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András Jakab:
Seven Role Models of Legal Scholars

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András Jakab:* Seven Role Models of Legal Scholars

In the following I am going to develop seven ideal-typical role models for (or caricatures of) legal scholars: the Oracle Scientist, the Prophet, the Law Reformer, the Humble Clerk, the Wise Pragmatist, the Self-Reflective, and the Media Star.[1] Ten features are going to characterize the ideal-typical roles: primary audience, ideal function, perverted form, influence on the law, prestige, measure of success, time scale, use of non-legal (moral or social/economic) arguments, precondition of existence, typical countries and famous lawyers (representing themselves *or* at least proposing to other legal scholars to follow that specific role model).[2]

The list of role models is not meant to be exhaustive, as there are possibly other ones with which we could sophisticate the picture endlessly. The role models are also not meant to be exclusive, thus it is possible that one single scholar bears features of different role models, or writes a paper in one role and another paper in another role. Probably no legal scholar would fully fit into any of the role models, but these as ideal types (in a Weberian sense) still seem to have some explanatory force about how we perceive our task. The scope of the explanation is consciously limited: the construction of these ideal types had the purpose of explaining role models of legal scholars only in the German speaking European countries (further to some extent in other civil law countries such as Spain and Italy), Hungary (as a post-socialist country), the UK, and the US. The role models are thus not analytical constructions which show all logically possible constellations of the different characterizing features: only those which seemed to be able to explain existing legal scholarly mentalities and self-perceptions in the named countries have been constructed. Even though the categories of the present study might be broadened to include further countries, this has not been tried or tested here.

The development of ideal typical role models also contests the notion of having a general idea of 'the' legal scholarship or legal science. Long but fruitless debates have been conducted on the question whether legal scholarship is scholarship or science at all. Those

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[2] The expressions 'role' and 'role model' in this article are not used in their specific and precise social-psychological or anthropological senses, but only in their everyday meaning.

who were sceptical about it annoyed or provoqued the legal academia;[3] those who confirmed it with a loose concept of scholarship or science were popular.[4] But as a matter of fact, what legal scholars are doing under the heading of legal scholarship, is just very different with seemingly no common thread. Whether we label it with the noble word science or scholarship is secondary, what really matters is what kind of presuppositions are behind the different ways of conducting legal scholarship (and under what circumstances they can be accepted) and why in their genre some of the works will be considered by their academic community better or worse. Thus deducing good legal scholarship from an abstract idea of 'the' legal science is rather hopeless; what we can rather do is to understand our own approach, what the most meaningful way of undertaking it could be and what pitfalls within that we should avoid. Consequently, I do not have a precise definition of the 'legal scholar' either: everybody will be considered as such, if he or she consideres himself or herself as such.

1. Telling judges what the law is: The Oracle Scientist

The Oracle Scientist's primary audience are fellow academics, its secondary audience judges. He knows best what the law is, even better than judges. As a matter of fact, judges rely on the opinion of the Oracle Scientist(s) to solve cases. It can happen either directly by sending the file to them (see the Middle Ages German institution of *Aktenversendung* which meant that courts sent the files of a case to universities for decision),[5] or by consulting academic literature. The reason for citing academic literature by practitioners can also be in positive procedural law, as it was in the Middle Ages in certain parts of Europe when it was in some courts obligatory for advocates to cite relevant literature (cf. 'chi non ha Azzo non vada in palazzo', 'Quidquid non agnoscit glossa nec agnoscit forum'), and when judges could be held personally liable for wrong decisions, but they avoided it if they followed the *communis opinio* (majority of authoritative writers). To prove the latter point, they quoted as much literature as they could.[6] But even in modern times, in some legal orders positive law refers to the "the common and constant opinion of learned persons" (Code of Canon Law of 1983, Canon 19: 'communi constantique doctorum sententia'), to the "approved legal doctrine" (Swiss Civil Code, art. 1.3: 'bewährte Lehre') or to the "the teachings of the most highly qualified publicists of the various nations" (Statute of the International Court of Justice, art. 38(1)) for the solution of cases. Oracle Scientists who have never worked before in (lower) judicial offices are often invited to the highest judicial positions.[7]

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[3] E.g., JULIUS VON KIRCHMANN, DIE WERTHLOSIGKEIT DER JURISPRUDENZ ALS WISSENSCHAFT (3rd ed., 1848) (available at http://fama2.us.es/fde/ocr/2006/werthlosigkeitDerJurisprudenz.pdf); ANDRÁS SAJÓ, KRITIKAI ÉRTEKEZÉS A JOGTUDOMÁNYRÓL (Critical Study on Legal Science) (1983).

[4] Ulfrid Neumann, *Wissenschaftstheorie der Rechtswissenschaft*, in EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE DER GEGENWART 385-400 (Arthur Kaufmann, Winfried Hassemer, Ulfrid Neumann eds., 7th ed., 2004), with an overview of the literature.

[5] HAROLD J. BERMAN, LAW AND REVOLUTION II. THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 143 (2003) with further references to specific provisions of contemporary procedural norms; GERHARD KÖBLER, DEUTSCHE RECHTSGESCHICHTE 156 (5th ed., 1996). Similar practice existed in ancient Roman law, when the *praetor* (an elected lay politician serving also as pre-trial judge) and the *judex* (the actual judge, equally a layman, appointed *ad hoc* by the praetor) asked the jurists (*iuris consulti*, called also men experienced in law, i.e. *iuris prudentes*) about how to solve the case, see RANDALL LESAFFER, EUROPEAN LEGAL HISTORY 92-93 (2009). GAIUS lists scholarly opinion [*responsa prudentium*, 'answers of the learned'] as a source of law, see GAIUS, INSTITUTES 1.2.

[6] William Twining e.a., *The Role of Academics in the Legal System*, in [THE OXFORD HANDBOOK OF] LEGAL STUDIES 938 (Peter Cane & Mark Tushnet eds., 2003).

[7] *Id.*, 940.

His influence is thus considerable on the law, even though she does not bear responsibility (in a legal sense) for what she is doing.[8] Her prestige is high, her word (or at least the word of the majority of the Order of Oracle Scientists,[9] i.e. the *herrschende Lehre* or the *doctrine dominante*) should be followed by judges. If the legislator is afraid that its law will be "modified" by the Oracle Scientists (a well-founded fear in some cases), then it has to prohibit their work.[10]

The Oracle Scientist is not simply a scientist expert, he is more than that. He has some esoteric knowledge, so he can tell what the law states about a problem, even if laypersons do not see any legal provision on the issue. He is thus also an oracle who can see the signs from which he reads the law. But his job is different from religious oracles as it can be learned like a science, through long years of training and practice in the Order of Oracle Scientists.

They use a special language and logic, that of the *Rechtsdogmatik*. If you want to express arguments of efficiency and justice in the language of *Rechtsdogmatik*, then you have to translate them into legal arguments ("unlawful").[11] Arguments of effectiveness etc. are not necessarily irrelevant to law, but they cannot be deployed directly ("naked"),[12] we need the all-knowing translator to do that for us (e.g. with the help of *Generalklauseln*).

But the Oracle Scientist is a very peculiar translator, because you cannot ask her to translate just anything. He is building a legal conceptual system on his own which also includes wishes for a better society even though he never talks about such policy issues directly (that would be improper). But somehow, the system he builds up helps to realize meaningful policy issues. The Oracle Scientist seems to know all our wishes and questions about how to apply the law even before we express them. He must think in two tiers: the legal language he speaks, and the real-life (social or moral) issues he never talks about.[13]

Her aim is to build up a conceptual system *(doctrine, Rechtsdogmatik)* by eliminating contingencies and apparent gaps or contradictions.[14] The system he builds always gives the one single legally right answer. The Oracle Scientist likes to represent himself as a neutral,

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[8] For the legitimacy problem of influencing the content of law see MATTHIAS JESTAEDT, DAS MAG IN DER THEORIE RICHTIG SEIN... 83-85 (2006).

[9] You can become a member of the Order of Oracle Scientists, if you get accepted in a long ritual by current members. The ritual includes the defence of a doctoral dissertation, the submission of a *Habilitationsschrift* and finally the appointment as (full) professor. Without having fulfilled these steps of the ritual, whatever you say will count less (independently from the content of what you say), than what the very last member of the Order says.

[10] In the 6th century AD, Justinian made it obligatory to follow the opinions of some (mostly then dead) scholars by codifying them (so basically he made obligatory to follow his own code which happened to be based partly on scholarly opinions), but forbade any new commentaries on it: "We command that our complete work, which is to be composed by you with God's approval, is to bear the name of Digesta or Pandects. No skilled lawyers are to presume in the future to supply any commentaries thereon and confuse with their own verbosity the brevity of the aforesaid work..." *Constitutio Deo auctore* 12. With an even more radical solution, French revolutionaries simply closed law faculties in 1793. See RAOUL C. VAN CAENEGEM, JUDGES, LEGISLATORS, AND PROFESSORS 156 (1987).

[11] PHILIPPE A. MASTRONARDI: JURISTISCHES DENKEN 264-276 (2001).

[12] MARKUS PÖCKER, UNAUFGELÖSTE SPANNUNGEN UND BLOCKIERTE VERÄNDERUNGSMÖGLICHKEITEN IM SELBSTBILD DER JURISTISCHEN DOGMATIK, RECHTSTHEORIE 157-160 (2006).

[13] András Jakab, *What makes a good lawyer?*, 62 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 275-287 (2007) on two-level thinking.

[14] Contradictions have to be eliminated by way of interpretation, otherwise one cannot contribute to the solution of future problems. If contradictions are merely highlighted, those applying the law will stare puzzled at the two passages, then decide by tossing a coin. The Oracle Scientist's task is to help avoiding this, thus making a calculable functioning of the system possible. See Eike von Savigny, *Die Rolle der Dogmatik – wissenschaftstheoretisch gesehen*, in JURISTISCHE DOGMATIK UND WISSENSCHAFTSTHEORIE 104 (Ulfrid Neumann e. a. ed., 1976).

professional and objective scientist,[15] but as a matter of fact his job is very creative and he is building his own (implied) values into his system.[16] The system looks as its very own emanation, which expands itself the Oracle Scientist being only the mouthpiece of the autonomous *Rechtsdogmatik*.

The perverted form of the Oracle Scientist is the legal scholar, who does not care about the practical applicability and usefulness of his conceptual system. Rudolf von Jhering, one of the greatest Oracle Scientists of all times, described the perverted and exaggerated approach in his classic (self-)ironic essay on the 'juristic conceptual heaven' (*Im juristischen Begriffshimmel*) the following way:[17]

> Concepts do not tolerate any connection to the real world. [...] In the world of concepts, that you can see here, there is no life in the sense you know it, it is the empire of abstract thoughts and concepts, that follow logically […] from each other which for that reason shy away from every touch of the earthly world.
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> Here rules only pure science, legal logic, and the precondition of their rule and dignity is exactly […] that they do not have to do anything with life. […] Life […] is synonymous with the death of science.
>
> The lawyer calculates with his concepts, just like a mathematician works with his numbers; if the end result is logically correct, then there is nothing else to be worried about any more.
>
> The concepts you can see here exist, and with this everything has been said. They are absolute truths, – they always have been – they always will be. To ask about their nature and justification is nothing better than to ask 'why is two times two four'. It is just four. With this 'is' has everything been said, there is no justification for it. It is exactly the same with concepts, they are based as absolute truths in themselves, there is no a justification for them. The only thing which a thinker can do is to immerse oneself in them with full devotion and without any restraint, in order to reveal the amplitude of their content [...]. What he can reveal this way is truth, and every truth has a claim to be universally valid.
>
> […] just like a natural scientist who tries to discover the secrets of nature, also the legal researcher has no other purpose than to unlock the beautiful secrets of the legal world, to reveal the fine veins in the logical organism of the law.

If you dare to question the Oracle Scientist by saying that he is doing *Begriffsjurisprudenz* as described by Jhering, then her answer will probably be that this is her job[18] and that she does not have the legitimacy to do more (like considering policy issues), and that she serves legal certainty this way the best. Maybe he would also note that he is actually doing a special type of *Begriffsjurisprudenz*, the so called *Interessenjurisprudenz*, which is a more sophisticated version (and not the opposite) of the former and that with the latter he can avoid absurdities.[19] He might also add that this type of criticism is very old,[20] and getting a bit boring now. He would definitely point out that the critiques come and go, but the Order of the Oracle

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[15] Oliver Lepsius, *Themen einer Rechtswissenschaftstheorie*, in RECHTSWISSENSCHAFTSTHEORIE 3 (Matthias Jestaedt & Oliver Lepsius eds., 2008).

[16] Christoph Engel and Wolfgang Schön, *Vorwort*, in DAS PROPRIUM DER RECHTSWISSENSCHAFT, XII (Christoph Engel & Wolfgang Schön eds., 2007).

[17] RUDOLF VON JHERING, SCHERZ UND ERNST IN DER JURISPRUDENZ 252-253, 258, 274, 287, 288 (1884).

[18] Lawyers necessarily work with abstract concepts, see Eugen Bucher,*Was ist »Begriffsjurisprudenz«?* in THEORIE UND TECHNIK DER BEGRIFFSJURISPRUDENZ, 389 (Werner Krawietz ed., 1976).

[19] This is well shown by the fact that the four traditional methods of SAVIGNY (grammatical, logical, systemic and historical) are not replaced by the teleological (or purposive) interpretation of which JHERING is thought to be the inventor: it is added to them as a fifth method. The opposite of *Begriffsjurisprudenz* is rather the "School of Free Law" (*Freirechtsschule*), see BUCHER (note 18), 372-373.

[20] See esp. Philipp Heck, „*Was ist die Begriffsjurisprudenz, die wir bekämpfen?*, DEUTSCHE JURISTENZEITUNG 1456-1461 (1909).

Scientists stays.[21] If someone wants to criticize them meaningfully – so the Oracle Scientist –, then concrete mistakes should be pointed out,[22] but the job as such should not be doubted.

He is a secret law-maker: he pretends not to make law (as nobody empowered him to do so), but in fact he does so, at least in a limited way. In order to conceal his law-making, he is telling us that he is just explaining the conceptual system of law and drawing the consequences from it. But this system is actually partly the result of his *scientific* work.[23] But if we ask another fellow (or conspirator) Oracle Scientist, then he is also going to confirm that none of them is actually making any law.

His system covers all the possible problems[24] without gaps[25] or contradictions.[26] The structure of the system has to be built up, even if it is a chaotic uncodified system. Or rather: it is even more important in these situations.[27] The most important feature of legal scholarship is thus its systematic nature.[28]

Legal scholarship does not simply describe the law, it represents the law.[29] Consequently, a good practitioner has to know thoroughly the academic literature *(nemo bonus iurista nisi bartolista).*[30] So if the practitioner does not read the Oracle Scientist, it is not a failure of the Oracle Scientist, it is a failure of the practitioner. We do not measure the success of the Oracle Scientist through his or her influence on the legal practice. If the legal practice does not listen to what he or she is saying, that is their (intellectual) problem. The Oracle Scientist is building his system for its perfectness (i.e., full, detailed and non-contradictory) and beauty; practicability is important (this is the official function of the system),[31] but only secondary. Even positive law can come and go, but the conceptual system

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[21] Openly and explicitly in the tradition of *Begriffsjurisprudenz* today e.g. ROBERT ALEXY: THEORIE DER GRUNDRECHTE 38 (2001). While rejecting mere logical inference, ALEXY still thinks the elaboration of the conceptual system to be the primary goal of jurisprudence, and in this aspect he explicitly sides with the tradition of *Begriffsjurisprudenz*. Another remarkable contemporary advocacy of this approach is Armin von Bogdandy, *The past and promise of doctrinal constructivism*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 364-400 (2009).

[22] Only concrete logical faults have to be shown, but conceptualism as such should not be criticized see BUCHER (note 18), 388; Horst-Eberhard Henke, *„Wie tot ist die Begriffsjurisprudenz?* in KRAWIETZ (note 18), 415.

[23] Andreas Voßkuhle, *Neue Verwaltungsrechtswissenschaft*, inGRUNDLAGEN DES VERWALTUNGSRECHTS, vol. I § 1 Rn 6 (Wolfgang Hoffmann-Riem, Eberhard Schmidt Aßmann & Andreas Voßkuhle eds., 2006).

[24] Building a conceptual system instead of reproductivity is advocated also by HENKE (note 18), 414.

[25] The ideal of gaplessness is characteristic not only of *Begriffsjurisprudenz*, but also of the rationalist natural-law tradition, see GUSTAV BOEHMER, GRUNDLAGEN DER BÜRGERLICHEN RECHTSORDNUNG. 2.1. DOGMENGESCHICHTLICHE GRUNDLAGEN DES BÜRGERLICHEN RECHTES 63 (1951) ; with reference to CHRISTIAN WOLFF, see Werner Krawietz, *Begriffsjurisprudenz* in KRAWIETZ (note 18), 432–437, esp. 436. The beginnings of conceptual system-building in law are traced back to scholastics (or its reflections in the works of the glossators and commentators) by Harold J. Berman, *The Origins of Western Legal Science* in THE WESTERN IDEA OF LAW, 399-413, esp. 401, 405 (1983).

[26] Even authors outside of the *Begriffsjurisprudenz* tradition often assume non-contradiction in the case of a legal *system*, see e.g. J. W. HARRIS: LAW AND LEGAL SCIENCE. AN INQUIRY INTO THE CONCEPTS 'LEGAL RULE' AND 'LEGAL SYSTEM' 11, 81-83 (1979).

[27] TWINING e.a. (note 6), 937.

[28] 'Rechtswissenschaft ist systematisch oder sie ist nicht.' ('Legal scholarship is either systematic, or it is not legal scholarship.'), see LEPSIUS (note 15), 16.

[29] 'Rechtswissenschaft scheint das Recht nicht nur zu beschreiben, sondern auch zu vertreten.' Christoph Möllers, *Vorüberlegungen zu einer Wissenschaftstheorie des öffentlichen Rechts*, in Jestaedt & Lepsius (note 15), 167.

[30] Renowned German law firms expect their applicants to hold a doctorate.

[31] In lack of potential practicability, the Oracle Scientist does not build grand theories, but only middle-level theories (e.g. theory on proportionality) which can be used to sophisticate the conceptual system designed to solve cases. See LEPSIUS (note 15), 26.

remains, it has been built for eternity.[32] Changing social circumstances also do not really influence it.

Even though we do not measure the success of the Oracle Scientist by her reception or influence amongst practitioners, you need a legal culture where this type of behaviour is accepted. You need a demand amongst legal practitioners for the opinion of the Oracle Scientist. If legal practitioners (especially judges) do not particularly respect legal scholars, then the scholarly attempt to scientifically and conceptually systematize law will miserably fail (cf. the cases of Wesley Hohfeld[33] and Christopher Columbus Langdell).[34] There is just no demand for the work of the Oracle Scientist in some legal cultures.

Oracle Scientists accept that there might be other types of legal scholars, but they consider themselves as the most important body of legal scholars, and consider their approach as the "heart" of legal scholarship.[35]

In civil law countries where judges receive their positions more or less straight after their law degree,[36] the chances of such an approach are typically higher, than in common law countries where the most prestigious legal job is the one of the judge. In the latter countries the scholar either has to be either a Humble Clerk of judges,[37] or a Prophet leading superhuman (Herculean) judges, or a Wise Pragmatist somebody advising them to consider non-legal (economic, social) aspects, or somebody who actually does not care about judges but writes only to other fellow academics (Self-Reflective). But a common law scholar using only legal (non-moral and non-social) arguments telling off judges about what the law is, is hardly conceivable. In civil law countries (especially in the Germanic legal family) it is usual practice, however.[38] The relationship is well expressed by Merryman:[39]

> The scholar is the scientist, and the judge, at best, merely the engineer. The scholar provides the systematic, scientific legal structure that the judge accepts and applies. The work of the scholar is creative and exalted; that of the judge is, although important, on a lower plane.

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[32] In this sense *Rechtsdogmatik* is conservative, see LEPSIUS (note 15), 19. Cf. the Hungarian concept of the "invisible Constitution" as developed by the then president of the Hungarian Constitutional Court László Sólyom in his concurring opinion in Dec. 23/1990. (X.31.) AB, ABH 1990, 88, 97-98. Sólyom famously said in different interviews that even if there will be a new Constitution, the „invisible Constitution" consisting of the conceptual system, remains the same – not even the constitution maker could change it. The plausibility of such opinions is limited though, if positive law is changing so much, that there is no time to adjust the system to the new legal situation. The Oracle Scientist is thus struggling, if the legislator (or the constituent power) are too active, see MÖLLERS (note 29), 165; Christoph Engel & Wolfgang Schön, *Vorwort*, in DAS PROPRIUM DER RECHTSWISSENSCHAFT, XI (Christoph Engel & Wolfgang Schön eds., 2007).

[33] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE LAW JOURNAL 16 (1913).

[34] On LANGDELL'S vision of law see John Chipman Gray, *Langdell's Orthodoxy*, 45 U. PITT L. REV. 1 (1983). Only his teaching method (case method) survived, but not his approach to legal scholarship. SEE WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE. THE ORIGIN OF MODERN LEGAL EDUCATION 148-170 (1994); ROBERT STEVENS, LAW SCHOOL. LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 35-72 (1983).

[35] *Dogmatik* as the "core discipline of legal scholarship" (Kerndisziplin der Rechtswissenschaft) see Ralf Dreier, *Rechtstheorie und Rechtsgeschichte*, in RECHT - STAAT - VERNUNFT. STUDIEN ZUR RECHTSTHEORIE 2, 217 (Ralf Dreier ed., 1991).

[36] Judges are thus young, inexperienced, and receive only a modest salary. Their social standing is also modest. Mostly they cannot submit dissenting opinions either, so they cannot make names, they remain unknown in the legal community. TWINING e.a. (note 6), 939.

[37] If judges disagree with the Prophet, then they are evil and cynical betrayers of their profession. Cf. Ronald Dworkin, *The Decision that Threatens Democracy*, THE NEW REVIEW OF BOOKS 13 May 2010. Note that this type of criticism (as opposed to the criticism by an Oracle Scientist) is not about the judges' intellectual capacity.

[38] E.g., Armin von Bogdandy, *Prinzipien der Rechtsfortbildung im Europäischen Rechtsraum. Überlegungen zum Lissabon-Urteil des BVerfG*, NEUE JURISTISCHE WOCHENSCHRIFT 1-5 (2010/1-2).

[39] John Henry Merryman, *The Italian Style III: Interpretation*, STANFORD LAW REVIEW 586 (1965-66).

The reason why conceptual-doctrinal legal thought (*Rechtsdogmatik*) reached its highest level emerged in Germany (at the time still fragmented) in the 19th century is that it was the place where on the one hand law was in principle quite rigid as they used the ancient and highly esteemed, consequently unquestionable, law, that is Roman law, or its modernised version, the '*ius romanum hodiernum' (heutiges römisches Recht)*. On the other hand, they enshrined conceptual elaboration into a conscious program (as an alternative to the French revolutionary invaders' codification).[40] This combination is unique in history, and even today's German legal scholarship owes its conceptual sophistication to it.[41]

2. Telling judges what the right thing is to decide: The Prophet

The Prophet is primarily talking to judges, his secondary audience are legal scholars.[42] But he does not consider his profession as an Order (or a guild) like the Oracle Scientist did. He sees himself rather as the leader of a church,[43] whose members are not only and not even primarily legal scholars, but judges. Legal scholarship is about judges,[44] it is also written for judges. The Prophet knows the moral foundations of our society and he will tell us (especially judges) what to do. He knows the right way, he has the vision, he is superhuman. He is Hercules, and if we follow him, we can become like him.[45] Unfortunately, society is not mature enough yet and they do not see his 'truth'. The Prophet is trying to explain to them that if they do not agree with him, then they are just wrong. But it is not always successful, so it is better to talk to a more elevated section of society, to the intellectuals and among them especially judges.

Oracle Scientists might consider the 'truth' to be what the majority of their Order thinks *(herrschende Meinung)*. But the Prophet does not need the majority of any Order or body. The Prophet can see the truth on his own, without any help from others. The Prophet thinks that Oracle Scientists (and also the Wise Pragmatists) are dishonest, manipulative, pharisaic and conspirative legal scholars, who pretend not to move along their own political-moral agenda and to be neutral – even though they actually do have a conscious political agenda behind the facade of neutrality.[46]

On the base of the Constitution (considered as some kind of codified natural law of the given political community), the Prophet can find out the *One Single Right Moral Vision* (OSRMV) of the given society.[47] The Constitution is actually based on the OSRMV, only that most people do not see it. As a matter of fact, only the Prophet can see it, as he is superhuman. Judges are the avant-garde, they have to lead social change implementing the OSRMV; especially judges from the highest (constitutional or supreme) court have this task.

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[40] See in particular FRIEDRICH CARL VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814).

[41] Italian legal scholarship with its abstract conceptualism seems similar in many respects to the German one (without Savigny's conscious and explicit program though), see John Henry Merryman, The *Italian Style I: Doctrine*, STANFORD LAW REVIEW 39-65, esp. 45-48 (1965-66).

[42] RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY IX (2002) uses the expression 'moral entrepreneurs' for these (partly legal) scholars, but I prefer the word 'Prophet' as it rather expresses the need for followers.

[43] Those who do not like this approach might consider the Prophet as a religious fanatic. Dworkin as "the Taliban of the Western legal thought": Richard A. Posner, *The Problematics of Moral and Legal Theory*, HARVARD LAW REVIEW 1638-1715, esp. 1695 (1998).

[44] RONALD DWORKIN, LAW'S EMPIRE 90 (1986).

[45] Judge as Hercules, see *Id.*, 239.

[46] RONALD DWORKIN, LIFE'S DOMINION 3-29, 118-147 (ed., Alfred A. Knopf, 1993).

[47] 'Law as integrity' based on a coherent moral vision, see DWORKIN (note. 44), 225–228, 254–258.

If they do not do it, they are heretics and betrayers.[48] Democracy is of course (morally) good, but only if the people elect politicians who want to make laws exactly conforming to the ideas of the Prophet. But if it is not happening (as it is not happening, as the people have not *yet* recognized fully the Prophet's truth), then judges have to implement the OSRMV (relying on the Constitution) instead of politicians. The Prophet purports that he has been enlightened about the OSRMV from the Constitution itself, so there is nothing arbitrary in his method. Constitutional court judges and supreme court judges often find his ideas appealing as these help them to expand their power (and at the same time to build up a moral image).

His critics doubt, however, whether the Constitution supports only one moral vision. They say that several moral visions fit to the Constitution.[49] The critics say these things only because they do not entirely *yet* understand the Prophet. With time, this will definitely change, the more advanced teachings of the Prophet will prevail and the outdated (or retarded) concurrent opinions will all fail. The Prophet's teachings are for eternity, but these are sometimes about very concrete issues, so if a new case comes up, it is better to ask him again, so he can teach us something new and wise again.

The Prophet can work only in a country where the judiciary is prestigious enough to be brave enough to use his OSRMV. In countries where judges have legitimacy issues, the Prophet's not strictly legal considerations can have only limited success, as judges do not dare to use such arguments. If judges' power stems from the legislator, then they are shyer to talk about moral visions, and they rather ask the Oracle Scientist about what to do.[50] The Prophet's teaching is also difficult to use in practice, if the respective country does not have a written constitution, because it is even more difficult to claim the existence of OSRMV if it has to fit a chaotic ancient precedent system. The Prophet is thus most likely to succeed in common law countries with a written Constitution and to a lesser extent in civil law countries with a strong constitutional court where prestigious judges are sitting.[51] It also helps his work if there are strong natural law traditions in his country.[52]

The Prophet wants to influence the law through judicial decisions, even though he is not a judge himself (he is much more than that). If judges do not follow him, he can be said to have failed. A Prophet without followers is nobody, but an arrogant lunatic.

3. Advising the legislator what the law should be: The Law Reformer

[48] Cf. above note 37. Some Oracle Scientists (following a Weberian view of science) plainly despise the Prophet as un-scientific. Cf. MAX WEBER, WISSENSCHAFT ALS BERUF 25 (10th ed., 1996) 'weil der Prophet und der Demagoge nicht auf den Katheder eines Hörsaals gehören.' ('because the prophet and the demagogue do not belong to the lectern of a lecture hall.') Weber himself rather belongs to the Self-Reflective category, but his quoted text makes explicit some presuppositions shared by most of the Oracle Scientists.

[49] NIGEL E. SIMMONDS: CENTRAL ISSUES IN JURISPRUDENCE. JUSTICE, LAW AND RIGHTS 217 (2002), with further references.

[50] Cf. Pierre Legrand, *European Legal Systems are not Converging*, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 74-75 (1996) on the difference between common law and civil law countries explaining that in the common law perception the court's power is original (stems from the common law and not from statutes) as opposed civil law countries where it stems from the legislator. On 'bi-polar sovereignty of the Crown in Parliament and the Crown in its courts' see also Sir Stephen Sedley, *Human Rights: a Twenty-First Century Agenda*, PUBLIC LAW 386 (1995).

[51] Unfortunately (for the Prophet), the constitutional court judges in civil law countries are often members of the Order of Oracle Scientists, and they are not particularly impressed by the emotional parvenu Prophet. They prefer to follow their centuries old traditions of (seemingly) value-neutral scientific approach to law.

[52] PATRICK S ATIYAH & ROBERT S SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW. A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS 230-231 (1987) on the Declaration of Independence and on the right to rebellion (which is very difficult to conceptualize without natural law arguments).

The Law Reformer does not really want to talk to judges. She wants to convince the legislator. Either because he does not trust judges (intellectually or morally), or because he thinks it is more democratic and transparent to change the law by the legislator. The Law Reformer thus does not often like judge made law at all. With the famous words of one of them:[53]

> It is the judges … that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait until he does it, and then you beat him for it. This is the way you make laws for your dog: and this is the way judges make law for you and me.

The Law Reformer has plans for society, how to improve it and how to advance it. In order to convince the legislator, he of course has to use policy-arguments (combined with moral considerations).

This type of legal scholar dominated the landscape in socialist countries, where the official doctrine of 'socialist normativism' tried to turn judges into law-applying machines (using rather literal interpretation), and the official law-making power only lay with the Parliament. The Parliament followed the 'scientific' and modern socialist views in order to transform society into socialism and later into communism. For the big reform plan they needed advisors about how to use law as an instrument of social transformation. These advisors were legal scholars presenting *de lege ferenda* works offered to the legislator for further use.[54] If the legislator is legally omnipotent (i.e., there are no constitutional constraints),[55] then we do not have to deal with intricate doctrinal questions at all, we can concentrate on the instrumental character of law. Law is a means to change society, and we need lawyers who can use this instrument. The most important lawyer is the statute-drafter or codifier: the Law Reformer. And if legal scholars want to be useful to society (and not just theorize for no reason), then they should prepare proposals for new laws.[56] They have to use the results of social sciences within the frames of the orders by politicians.

If judges happen to develop some new ideas then the scholar has to present a proposal how to codify it, as judge-made law is uncertain in this paradigm (as they could change their practice and their decisions are more difficult to access than statutes): only the legislator makes 'real' law.[57] A work written in this style is relevant as long as the social problem to be solved is still there and/or the law for dealing with it has been made. After this, the scholarly work can be thrown away.

The Law Reformer is successful if politicians accept his or her proposals, and if in practice these new laws work. This approach can and sporadically does exist everywhere, but it is surprisingly strong in some post-socialist countries, where (despite a new constitutional system) such old mentalities based on the unlimited central legislator and on a non-

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[53] Jeremy Bentham, *Truth versus Asshurst*, in THE WORKS OF JEREMY BENTHAM, vol. V, 233-237, 235 (W Tait ed., 1843).

[54] See András Jakab, *Surviving Socialist Legal Concepts and Methods*, in THE TRANSFORMATION OF THE HUNGARIAN LEGAL ORDER 1985-2005, 606-619, esp. 607-608 (András Jakab, Péter Takács and Allan F. Tatham eds., 2007).

[55] At this point, the Westminster system and the socialist countries were very similar.

[56] The real task of legal scholarship is preparing proposals for new laws, otherwise legal scholarship is just 'useless theorizing', see JÁNOS BEÉR, ISTVÁN KOVÁCS AND LAJOS SZAMEL, MAGYAR ÁLLAMJOG (Hungarian State Law) 16, 18 (4th ed., 1972).

[57] The fact that judicial decisions are published or even systematized, and the fact that the legislator can change the statute as easily as the judges their case law, do not seem to disturb the proponents of this approach.

autonomous judiciary survived.[58] It is getting weaker, but probably for several decades its traces will remain strong in these countries.

4. Explaining to attorneys and law students what judges or legislators did: The Humble Clerk

The Humble Clerk simply repeats what judges or legislators decided. His primary audience are attorneys and law students. The Humble Clerk is never considered as an authority. The more precise he is in repeating what judges and legislators said, the better clerk he is.

The Humble Clerk can be considered as the other type of black letter scholarship, besides the Oracle Scientist. Also the Humble Clerk claims neutrality; the difference is that the Humble Clerk is actually neutral, as he is not doing any creative work. He just repeats (copy-pastes), summarizes (this can be dangerously creative and imprecise) and describes (never prescribes). Thus, he does not have to use any extra-legal (moral or economic) arguments either, there is nothing interdisciplinary in what he is doing.

If the Humble Clerk is trying to be creatively academic, it goes miserably wrong. He is just not trained for such intellectual exercises. An apposite description of the problem is given by Dicey:[59]

> Our best works, such as Smith's Leading Cases, are at bottom a mere accumulation of notes on detached points of curious, rather than useful, learning. They are deficient in all general conceptions, in all grasp of principles, in all idea of method. [...] Turn, for example, to a writer whose book was twenty years ago the student's guide to the law of contract. Mr JW Smith opens his treatise with a chapter on the 'Nature and Classification of Contracts'. Of the nature of contracts he tells his reader nothing. What he does tell them is that agreements consist of contracts of record, contracts under seal and simple contracts. He first substitutes division for definition, and then gives a division which, for absolute uninstructiveness, may be compared to an attempt to classify animals by dividing them into dodos, lions and all animals which are not dodos or lions.

The prestige of the Humble Clerk is low. He stayed at the university because he did not make it to the Bar; he is a loser who does not dare to go out into real life. He is not good enough for that, he can only become a clerk. Or he is just lazy who does not like long working hours in law firms and wants to enjoy the long summer holidays at universities.

In a country where the most prestigious job is the one of the judges, so if the judge is the 'living oracle of the law',[60] then the legal scholar cannot be anymore the oracle. If a Humble Clerk writes a case note, he cannot dare to express criticism on what the judges said.[61] Even if something is obviously wrong, he can only document what the judges said, he cannot try to correct it or to dissent from it.[62] Dissent and correction are for judges and legislators.

If he sees the work of the Oracle Scientists, he is partly impressed, partly critical about its artificial system building and doubts whether it is actually the law as judges have not yet

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[58] Cf. an interview with Ferenc Petrik former Supreme Court judge in Hungary about the scholarly value of codification, available at http://www.jogiforum.hu/interju/66. For a rebuttal by the present author see http://www.jogiforum.hu/interju/69.

[59] ALBERT VENN DICEY, CAN ENGLISH LAW BE TAUGHT AT THE UNIVERSITIES? INAUGURAL LECTURE, 21 APRIL 1883, 13 (1883). As a matter of fact, a real Oracle Scientist would consider DICEY'S works (e.g., AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION, 10th ed., 1959) exactly as primitive and unsystematic as he does his contract lawyer colleague's book.

[60] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, I. 69.

[61] TWINING e.a. (note 6), 937.

[62] With anecdotes: John Smith, An *Academic Lawyer and Law Reform [Presidential Address, The Society of Public Teachers of Law]*, LEGAL STUDIES 21-22 (1981).

confirmed it.[63] Humble Clerks have to be impressed how smart the judges are, and they have to note and repeat the words of those wise men and women as precisely as possible.[64] If judges seemingly contradict themselves or each other (a truly embarrassing situation for a clerk), then the Humble Clerk has to look again: judges cannot have made a mistake, somehow all the decisions have to be right, those just must be understood the right way. In his eyes, all judicial decisions are right, unless another judicial decision (or a statute) tells you later that those were wrong.

Unfortunately, judges do not care about what the loser clerks say, they hardly quote any scholars.[65] Judges even openly despise legal scholarship and talk about the „dangers, well perceived by our predecessors but tending to be neglected in modern times, of placing reliance on textbook authority for an analysis of judicial decisions".[66] Judges in such a legal order might "even regard it as complimentary to be told that they are suspected of having little interest in theory or an academic approach to legal issues."[67]

If an academic wants to do something intellectually challenging in such a legal culture, then he is doing research about law with non-legal (sociological, political science, economic) methods (socio-legal studies), or he is writing about very abstract theoretical issues (jurisprudence, constitutional theory). Thus she has to become a Self-Reflective.

In continental countries, the Oracle Scientist is the typical black letter legal scholar, in the UK the Humble Clerk, traditionally in the US it is rather what I call later the Wise Pragmatist and nowadays the Self-reflective. The differences described by him are thus less a question of the history of legal theory but rather of comparative law. Traditionally the Humble Clerk is the typical English law school member (lacking the scholarly ambition of the Oracle Scientist) as William Twining described the situation with the following (fictitious) picture:[68]

> […] a case exhibiting a sample of recent publications by the Faculty, four slim monographs, about a dozen fat books addressed to the student market (three of which are past their third editions) and a number of offprints with obscure titles, which some might think are self-addressed. No room could be found here for rather more lucrative publications, such as nutshells (or other student aids), contributions to loose-leaf practitioners' services, and occasional journalism. First impressions suggest that this is primarily a teaching institution, which is quite a vocationally-oriented, but which is trying to build up his research profile.

In England, as opposed to the Continent or the US, even for major scholarly tasks needed by the government, judges seem rather to be the right candidates.[69] If there is a need for an important report about the legal system, then rather judges seem to have the necessary

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[63] Criticising the Oracle Scientists (in our case: PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Jürgen Bast & Armin von Bogdandy eds., 2006)) for seeing a systematic law where it actually does not exist, see Michelle Everson, *Is it just me, or is there an Elephant in the Room?*, EUROPEAN LAW JOURNAL 136-145, esp. 138 (2007) against the 'Germanic obsession' of systematic and elitist authoritative legal doctrine. EVERSON also considers the object of her criticism the 'theory' (i.e., doctrine) built up by German scholars, most of whom, however, would probably not consider themselves as *Rechtstheoretiker*, but rather as *Rechtsdogmatiker*.

[64] On the minority complex of English legal scholars see FIONA COWNIE, LEGAL ACADEMICS. CULTURE AND IDENTITIES 69 (2004).

[65] Cf. Hein Kötz, *Scholarship and the Courts. A Comparative Study*, in COMPARATIVE AND PRIVATE INTERNATIONAL LAW. ESSAYS IN HONOUR OF JOHN H. MERRYMAN ON HIS SEVENTIETH BIRTHDAY, 183-195 (DS Clarks ed., 1990), showing that as opposed to 13 secondary authority per judgment in Germany (where the academia is dominated by Oracle Scientists), in England (dominated by Humble Clerks) you find only 0,77 in average.

[66] *Johnson v Agnew* [1980] AC 367, 395 per Lord Wilberforce (House of Lords).

[67] On English judges ATIYAH & SUMMERS (note 52), 357. Until recently, in England many judges have never been to law school, but after a non-legal university degree went directly to the Bar, qualified there, so academics counted hardly anything for them. *Id.*, 348.

[68] WILLAM TWINING, BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL 69 (1994).

[69] ATIYAH & SUMMERS (not 52), 386-387.

intellectual and moral qualification for it.[70] Legal scholars can quote them later and disseminate the judge's profound ideas.

In countries, where instead of the judge (and the judge made law) the emphasis is on (the literal meaning of) codified law, the Humble Clerk notes and repeats what the legislator said. If the legislator changes the law, all the former works of the Clerk can be thrown away.[71] In this perception, it is possible to run a legal system without any kind of legal scholarship.[72] Legal scholarship is thus not an intellectually valuable work, even though it might be useful to do the secretarial part of running the legal system (as the legal material is just big to overview it).[73]

5. Advising judges about socially best decisions: The Wise Pragmatist

The Wise Pragmatist is writing for judges, he is advising them about socially best decisions. In doing so, law in a strict sense is only one factor for him besides common sense, sociology or economy; he is using thus *policy arguments* very often.

In general, he takes the normativity of law less seriously. To formulate it in a cynical and provocative way: "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law."[74] or "General propositions do not decide concrete cases."[75] His doubt in the normativity of law makes him characteristically different from the Oracle Scientist, the Humble Clerk and the Prophet. He also lacks the intellectuality of the Oracle Scientist and the moralism of the Prophet. He is rather instrumentalist and utilitarian.

As opposed to the Law Reformer, he does not distrust judges. It is rather the opposite: a precondition of the existence of the Wise Pragmatist-type legal scholar is exactly a prestigious and trusted judiciary which dares to use not strictly legal arguments (in a society where judges are rather considered to be state bureaucrats of the "mouthpiece of the law" type this approach is unlikely to succeed). Also as opposed to the Law Reformer, the difference between legal and non-legal arguments is less sharp for him. The Wise Pragmatist does not take seriously the difference between what the law is and what it should be, whereas the Law Reformer wants to see a sharp line.[76] The Law Reformer protects his own competence for changing the law (or at least advising the legislator about it) in this way, whereas the Wise Pragmatist is helping to expand judges' possibilities by blurring the frontier. In this sense, the

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[70] Among many see e.g., Glidewell Report (*The Review of the Crown Prosecution Service*, 1998), Woolf Report (*Report on Access to Civil Justice*, 1996), Auld Report (*Review of the Criminal Courts of England and Wales*, 2001). Even if academics write sometimes such official reports, it is not obvious for the English (as opposed to the continental or the US perception) that academics should be the primary authors in such cases.

[71] '[D]rei berichtigende Worte des Gesetzgebers und ganze Bibliotheken werden zu Makulatur.' (Three correcting words of the legislator and whole libraries become waste paper.) KIRCHMANN (note 3), 17. That is the reason why Oracle Scientists often oppose law reforms: it would ruin their oeuvre, cf. *Id.*, 11. For a powerful response by Karl Larenz see http://www.juristische-gesellschaft.de/schriften/26.pdf.

[72] KIRCHMANN (note 3), 7.

[73] An even more despised category of legal scholars is if they are clerks of party politicians in a dictatorship (so not even of judges or of legislators). During the toughest times of socialism, legal scholars did not have the standing of Law Reformers, they were just clerks of communist politicians repeating party resolutions, but not proposing law reform. It was (existentially) risky to propose anything new, as communist leaders might have disagreed, so the legal scholar could lose his job or even more. See for more details and stories MICHAEL STOLLEIS, SOZIALISTISCHE GESETZLICHKEIT. STAATS- UND VERWALTUNGSRECHTSWISSENSCHAFT IN DER DDR (2009).

[74] Oliver Wendell Holmes, *Law in Science and Science in Law*, HARVARD LAW REVIEW 994 (1899.

[75] *Lochner* v. *New York* 198 US 45, 76 (1905) (Holmes J. dissenting).

[76] Bentham's legal positivism can be explained by his purpose to reform English law. See GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 147-336 (1986).

Wise Pragmatist is inherently anti-positivist (or at least, as Holmes, an anti-formalist positivist), the Law Reformer is positivist and formalist.

Another precondition for the existence of Wise Pragmatists is the inefficiency of legislation. As in the UK there are no such problems (cf. parliamentary sovereignty meaning in practice the sovereignty of the House of Commons in which normally only one party is in government, and this party's internal discipline is strong), this type of legal scholar could not emerge.[77] In the US, however, where the separation of powers in the law-making power (possessed by three politically distinct and powerful organs together: Senate, House of Representative, and President), the lack of party discipline in the Congress (and consequently the numerous unexpected amendments proposed by members of the Congress),[78] the rather low quality of legislative drafting,[79] the constitutional limits (as interpreted by the Supreme Court), and the higher speed of changing social circumstances[80] all contribute to the eminent need for judicial law-making.[81] Judges seem to be able to make law in the US more speedily[82] and more cheaply[83] than the legislator. It also means, that judges in the US have to look rather at the future (solutions for social challenges), not at the past (case law).[84] Consequently, judges adhere less to the doctrine of *stare decisis*, they deviate from past decisions more often.[85] But they are grateful for advice as to in which direction they should do so. This advice is very often not legal(istic) at all, but is using economic or social arguments (e.g., in the form of a Brandeis Brief).[86]

Judges in the US are also often rather politicians (state judges are sometimes directly elected by the local population for a limited term, federal judges are appointed mostly exactly because of party membership and loyalty, so their audience is much less the legal profession than the electing people or the appointing politicians), so non-legal (political, social, policy, moral) arguments are much more acceptable for them than in other countries.[87]

As the law is difficult to change by legislation, it is better not to have 'descriptive accuracy' about law, because it would mean that we might discover the need for a (cumbersome) legislation. Problems can rather be solved in a practical manner, if we consider law as aiming for meaningful social purposes and interpret it in the courts liberally. To find out these purposes, academic literature can be of great help. The Oracle Scientist could also give such advice, but in the US nobody really believes that the law is in fact as systematic as

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[77] Legal change in the UK is rather introduced by legislation, which is prepared by highly educated civil servants and not by legal scholars. ATIYAH & SUMMERS (note 52), 141, 149.

[78] *Id.*, 314.

[79] *Id.*, 37, 334.

[80] *Id.*, 134.

[81] *Id.*, 270: "[T]here can be little doubt that one of the principal reasons that American courts make so much law is that (by comparison with British Parliament) American legislatures make so little."

[82] Maurice Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?*, 62 AMERICAN BAR ASSOCIATION JOURNAL 587 (1976).

[83] RICHARD NEELY, HOW COURTS GOVERN AMERICA 30,71 (1981).

[84] Judges as 'social engineers', see ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 47 (1922).

[85] ATIYAH & SUMMERS (note 52), 118-127. In the UK, higher courts bind themselves (with some exceptions), in the US they can overrule their own past decisions. In the US, even a lower court can overrule a past decision of a higher court if it expects the higher court to overrule it ('anticipatory overruling'). The deviation from the *stare decisis* is partly caused by the size of the US: there are just too many judicial decisions to have a strict *stare decisis*. Once the *stare decisis* is loosened up, there is also more room to follow academic opinions. *Id.*, 32, 128-130, 148.

[86] Louis Brandeis (judge of the Supreme Court between 1916 and 1939) argued as an attorney in the case *Muller v. Oregon* 208 U.S. 412 (1908) by delivering a detailed sociological presentation of the social effects long working hours for women.

[87] ATIYAH & SUMMERS (note 52), 342, 344, 350-351, 379. This is very different from both civil law countries and England. For the latter see Lord Scarman in *McLoughlin* v. *O'Brian* [1983] 1 AC at 340 about the necessary abstinence of English judges from policy.

all Oracles Scientists profess. Law seems rather to be a practical device to manage society. The technical language of advice by the Oracle Scientist does not give any substantive reasons either why the final decision should be accepted (by the people or by the politicians).[88] And also importantly, except for some European immigrants there are just no Oracle Scientists in the US, and even if they write about a question in their legalistic style, a US judge just does not get them as their scholarly language and style are out of touch with her needs and interests. If somebody tries to be an Oracle Scientist in such a legal culture (like Langdell did), he will be dismissed as a 'formalist' and he will fail.

Because of the non-professional factors in the selection of judges, sometimes the necessary intellectual capacity is also missing to be able to understand the Oracle Scientists:

> It is amazing how many judges - especially, but not exclusively, state judges - lack the basic intelligence to understand a moderately complex legal argument. Some are just plain stupid; others lack the necessary legal education; still others are lazy and impatient.[89]

For those judges who lack the doctrinal-technical legal knowledge, it is just easier to decide the case on its substantive merits.[90] To counter the mentioned unfavourable intellectual phenomena, sometimes prestigious Wise Pragmatist professors are appointed to the highest judicial positions without any previous practical experience (but with well identifiable political sympathies), where they often bring in their sociological or economic approaches.[91]

As US legislation is sporadic, and the law making power is in a much larger extent in the hands of judges than in other countries, and as the *stare decisis* is less adhered to, the danger of legal uncertainty is more imminent. The legislator cannot encounter this legal uncertainty because of its inefficiency, the judges cannot do it because of the (case by case) nature of judicial law making either. So, legal scholars (Wise Pragmatists, cooperating with judges and practitioners) have to do it, in the form of Restatements of the Law.[92] The Restatement is more creative than the Humble Clerk's work, but it does not have the scientific ambition of the Oracle Scientist's writings either.[93] It just wants to help judges, like the Wise Pragmatist always does. But it also gives the opportunity for (some) law reforms: the case law is so chaotic, contradictory and huge that you can use your own policy ideas to choose the 'right' ones.

Even if the legislator did not agree with the way judicial case law is evolving (under the influence of the Wise Pragmatists), it cannot counter it so easily because of its mentioned efficiency problems and because of the constitutional constraints.[94] The constitutional constraints themselves are in the hands of judges ('The Constitution is what the judges say it is')[95] and the Constitution is practically unamendable.

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[88] In a non-elitist culture, the reasons have to be understandable and acceptable also for the general public. Contrasting with the UK see ATIYAH & SUMMERS (note 52), 38, 225, 232.
[89] ALAN DERSHOWITZ, THE BEST DEFENCE 111 (1982).
[90] ATIYAH & SUMMERS (note 52), 358.
[91] Id., 340, 345.
[92] Cf. the work of the American Law Institute (http://www.ali.org/). In their self-description: "The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law." The Restatements of Law do not have any formal validity, but are nevertheless very influential with a strong persuasive force.
[93] In international law, a well-known example of the Wise Pragmatist approach is the New Haven School. See MICHAEL REISMAN, "THE VIEW FROM THE NEW HAVEN SCHOOL OF INTERNATIONAL LAW" INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (1992). This approach never had any success e.g. in the Oracle Scientist dominated German international legal scholarship.
[94] ATIYAH & SUMMERS (note 52), 269.
[95] Charles Evans Hughes, *Speech at Elmira*, 3. May 1907, cited by BERNARD SCHWARTZ: CONSTITUTIONAL LAW, VII (1972).

The balance between the legislator and the judge is very different in the UK and the US. Consequently (and notably contradicting to some rough continental European prejudices), the role and prestige of legal scholars is also very different (prestigious Wise Pragmatist vs. nobody Humble Clerk):

> Perhaps nothing illustrates the gulf which still separates English and American law schools more than they way in which England's premier law journal, *The Law Quarterly Review*, has been taken over by the practising profession, being edited from 'chambers' in London by a Circuit judge. We doubt if anything short of a constitutional amendment could shift the control of the *Harvard Law Review* to a Wall Street firm of attorneys![96]

Another factor helping the influence of the Wise Pragmatist is that American federal judges have law clerks. They are fresh law school graduates who were often student editors of law reviews and are keen to use that knowledge or their interdisciplinary education.[97] Their interdisciplinary orientation is due partly to the fact that law is a second degree in the US, so they have to have a first degree in something non-legal, and partly to the fact that US legal education in general tends to be more interdisciplinary (maybe also because of the above described need for interdisciplinarity) than other countries' legal education.

6. Theorizing about law and legal scholarship for other legal scholars: The Self-Reflective

The Self-Reflective writes for fellow academics, she does not even try to be useful for legal practitioners.[98] Most legal theorists (at least who do not want to make a direct impact on how the legal order is run) belong to this category of legal scholars.[99] But also representatives of "law and" movements or comparative lawyers would mostly count to this group (unless they give practical advice either for the legislator or for the judges, what would make them belong to one of the formerly mentioned role models).

As opposed to the former models in which there is a hierarchy in prestige between legal scholars and practitioners (the Oracle Scientist, the Wise Pragmatist, the Prophet and the Law Reformer are higher than the practitioner, the Humble Clerk is lower), here there is no hierarchy. The Self-Reflective is simply playing in a different field. She is not impressed by practitioners, and she does not want to impress practitioners. She wants to stay full time in the ivory tower, she does not really care what is going on outside in the real world. Her audience are either other Self-Reflectives, or the Oracle Scientists, the Wise Pragmatists, the Prophets, or Law Reformers. She is successful, if she can influence what her audience thinks or writes, and can be measured by the number of quotation she gets or by the fact that she publishes in renowned and popular scholarly forums (e.g. in peer reviewed law reviews). Maybe she does not even want to influence these other academics, she just wants to provoke them.[100]

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[96] ATIYAH & SUMMERS (note 52), 388 note 5.

[97] Ronald A. Cass and Jack M. Beerman, *Throwing Stones at the Mudbank: The Impact of Scholarship on Administrative Law*, ADMINISTRATIVE LAW REVIEW 8-9 (1993). Law clerks remain only one year at the court, which makes sure that the new intake always bring fresh academic air to the court.

[98] Also academics belonging to other groups sometimes write themselves Self-Reflective works (e.g., the quoted writings of JHERING), but they do not consider it the primary task of legal scholars. For them, it is rather a methodological pre- or meta-work. And on the other hand, also Self-Reflectives might make short excursions into other role perceptions.

[99] In the present categorisation, basically all legal theorists are Self-Reflectives except if they explicitly proposed another role model for legal scholars (like e.g. Bentham did).

[100] E.g., destroying or at least pointing out the self-deception of Oracle Scientists about their neutrality and objectivity. On Critical Legal Studies from this perspective see COWNIE (note 64), 51-53.

As she does not consider herself as part of the legal (practical) discourse, but rather as leading a meta-discourse about the legal discourse, she is not limited to legal arguments. She can use moral, economic or philosophical (philosophy of science etc) arguments.[101] As her ideas are bound to the changing law, but are very general, she aims to write for eternity, and her chances to be readable long term are actually better, than the similar ambitions of the Oracle Scientist or of the Prophet.

You can find such legal scholars (they do not necessarily consider themselves as legal theorists) in most law schools, but the likelihood of their existence is higher, if there is a regular bureaucratized scholarship assessment. In the latter case, legal academics will evaluate the work of legal academics and they obviously appreciate more works which have been addressed explicitly to them. Thus academics will want to impress only fellow academics (who decide about their tenure) and do not care at all about practicability.

The phenomenon is well-known in the US, where they talk about the growing gap between legal academia (incl. legal education) and the legal profession.[102] The legal scholarship which is rarely quoted by courts is not respected by legal academics, and the respected works are absolutely useless for practitioners' use.[103] Statistically, there is a clear decline in judicial quotes of scholarly works,[104] which can also be explained by the popular topics chosen by newer generations of legal academics.

In the UK, where for a long time such mechanisms did not exist, this gap was unknown,[105] but the RAE (Research Assessment Exercise)[106] is pushing legal scholarship in this direction.[107] The unfavourable side effect of such changes is that less talented people will work as Oracle Scientists, as Humble Clerks, or as Wise Pragmatists, thus that type of (black letter) legal research is fading.[108]

Another problem is that the self-perpetuating, self-referential and closed discourse of the Self-Reflectives will begin to live its own life. You are successful in the discourse if you are successful in the discourse. This tautological way of measuring success results in try-hard originality, sexy titles (which catch the eyes), provocative quotes, and counter-intuitive theses. Such papers will probably never be read by anyone. The latter seems to be a failure for the Self-Reflective (and to a certain extent it is), but in a bureaucratized scholarship assessment system it can become secondary: once the output is there (in a good law review), its content or influence (which is more difficult to measure) count less. So the main point in publications will be to *look like* something very original, paradigm-shifting and brilliant in order to be accepted for publication.[109] In the US, where such behaviour is flourishing, „[a] law professor

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[101] *Inter*disciplinary and *multi*disciplinary approaches are also used, see GUNNAR FOLKE SCHUPPERT, STAATSWISSENSCHAFT (2003); GUNNAR FOLKE SCHUPPERT, VERWALTUNGSWISSENSCHAFT (2000).

[102] Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, MICHIGAN LAW REVIEW 34-78 (1992); TWINING e.a. (note 6), 931. Another reason for the gap in the US is that law schools are rather on the political left, whereas judges are rather conservative, see TWINING e.a. (note 6), 935.

[103] Deborah Jones Merritt and Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, CHICAGO-KENT LAW REVIEW 871-899 (1996). The answer to the question of their article title according to the authors is a clear no.

[104] Louis J. Sirico Jr, *The Citing of Law Reviews by the Supreme Court: 1971-99*, INDIANA LAW JOURNAL 1099-1139 (2000).

[105] TWINING e.a. (note 6) 940.

[106] Since 1986, approximately every five years, the quality of research at UK higher education institutions will be evaluated on behalf of the higher education funding councils. The core of the evaluation is that full-time members of the higher education institutions submit a limited number of writings which will be read by other legal academics and evaluated accordingly. For more information see http://www.rae.ac.uk/. The name of the system is changing, but its relevant content (as to the topic of this paper) remains the same, see http://www.hefce.ac.uk/Research/ref/.

[107] COWNIE (note 64), 136; TWINING e.a. (note 6), 925.

[108] TWINING e.a. (note 6),932.

[109] Daniel A. Farber, *The Case Against Brilliance*, MINNESOTA LAW REVIEW 917-930 (1985-1986).

with no formal qualifications in philosophy might undertake a project of remarkable philosophical ambition and publish it in a journal edited by individuals who not only are equally unlikely to have any philosophical qualifications but who have yet to become qualified in law."[110] As a matter of fact, you just have to look like a deep thinker, you have to sell your product once, you don't give any guarantees, and then you can go to the next law review. The best ones can aim for a successful provocation in the debate (and not the solution of any problem), but the discourse is just so big, that your voice seems hopelessly low in the loud crowd. It looks like you work for eternity, but you just work for your next publication, because this is expected from you at the university. From the ambitioned eternal truth, so will be an unreadable amount of mediocre interdisciplinary ("law and") scholarship – with only a few quality exceptions.[111]

If you also measure influence by the number of cites, then the picture looks a bit different. The cite-counting method has been heavily criticised as it does not give a real picture of the quality of legal scholarship one produces.[112] Sometimes you get cited several times, because everybody wants to show how wrong you were. Sometimes you get cites only because the other scholar wants to fill up footnotes. Often treatises are quoted, which just summarize the law, but which do not offer any new ideas. And if an article becomes widely accepted, then the distortion can work in both ways: either you will be quoted by everybody,[113] or you will not be quoted because your opinion is so widely accepted that it is not any more connected to you personally.[114]

Even a kind of (partly ironic) self-help literature evolved to analyse the nature of citations and to give advice on how to win cites. The advice is the following:[115]

> Maxim One: (Make sure that you have already) Attend(ed) Harvard, Yale, or the University of Chicago Law Schools. [...] Maxim Two: Publish all of your articles in the *Harvard Law Review*, the *Yale Law Journal*, or the University of *Chicago Law Review*. [...] Maxim Three: Take a job as an assistant professor at the Harvard, Yale, or University of Chicago Law School.

If the three maxims are followed, then your articles are much more likely to get cites than otherwise. As a matter of fact, you do not get positions at good universities, because your articles are often quoted, but rather the other way around: you get quoted, because you have a position at a prestigious university. Students or young scholars aiming for tenure will quote you, because they cannot judge the actual quality of articles, so they go for the proxies (i.e., who published it and in which journal).[116] After they get a tenure, their productivity will normally decline so the real market for cites is not the one of tenured professors (for whom very often students do the research anyway), but rather students and assistant professors.

You should also forget about what is important for the real world; you should rather ask yourself what can be quoted:[117]

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[110] Neil Duxbury, *A Century of Legal Studies*, in [THE OXFORD HANDBOOK OF] LEGAL STUDIES 957 (Peter Cane & Mark Tushnet eds., 2003).
[111] On a similar view: EDWARDS (note 102), 36; Kenneth Lason, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, HARVARD LAW REVIEW 926-950 (1989-1990).
[112] CASS and BEERMAN (note 97), 2-3.
[113] JM Balkin and Sanford Levinson, *How to win cites and influence people*, CHICAGO-KENT LAW REVIEW 845 (1995-1996): "By gaining an increasing presence in that [discourse] space, the canonical work may create an increasingly hospitable environment for its own reproduction in the minds of future academics."
[114] CASS and BEERMAN (note 97), 3.
[115] BALKIN and LEVINSON (note 113), 843-869.
[116] *Id.*, 860.
[117] *Id.*, 855.

> If we have one basic piece of advice about topic selection, it's this: Never confuse what's important in the world outside law schools with what is important in law reviews.

Even if self-cites do not count in most systems, it is still useful to advertise your own writings wherever it is possible, so you should not shy away from that. Thus for a conscious and successful impression management you need some shamelessness:[118]

> (1) Cite yourself, early and often. (2) Get your friends to cite you whenever you can. [...] We realize that it takes a bit of chutzpah to shamelessly self-cite. But after a while, you'll get over it. Believe us, many other people in the legal academy already have. [...] Friends are usually more than happy to cite you, especially if you offer to cite them in return. Sometimes, however, they need a bit of cajoling doing the right thing. Make your friends feel guilty if they don't cite you in all of their articles. Tell them how hurt you are that they are neglecting you and your ideas. If all else fails, accuse them of insensitivity, plagiarism, or worse. Sure it may strain the friendship, but aren't the extra cites worth it?

And finally, the actual content of the article counts even less, than we like to admit it. The article rather needs new keywords, or it has to be able to symbolize a movement, an approach or a political stance, i.e. it has to become an "icon". If you manage to catch this role, than your article will become canonical and get cited again and again (often without being read).[119] So, when you choose topic or keywords, you should bear this feature of legal scholarly discourse in mind.

7. Telling the public what the law is: The Media Star

In every country we know different legal scholars turning up on TV or being interviewed regularly in newspapers. Some of them do have an otherwise respected scholarly activity (Alan Dershowitz as a Wise Pragmatist),[120] others just do not (the latter ones should remain unnamed out of courtesy).

The Media Star has to be understandable (even at the cost of being precise), in cases he even has to be funny. He has to understand what the people actually do not understand. He has an important function in bringing law closer to the public, thus making it more transparent or even democratic in an epistemological sense. It helps to run the legal system either by making addressees aware of the law or by making them believe that the law makes sense (and that it is not a secret and intrinsic knowledge). He is not running the legal system from inside (as a Media Star), but is only helping outsiders understand what is happening inside.

Unfortunately, their colleagues do not really respect him (or at least not for his being a media star, but for his other scholarly activities), maybe because his audience are not even lawyers and because he consequently has to be imprecise in order to remain understandable to lay persons. It is also a dangerous function in the sense that the prompt opinions required by the media do not leave enough time to think about them thoroughly, so even the best scholars make mistakes more easily and damage thus their own scholarly reputation.

The Media Star might even express his or the general public's wishes to change the law, and it might even have an effect, if politicians think that leaving unchanged the law would outrage the public. As opposed to the Law Reformer he does not give his advice in person to politicians about such changes, he rather proclaims in the media what the people want. He can be considered as successful if he can influence public debates and if his media

[118] Id., 856-857, 859.
[119] Id., 861-862.
[120] For a self-promoting account of his media activities see www.alandershowitz.com.

coverage is high. His views are aimed at the moment, nobody expects them to be useful long term.

If the Media Star proposes to change the law, then she is usually using non-legal arguments. If, however, she simply explains what the law is, then she remains within the strict limits of legal reasoning. The Media Star can exist in countries where the press is free and where the public is interested, but also in dictatorships if the regime decides that population needs some legal education through TV etc.

The Media Star has nowhere a full-time job, there is no country where it would be dominant amongst legal academics. Even if somebody is fulfilling this function as a legal scholar, he or she fulfils one of the other role models as mentioned above. If not, then she or he is usually not even considered as a legal scholar (only as a media figure). By definition, there are only a few Media Star legal scholars in every country. He is a Media Star exactly because the media coverage possibilities are limited and he managed to catch a considerable part of it.

8. Which one is the ideal legal scholar?

Asking which of the above role models is 'the' ideal is similar to asking which football player is the ideal one: the goalkeeper, the defender, the midfielder or the forward. They do different jobs, but they could all contribute to a 'better common result'. In a legal system, the role of legal scholars could be perceived as similarly manifold, but (just like in a football team) you have to be careful about role proportions. A team consisting of ten goalkeepers is unlikely to win. And a legal order full of Prophets is unlikely to function properly. So the question should be, what is the ideal proportion of the role models is then?

But as we have seen, it is not even about 'universal' proportions, as much depends on the institutional context and on the potential audience of the respective country where the legal scholar is working. Some role models are just not needed at all in certain legal cultures, while other role models are needed a bit less or a bit more.[121] The 'real' task of legal scholars is thus only partly an issue of legal theory, it is in an even bigger part rather a problem of comparative law. In continental European countries the Oracle Scientist seems to be the typical and mostly needed legal scholar, in the UK the Humble Servant, in the US the Wise Pragmatist and in moderate dictatorships or post-dictatorial regimes the Law Reformer; though in very small numbers, we can discover almost every (but not every) role model in the named countries.

The Self-Reflective seems to be the most international role of all (as he does not try to help to run a legal system which is different from his original legal culture), so this is the role one can take up the most easily when changing country as a legal scholar. Self-Reflectives can simply give new insights into general questions of law, or they can coach other legal scholars.[122] If she is in his original legal culture, then the second seems like a more often needed task. But nobody can expect a truly European scholar in the US to train Wise Pragmatists (not because he could not, but because it would contradict his whole *ars poetica*). And on the other hand, we do not invite American scholars to Europe to coach us about

[121] Globalization means that certain legal institutions or rules are borrowed from each other, but basic mentalities (as described in this article) will continue to differ in different legal cultures. Similarly LEGRAND (note 50), 52-81, esp. 79-81.

[122] Cf. the 'theory based practicality' *(theoriegestützte Praxisgewandtheit)* as the ideal type of commentaries (a typical genre of the Oracle Scientists) Peter Lerche, *Maunz/Dürig, Grundgesetz*, in RECHTSWISSENSCHAFT UND RECHTSLITERATUR IM 20. JAHRHUNDERT, 1026 (Dietmar Willoweit ed., 2007). Doctrinal legal scholars as the main audience of legal theorists: Mátyás Bódig, *Legal Theory and Legal Doctrinal Scholarship*, CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 483-514, esp. 494 (2010).

methodological problems of *Rechtsdogmatik*. We do it, because we want to exercise our brains by seeing something which is very different from what we believe in, and besides satisfying the pure curiosity about American law, we also hope to understand our very own differing role perception as a legal scholar a little bit better.

	audience	ideal function	perversion	aimed influence on the law	prestige in the general legal community and amongst other scholars	measure of success	time scale	non-legal (moral or policy) arguments	precondition of existence	typical countries and lawyers
Oracle Scientist	1. academics, 2. judges	furthering legal certainty by building a conceptual system	forcing artificial conceptual absurdities on real life, losing practical relevance	high	high	perfectness of the system	aimed for eternity, but in practice medium term	very limited, disguised, rather through vague legal concepts	doctrinally well trained judiciary	German (Austrian, Swiss, Italian, and Spanish) law professors, Langdell, Hohfeld
Prophet	1. judges, 2. academics	community building in a moral sense	hijacking law by own preferences behind the mask of moral dignity	high	rather high	influence on judges	aimed for eternity, but in practice medium term	substantial (moral arguments)	1. prestigious judiciary which dares to use also not strictly legal considerations, 2. constitutional limits on the legislature	Dworkin, human rights litigator professors
Law Reformer	politicians (legislator)	promoting social development or reform	extreme instrumentalism, serving dictatorships	high	medium	influence on politicians (legislator) and real life success of the proposed law	medium (until the social problem has been solved)	substantial	central legislator which is able and willing to make new laws	Bentham, (post)socialist countries
Humble Clerk	attorneys, law students	documenting what the law is (and not what it ought to be)	mindless repetition of what judges or legislators said	near to zero	low	how precisely s/he notes and repeats the law (typically judicial decision)	rather short: until the next relevant judicial decision	zero	growing amount of law, and the following need to document it	Kirchmann, English black letter scholarship
Wise Pragmatist	judges	advising judges about socially best decisions	armchair sociologist or a Prophet disguised as social scientist; cynic about the normativity of law	high	high	influence on judges	medium	substantial (policy arguments)	1. prestigious judiciary which dares to use also not strictly legal considerations, 2. efficiency problems with the legislature	Posner, traditional US legal scholarship (legal realists), law & economics
Self-Reflective	fellow academics	1. understanding better general questions of law, 2. coaching other types of legal scholars	self-perpetuating community without any practical use for the legal system	zero, or collateral influence	rather high (if understandable)	publications in esteemed (e.g., peer reviewed) forums, influence on academic discourse (quotations)	aimed for eternity, but in practice mostly rather medium term	substantial	no specific preconditions, but bureaucratized scholarship assessment induces it	Kelsen (in his theoretical writings), Somek, Jakab, major part of modern legal scholarship at top US universities
Media Star	general public	explaining the people what the law is, so helping them to accept and follow it	pure media figure without relevant scholarly work and without real knowledge	medium	low	media coverage, influence on public political debates	very short	it depends	technical development, and 1. either free press and interested public, 2. or a dictatorial regime deciding for general legal education through TV	Alan Dershowitz; nowhere dominant, only as a part-time job; parallel work in any of the above categories