for RPG work but more RPG work. What is your way forward? I have several suggestions as a checklist.

- Write a mission statement that sets out your core competence.
  
- Plunge deeper. “[T]he knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding.”<sup>253</sup> The “deepe

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<sup>252</sup> Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Dobbs Ferry, NY: Oceana, 1951), pp. 105-06.

<sup>253</sup> Edward Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary Upon Littleton, Not the Name of the Author Only but of the Law Itself* Vol 1 (London: Clarke, Pheney and Brooke, 2 vols, rev ed, 1823), “Of Escuage” L.2.C.3. Sect. 96 [71.a.]



well” is global. “The law is the calling of thinkers.”<sup>254</sup> Learn all the knowledges (*nā ‘ike apau*).

- Know the questions, problems, dichotomies, and pitfalls—accept them, embrace them, take them on board, and use them creatively. Understand that they are evolving. “It is as it is.”<sup>255</sup> Do not fight it.

- Study your particular law school, supervisor, university, and RPG program to identify precisely where they situated in this RPG milieu, and make sure you are comfortable and competent to operate within it. Know what its “thousand vicious gaffs” are. Conduct this study with as much care and detail as you will devote to your RPG research study itself. Stay aware of the evolution of this educational milieu and adjust to it.

- Make sure you understand what is demanded of you objectively in the global academic world. Know exactly where you stand in relation to Column A and Column B, and devise a thorough-going plan that maps your RPG project well into the future based on that understanding.

- Understand the difference between “further” and “higher” education, and make sure your RPG project can be described as the latter.

- Make certain that you know exactly what counts as “new,” as a “contribution,”

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<sup>254</sup> Oliver Wendell Holmes, Jr., “Lecture Delivered to Undergraduates of Harvard University on February 17, 1886” in Sheldon M. Novick (ed), *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (Chicago and London: University of Chicago Press: vol 3, 1995), p. 472.

<sup>255</sup> Said to be the motto of Edward III (1312–1377), and cited as such on the frontispiece of Pearl S. Buck, *A Bridge for Passing* (New York: Pocket Books, 1962), frontispiece.

and “knowledge,” and as “research” with regard to the particular subject, purpose, and thesis of your RPG project, and that you stay attuned to those realities through the duration of your work. If any of the requirements change, you must adapt accordingly. *Improvise, adapt, overcome.*<sup>256</sup>

- Learn and know how to deploy with expertise every tool and resource available to you in your study. If you must get special tools in order to conduct your research, then do so early. For example, if you need competence in statistical analysis, interviewing technique, archival research, the theory and discipline of a non-law subject—then you must get it. If you are doing comparative law, international law, or interdisciplinary law, you must get the languages and cultural knowledge of those fields. Your mastery of research technology—hardware, software, the Internet, databases, new and emerging technologies—must be right up-to-date and fluent.

- You must understand the differences in framework and theory of different disciplines such as, say anthropology and social science—the intense observation of one culture, versus the intense observation of many cultural situations. If the law school does not provide these tools, then you must go to get them elsewhere.

It is a great double privilege to be admitted to an RPG program to study law—first because it is a privilege to be an RPG student, and second because it is a privilege to study law. There has never been a greater need for quality research in law and a global vision of what quality research is all about. There has never been a time when justice and the rule of law are more in need of articulation by true scholars. This is important work, and I congratulate all who have become part of this community. Dr. Nibley wrote:

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<sup>256</sup> Said to be an unofficial motto of the United States Marine Corps.

The ever-increasing scope of knowledge necessary to cope with the great problems of our day has led to increasing emphasis on a maxim that would have sounded very strange only a few years ago: ‘There are no fields—there are only problems!’—meaning that one must bring to the discussion and solution of any given problem whatever is required to understand it: If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years—or else shift to some other problem. Degrees and credentials are largely irrelevant where a problem calls for more information than any one department can supply or than can be packaged into any one or a dozen degrees.<sup>257</sup>

Doing these things is your peculiar task. You must invent it. Your RPG work is a *causa sui* project, and you are both the teacher and student. The ancient Chinese classic *The Book of Rites* 禮記 contains a section on “Academics” 學記 that has much good insight for RPG students. It says:

“Learners have four shortcomings which the teacher must understand. Some err because of the multitude of their studies; some in their fewness; some in their feeling of ease; and some in the readiness with which they quit. These four shortcomings are due to the differences of their minds. When a teacher knows the character of her own mind, she can rescue the learner from his own shortcomings. Teaching should nurture the student’s strengths, and correct his shortcomings.”

學者有四失，教者必知之。人之學也，或失則多，或失則寡，或失則易，或失則

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<sup>257</sup> Hugh Nibley, “A New Look at the Pearl of Great Price, Part I: Challenge and Response (Continued)” (Feb. 1968) 71 *Improvement Era* 14 (emphasis added).

止。此四者，心之莫同也。知其心，然後能救其失也。教也者，長善而救其失者也。

You may arrive at your RPG program full qualified as measured by these standards, or you may arrive, as do many—perhaps most—RPG students, in need of some preliminary remedial work. Whatever the case, you are first of all your own teacher and the creator of your research project. Take stock of yourself, teach yourself, open your eyes and lift your sights high, for the wolf is always at the door. The exam is always scaled, and “once again, as in life, you are not in competition with me, yourself, or this exam, but with each other.”<sup>258</sup> The world market will judge you objectively to decide whether your product—and you—can “pass without objection in the trade.”<sup>259</sup> As you cobble all of this together, you will find that your unique RPG project is both an act of creation and of self-creation. Ultimately, that is the final meaning of the “new contribution to knowledge.”

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<sup>258</sup> Columbia Pictures, *Flatliners* (1990), screenplay by Peter Filardi.

<sup>259</sup> Uniform Commercial Code 2-314.

## ABOUT THIS BOOK

This book has grown out of a long-established traditional class in Advanced (Legal) Research Methodology (ARM) at the University of Hong Kong (HKU) Faculty of Law, Department of Law. It is a required class for all Research Postgraduate (RPG) Students in law, but it often includes undergraduates, non-law students, students from other universities, and many others who want to learn more about sophisticated legal research techniques. My first encounter with the class was as an RPG student when I started my PhD studies in 2001. The teacher was Professor Jill Cottrell, whose book, *Legal Research: A Guide for Hong Kong Students*, is still a standard work.<sup>260</sup> In following semesters, I had the privilege of co-teaching the class with Jill, and these pages reflect much of her influence and pedagogical philosophy. Her text is still one of the foundational sources for the ARM course, and I assign it for two reasons. First, it teaches the skills of basic legal research—black-letter, doctrinal research. Second, and just as importantly, it is jargon-free. Jill writes with simplicity and springboard lucidity—skills I want my RPGs to see and practice. I also co-taught the class with Professor Michael J. Dilena for one semester, and his counsel on “how to get a PhD” is also reflected here. As was the practice of both Jill and Michael, I invite guest lecturers to share their personal experiences and wisdom (we call them “war stories”) with each class. Among our regular guests have been Fu Hualing (department head) and Albert Chen (my own PhD supervisor)—of the HKU Faculty of Law—and many others. They have all told us some tremendous (and often harrowing) war stories. I thank all of them. Their influence is present in these pages also.

The idea of “war stories” is what makes this book very personal and even, perhaps, idiosyncratic (one reader called it “quirky”). RPG students are a special breed, and they often work in uncharted territory. They are the elite. They need the basics of

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<sup>260</sup> A useful follow-on text is John Bahrij, *Hong Kong Legal Research: Methods and Skills* (Hong Kong: Sweet & Maxwell Asia, 2007).

advanced research certainly, but they need something more. They need to see in their leader a role model, a coach, a mentor—someone who has been through what they are going through and succeeded. “Soldiers deserve soldiers.”<sup>261</sup> It is very easy, sitting in a study room with a computer and a pile of books for several years, for an individual RPG student to feel alone and to start believing that the doubts and fears and discouragement that beset all RPG students are unique to him/herself. War stories dispel those bugaboos. War stories say, *I fought in the same trench you are fighting in, and I survived. Here I am, alive and kicking. If I can do it, so can you. I’ll be with you all the way to the other side.* Whoever uses this book should see it as a model for this kind of approach. The book can be used by anyone studying law for research purposes, even if that study is not within the context of the law school.<sup>262</sup> The “counterparts” of the title means non-law students working outside the law school.

As an RPG student, I was also required to take a short course offered by the HKU Graduate School called “Introduction to Thesis Writing,” for which there was a section for the sciences and another for the “humanities and related disciplines.” I took the latter because I was assigned there due to the common perception that “law is one of the humanities.” Shortly after I finished that class, most (but not all) of the course materials were published by the HKU Press as *Dissertation Writing in Practice: Turning Ideas Into Text* by Linda Cooley and Jo Lewkowicz. This book, also, along with the many other resources listed in the chapters that follow, is one of the foundational sources for my ARM class.<sup>263</sup> Both the “Introduction” class and the books are excellent, but as any law student who engages either will admit, there is something of a misfit. Law has many connections with the humanities, as with the social sciences and, indeed, the sciences,

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<sup>261</sup> Warner Bros. Pictures, *Soldier* (1998), screenplay by David Webb Peoples.

<sup>262</sup> Robert J. Morris, “Improving Curriculum Theory and Design for Teaching Law to Non-Lawyers in Built Environment Education” (2007) 25(3/4) *Structural Design* 279.

<sup>263</sup> Along especially with Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Maidenhead: Open University Press, 2005). Despite the book’s title, it is useful for students of all advanced degrees, not just the PhD.

and the arts—but it is not any one of them. It defies being categorized in any one academic locale. Law, and therefore legal research and writing, are *sui generis*, as law students and teachers in “Introduction to Thesis Writing” themselves admit. The reason for this is not difficult to understand. There is no subject or activity of our modern lives that law does not touch and concern. If other subjects, categories, and pigeonholes—sciences, social sciences, arts, humanities—are the islands, law is the sea.<sup>264</sup> Hence, there is a gap, and a rather large one, between what those non-law materials can teach a law student and all that a law student must know and master in order to conduct successful RPG work. But here is the irony. Law RPG students who want to expand their research beyond black-letter subjects will move into non-law areas, and there they must master exactly those materials and methods that seem to be otherwise “misfit.” The fit, in fact, becomes perfect.

This is one reason the Faculty of Law provides both undergraduate and postgraduate courses for its students in *legal* research and writing in addition to the general courses of the Graduate School. It is the reason the word “legal” is appended as an adjective before “research and writing” in the previous sentence, and the reason we have a dedicated *law* library in addition to the university’s main (general) library, medical library, etc. To a certain extent, such a distinction is important, and to certain extent it is not. On a most basic level, good research is good research is good research, just as good writing is good writing is good writing. The principles are the same across the board and across disciplines. It is in the interstices between that basic level and the special task of *legal* research and writing—especially for RPG students—that the present text addresses and, hopefully, problematizes in useful ways for RPG students.

One of the tasks of the law school is to teach its students the practice of “thinking like a lawyer,” just as the medical school, for example, must teach its students to think

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<sup>264</sup> Robert J. Morris, “Globalizing and De-Hermeticizing Legal Education” (2005) 1 *Brigham Young University Education and Law Journal* 53.

like doctors<sup>265</sup>, and the Philosophy Department must teach its students to think like philosophers.<sup>266</sup> And “thinking like a lawyer” is, in many ways, different from thinking like anything or anybody else. Thus, pure legal research itself has many aspects that researchers in other fields would find strange and foreign. “Pure” research means the study of statutes, rules, regulations, cases, and constitutions—in other words, texts, “black-letter law”—and their intellectual manipulation into legal analysis. If a student undertakes to study other matters such as the prison system, the operations of government, the statistics of police arrests, the operations of the legislature or the governor’s office, or the Legal Aid system, those are studies properly described as The Legal System instead of The Law.<sup>267</sup>

In sum, then, it is the misfits—these *lacunae*—that form the gaps which this book designs to fill and explain. I have not designed these materials to substitute for the other resources mentioned above. The user of these materials will soon discover that I recur to the other resources again and again. But these materials reflect the special nature of the ARM class itself. First and most importantly, ARM is not based on lectures. Nor is it based on a standard “cookie-cutter” curriculum such as, say torts or contracts which provide a certain body of knowledge that must be “covered” and mastered. I never prepare a class syllabus or calendar ahead of time, and I do not know until the first day of class, when I first meet the students, what shape the course will take that semester. Even then, I only get a glimmer. It is in that first meeting that I ask them to complete the Diagnostic Quiz and the Personal Information Worksheet (Appendix A and Appendix B) so that we can get some idea of what they want and need from the class. I do not assume

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<sup>265</sup> Although pedagogical methods may be borrowed between the two, as noted in Richard Wu, “Reform of Professional Legal Education at the University of Hong Kong” (2004) 14(2) *Legal Education Review* 153, 166 note 48 and accompanying text.

<sup>266</sup> Robert J. Morris, “Not Thinking Like a Non-Lawyer: Implications of ‘Recognization’ for Legal Education” (2003) 53(2) *Journal of Legal Education* 267.

<sup>267</sup> This is the burden of explanation in Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (London: Pearson/Longman 2007).



that they know entirely what they want or need—or that I know beforehand who they are or what they need.<sup>268</sup> Surely, I know, they need the basics, and the basics must be reinforced and taught again and again. The truth is that even for some RPG students, much of the “advanced” class is an introduction to legal research. As we then sit in a communal circle and share those documents and our personal war stories with each other, we begin to form some consensus of what the next few months must accomplish and what things will be true for all of us then which are not yet true at the inception. Only then can I begin to pick and choose from the many resources available that combination of things which will, hopefully, get us to those desired endpoints. Thus, ARM is a highly *tailored* class. Even then, the process remains extremely fluid throughout the entire semester because we constantly surprise each other. As the class unfolds, new insights, desires, and directions incessantly reveal themselves. The tailoring is a constant, ongoing process—producing as much as 1/3 new or altered materials each time. Malleability is the primary characteristic of all these materials. As Sunzi teaches in *The Art of War*, we must remain constantly open to the fluidity of the battlefield situation. It would be a rare semester that used everything from the previous year, or that did not witness the creation of new teaching materials. Like Sunzi and warfare itself, I intend much of my approach to be disruptive of complacent practices, assumptions, and methods.

As noted above, I make frequent invitations to guest “lecturers” in the person of Faculty colleagues who are known for their excellent research abilities and most of whom are supervisors of RPG students. I invite them to come for the first hour of the three-hour session to tell the class whatever they think is important, as a sort of “last lecture” exercise, in doing legal research. Inevitably, however, the guest ends up staying for the entire three hours because the students have many, many questions, and the discussions are lively. Multiple heads and multiple viewpoints are better than one, and it is important for students to learn as many avenues of approach to sophisticated research as possible.

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<sup>268</sup> Anthony D’Amato, “The Decline and Fall of Law Teaching in the Age of Student Consumerism” (1987) 37(4) *Journal of Legal Education* 461, 475 (deploring the fact that “students now define what it is to learn”).

There are many ways to “skin the research cat” while still remaining true to the basic principles.

One “regular” visitor every semester is our Law Librarian, whose PowerPoint presentation covers a wide gamut of library skills and insights that we refer to in virtually every session thereafter. Her materials are included in this book, with profound thanks. This supplements other courses in such skills as computer-assisted research available in the law library, the self-taught walking tour, and training in Westlaw and Lexis-Nexis. I try to schedule her visit within the first two or three sessions of the semester because the skills she has to teach are fundamental and cannot be delayed. The only reason we wait for a week or two before her presentation is so that we can cover the initial orientation materials and I can “prepare the ground” a bit in anticipation of her arrival. In inviting our other guests, I try to choose people whose research expertise and experience match the needs of the students as discovered in the ongoing tailoring exercise. But even then, the guests always bring up some surprises, some aspects of their backgrounds and practice that we did not anticipate and that send us in new and exciting directions.

After each class session, I immediately debrief myself and prepare an extensive set of follow-up notes which I email to the students within a day or two. These notes help to summarize and solidify in written form the teachings of that session and set the stage for the next session, which I try to project in broad outlines, sometimes with written or reading exercises. These follow-up notes are very specific to each unique session. I provide these notes right up until the final two sessions of the semester, at which point I stop doing the follow-up work and assign the students to write their own summaries. By that point they have seen me do this job for nearly three months, and it is time for them to fledge their wings in accurately and thoroughly summing up a detailed and complicated legal discussion. It is a central skill in legal research.

In ARM we don’t do much writing. This is advanced *research* methodology, as our official syllabus commands, and we have our hands full just getting through all we need to do in the semester’s study of research methods. Were I to require much writing, the requirement could arguably be viewed as *ultra vires* of our syllabus. What writing

the students do prepare is graded solely for the evidence it presents of research. Ideally, we would undertake both research and writing in a circular feedback and re-folding into each other, as the two activities potentiate and complement each other. In this era of “outcome-based education,” in which pedagogical success is measured by the students’ end results, not the teacher’s resume, this is what we should be doing. However, that would require two full consecutive semesters, and the time is not, as of now, available. Also, we hope that each student’s supervisor will keep close tabs on the writing itself. In order to facilitate a kind of mutual assistance in this regard, I make it a point to extend a personal invitation to the supervisor of each student in the class to join our sessions as often as practicable. Some accept the invitation; some do not. In any case, we measure progress by demonstrable reported achievement in solving knotty research problems in creative ways. Thus, we try to learn both theory and practice. As Sunzi taught: “You may *know* how to win without being able to *do* it.”<sup>269</sup>

Over thirty years ago, I sat in Professor Wayne Thode’s combined torts and civil procedure class at the University of Utah College of Law. It was the first day of law school, and we were scared, frightened to death of the mountain we had yet to climb. Professor Thode’s first words were: “You and I have a long road to travel together.” Little did we know how long and how arduous the climb on that road would be. Nevertheless, we got through it. Advanced RPG legal research is the same, but with the “warrior spirit” it can be done. We also sat in the law school’s moot courtroom for a welcoming lecture by Dean Walter E. Oberer. He told us he hoped our study of the law and lifetime practice of the law would make of us “skeptics but not cynics.” It took me many years to understand the wisdom of his remark. It is easy in the modern world to become cynical. Legal research should, among other things, be fun and uplifting—and lead to skepticism but not cynicism. I thank Professors Thode and Oberer for their challenges. This book is dedicated to those challenges.

On Monday, September 17, 1787, Dr. Franklin rose to speak in the federal

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<sup>269</sup> 《孫子兵法》勝可知，而不可為。

constitutional convention and said:

"Mr. President, I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better Information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others."<sup>270</sup>

In our time, Justice Souter, in praise of a famous law professor, began a speech by noting:

"[Judge] Learned Hand said once that he would like to have posted over the door of every church and school, every courthouse and legislative hall in America, the words of Cromwell to the Scots before the battle of Dunbar, begging them to consider that they might be mistaken."<sup>271</sup>

In that spirit, I would, of course, appreciate hearing from anyone who uses this book. Please tell me ways to make it better, and please—above all—share with me your war stories.

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<sup>270</sup> Max Farrand (ed), *The Records of the Federal Convention of 1787* (New Haven & London: Yale University Press, rev ed, vol 2, 1966), pp. 641-42.

<sup>271</sup> David H. Souter, "Gerald Gunther" (2002) 55(3) *Stanford Law Review* 635.

## GLOSSARY

**Adjudication** – the process of legal and scholarly analysis whereby the RPG student evaluates and passes independent judgment on the quality and veracity of the work of other authors or sources

**Audience** – the total potential market of readers, scholars, and adjudicators for the RPG student’s scholarly work; an RPG author must assume, unless s/he knows otherwise, that the audience is intelligent but uninformed

**Core Competence** – the one skill or ability that each RPG student brings specially to his or her own research project

**Further Education** – more of the same education, or same kind of education, that the student has already received, the value of which is adjudicated subjectively

**Gap** – a lacuna in the existing body of knowledge that exists because of carelessness, ignorance, lack of research, lack of data, lack of insight, and/or lack of analysis

**Globalization** – the process of internationalizing the objective standards and expectations of acceptable academic work for RPG students beyond and across local, national, and jurisdictional boundaries

**Higher Education** – education that produces theory and analysis leading to a new contribution to knowledge, the value of which is adjudicated objectively

**IRAC** – a popular and commonly used acronym (Issues, Rules, Applications, Conclusions) which guides students of the common law through the traditional steps of

legal analysis

**Jack of all Trades** – someone who tries to do many things, to “be all things to all people,” without having the qualifications or credentials, i.e., a dilettante without a real core competence

**Knowledge Economy** – the globalized market for scholarship, research, and information which conceives of these as marketable, and therefore competitive, commodities or products and of education as a business

**Knowledge Exchange** – the process of moving knowledge discovered by research and scholarship out into the larger community beyond the university and the “ivory tower”

**Law** – the written cases, statutes, ordinances, rules, and regulations officially created by any jurisdiction, often referred to as “black-letter law” and “positive law”; the ability to analyze and practice the law is often referred to as “thinking like a lawyer”

**Legal Research** – the traditional system and methods of black-letter research using the tools and sources of the law, often called “doctrinal” research

**Legal Scholarship** – the systems and methods of research and analysis of the legal system, using not only legal research but the methods of other disciplines as well, including archival and empirical research with statistical analysis

**Legal System** – the departments, bureaus, offices, services, and other governmental organizations that administer and enforce the law, including the courts, executive departments, and legislative offices, plus the penal system, the political system, and so on

**New Contribution to Knowledge** – the requirement of all RPG research that it add, by

the process of innovation, new thinking, inventive research, and fresh analysis, something of substantive value to fill a gap the existing body of knowledge

**Operationalize** – to develop an active program of putting into practice the statements of subject, purpose, and thesis in order to bring all facets of the research project to a successful conclusion with a publishable thesis or dissertation that makes a new contribution to knowledge and that is itself a product which can be exported through knowledge exchange

**Pass Without Objection in the Trade** – the ability of RPG research to be accepted anywhere according to the objective global standards for academic work

**Plagiarism** – representing as one’s own (i.e., without proper attribution) the words, work, thoughts, or ideas of another from whatever source

**Postgraduate** – all degrees and programs, usually administered or overseen by the graduate school or graduate department of the university, that come after the basic undergraduate degrees and programs, however denominated by individual institutions

**Research postgraduate (RPG)** – postgraduate degrees and programs (usually masters and doctoral) that lead to a final written dissertation or thesis primarily through a program of guided and supervised research by the RPG student, as distinguished from a “taught” postgraduate program (TPG) in which class work predominates

**Thesis Statement** – the expression of the author’s own viewpoint and stance regarding the subject and purpose of the research; the expression by which the author “stakes her claim” to the subject territory

**Value** – the worth, merit, and importance of new knowledge as measured by objective

global standards of excellence



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