

University of Pennsylvania Carey Law School

## Penn Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Law

---

Summer 1988

### Introduction: "Plus Ca Change...?"

Stephen B. Burbank

*University of Pennsylvania Carey Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Higher Education Commons](#), [Higher Education and Teaching Commons](#), [Jurisprudence Commons](#), [Legal Profession Commons](#), [Legal Studies Commons](#), [Legal Writing and Research Commons](#), and the [Other Philosophy Commons](#)

---

#### Repository Citation

Burbank, Stephen B., "Introduction: "Plus Ca Change...?" (1988). *Faculty Scholarship at Penn Law*. 754. [https://scholarship.law.upenn.edu/faculty\\_scholarship/754](https://scholarship.law.upenn.edu/faculty_scholarship/754)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

## INTRODUCTION: "PLUS ÇA CHANGE . . . ?"†

---

Stephen B. Burbank\*

This is a time of self-conscious attention to legal scholarship that, although hardly unprecedented, must seem remarkable to many in the profession. We hear of "malaise" in the academy,<sup>1</sup> of the decline of doctrinal scholarship, and more generally, of the decline of law as an autonomous discipline.<sup>2</sup> For some who believe it, the news may be profoundly disturbing, tolling the thirteenth hour on entire careers. For others, bearing the news—and having it believed—may be essential to launching or sustaining careers.

Most of us, I suspect, are inclined to suspend judgment, injured more than most mortals to the harsh reality that there is little new under the sun. This Symposium furnishes additional evidence of the wisdom of that posture in the current debates about continuity and change in legal scholarship.

In today's climate, there is irony in a collection of papers that, at least as conceived, is devoted to the celebration of "great" law review articles. Some may think the entire enterprise perverse or at least a wasted grove. Greatness is, after all, contextual, contingent, or in any event in the eye of the beholder. Moreover, if it is true that legal scholarship has changed or is rapidly changing, and given that the articles discussed precede the millenium, a collection of value preferences can be of only historical interest—perversity for those with an antiquarian bent.

One need not, however, reify the concept of greatness to find of interest what contemporary scholars find of interest in the work of their elders.<sup>3</sup> Moreover, history ceases to be merely of

---

† © 1988 Stephen B. Burbank, all rights reserved.

\* Professor of Law, University of Pennsylvania. A.B. 1968, J.D. 1973, Harvard University.

1. See Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 647 (1988).

2. See *id.* Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

3. My apologies to the authors of the works that are celebrated here. If it be any comfort, I had originally written "predecessors."

historical interest when—which is usually—it tells us something relevant to our current situation.

From a historical perspective, the contributions to this Symposium provide reason to doubt claims that legal scholarship today is vastly different than it was thirty or fifty years ago. Certainly the essays by Professors Hovenkamp<sup>4</sup> and Katz,<sup>5</sup> treating articles that dealt with public law and private law in 1960 and 1936 respectively, throw cold water on claims either that economic insights have only recently been brought to law or, more grandiosely, that law and economics has only recently been recognized as a discipline. Together, those articles tend to confirm Mark Tushnet's recent speculation that "[l]egal scholarship in the United States may simply appropriate from other disciplines what those disciplines have to offer: institutional economics in the 1930's, neo-classical microeconomics today."<sup>6</sup> In addition, they may cause us to wonder what happened to the law in law and economics.

By the same token, although by a different route, Professor Peller's critique of Herbert Wechsler's neutral principles, as well as of the intellectual tradition whence it emanated,<sup>7</sup> is more or less what we would have expected of a legal realist in the 1930's. There is at least one difference, however. Professor Nelson's caution lest "in responding to ideology, we may become ideologues ourselves"<sup>8</sup>—issued to those concerned about empiricism—comes too late for those as profoundly unconcerned about facts as are the latter day realists. For both groups, another caution from the same source bears repetition: "Critical analyses that penetrate ideological characterizations of the legal system offered by legal elites and powerful interest groups will, by themselves, have little effect on general perceptions of law or on policy debates concerning legal change."<sup>9</sup>

As to "greatness," the skeptical reader will be pleased to find that this issue is not a collection of attempts to define that concept in the context of legal literature. It does include, however, some substantial attempts to tease out why the articles under

---

4. Hovenkamp, *Derek Bok and the Merger of Law and Economics*, 21 U. MICH. J.L. REF. 515 (1988).

5. Katz, *Reflections on Fuller and Perdue's The Reliance Interest in Contract Damages: A Positive Economic Framework*, 21 U. MICH. J.L. REF. 541 (1988).

6. Tushnet, *Legal Scholarship in the United States: An Overview*, 50 MOD. L. REV. 804, 805 (1987).

7. Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988).

8. Nelson, *Ideology, Scholarship, and Sociolegal Change: Lessons from Galanter and the "Litigation Crisis,"* 21 LAW & SOC'Y REV. 677, 690-91 (1988).

9. *Id.* at 690.

discussion have been acclaimed, have had an impact on legal development, or have otherwise achieved importance in the eyes of the audience to which they were addressed. Some of the authors thus also speak indirectly, as Professors Richman and Reynolds speak directly,<sup>10</sup> to reasons for the opposite phenomena: lack of acclaim or impact. The lessons I take away are sobering.

It comes as no surprise that frequency of citation is a poor measure of impact;<sup>11</sup> alas, citation may not even guarantee that the author has read the cited article. Nor should it be surprising that when a prominent author's goal is directly to affect legal development and that author offers both a more sophisticated analytical framework and simple rules, public authorities should find the rules congenial.<sup>12</sup> But what are we to make of the acclaim greeting an article that, as described in these pages, is "highly impressionistic,"<sup>13</sup> "bereft of any doctrinal presumption,"<sup>14</sup> and "a bit of fluff"?<sup>15</sup> Putting together Professor Marcus's candid and thorough evaluation of Abram Chayes's work<sup>16</sup> with Professor Neuman's wonderful evaluation of Henry Monaghan's "backfires,"<sup>17</sup> one might conclude that the surest route to acclaim or recognition is to avoid ambiguity, subtlety, rough edges—to avoid, that is, what for many of us distinguishes scholarship from journalism. That would, I think, miss a critical distinction that has to do with audience.

Chayes's article, according to Professor Marcus, has had no discernible impact in the courts, probably because it was resolutely adocrinal.<sup>18</sup> Monaghan's articles had effects in the court that counts, albeit not those he intended, because they were doctrinal and because the author discussed alternative approaches that could be appropriated without the author's qualifications, including qualifications the author did not think it necessary to develop.<sup>19</sup>

Simple rules, paradigms, or analytical frameworks need not be simplistic, but they are at risk of simplification. They also invite

10. Richman & Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REF. 623 (1988).

11. See Marcus, *supra* note 1, at 655.

12. See Hovenkamp, *supra* note 4, at 517. At the time (1960), the "prominence" of the author (Derek Bok) arose from two facts: He was a member of the Harvard Law School faculty, and he was publishing in the Harvard Law Review.

13. Marcus, *supra* note 1, at 652.

14. *Id.* at 691; see also *id.* at 652 ("almost bereft of traditional doctrinal analysis").

15. *Id.* at 691.

16. *Id. passim.*

17. Neuman, *Law Review Articles That Backfire*, 21 U. MICH. J.L. REF. 697 (1988).

18. Marcus, *supra* note 1, at 648.

19. See Neuman, *supra* note 17, at 718-20.

refinement and elaboration and may, as Professor Marcus describes<sup>20</sup> and Professor Katz demonstrates,<sup>21</sup> have considerable generative force. But that is not, at least today, the work of courts. In appropriating as well as in rejecting the fruits of scholarship, judges are guided by what "fill[s] the[ir] needs."<sup>22</sup> A scholar whose rules, paradigms, or analytical frameworks are not simple and who aspires to do more than titillate his colleagues should consider moonlighting as a journalist<sup>23</sup> or, as the contribution by Dean Hoeflich and Mr. Perelmuter may suggest,<sup>24</sup> becoming the author of a casebook.

For me, in other words, the contributions to this Symposium both illustrate a tension inherent in the work of legal scholarship and demonstrate that it has long been with us. That tension, explored by Professor Kronman,<sup>25</sup> arises from our training as, and our training of, advocates on the one hand and our aspiration to seek knowledge and (dare I say it) truth on the other. Moreover, I see in the reaching out to other disciplines not simply, and not primarily, the desire to "legitimate . . . the legal academy as a place properly attached to a university and not just a professional training ground,"<sup>26</sup> but a search for help in mediating that tension. Finally, in both Professor Hovenkamp's and Professor Marcus's contributions, I find (perhaps because I was looking for it) confirmation that what may be the greatest source of help remains largely untapped—empiricism.<sup>27</sup> As to that, most of us are prisoners of our educations. If that were not enough, the mishaps of the realists provide a healthy deterrent. And then there is the work involved. Life is so much easier in an air-conditioned office, or at worst a library (with janitors *and* re-

---

20. Marcus, *supra* note 1, *passim*.

21. Katz, *supra* note 5, *passim*.

22. Richman & Reynolds, *supra* note 10, at 646.

23. See Burbank, *Tolling the Statute in a Federal Case*, Nat'l L.J., Sept. 14, 1987, at 19.

24. Hoeflich & Perelmuter, *The Anatomy of a Leading Case: Lawrence v. Fox in the Courts, the Casebooks, and the Commentaries*, 21 U. MICH. J.L. REF. 721 (1988).

25. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955 (1981).

26. Tushnet, *supra* note 6, at 817.

27. See Hovenkamp, *supra* note 4, at 539; Marcus, *supra* note 1, at 691-94. After writing this Introduction, but before it went to the printer, I came across a very interesting article that explores this possibility in depth: Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988).

search assistants).<sup>28</sup> Up may be down in the untidy world outside,<sup>29</sup> but, by God, we know where our navels are.

There is hope. Fifteen years ago, Marc Galanter could not place in a law review an article that, as we now know, could comfortably have been the subject of commentary in this issue.<sup>30</sup> One of the letters of rejection (from *Yale Law Journal* editor Robert B. Reich) observed:

We have found your general analysis of legal systems, and the parts played therein by "RPs" [repeat players] and "OSs" [one shotters] to be both fascinating and well written. But does the model conform to empirical study, or even to what we can observe about the legal system? Since the demise of the Hughes, and Vinson courts, the legal system has proven itself more sensitive to the demands for legal change from minority interests than any other branch of our government. The liberal use of class actions, amicus briefs, and advocacy groups has given rise to a constant reformist pressure toward rule changes which favor the "have nots." The great irony of our time may be, as Skelly Wright contends, that the "haves," including large institutions, are taking refuge in our more political "representative" forums, while individualized and autonomous interests in our society have increasingly come to look to courts for the protection and articulation of their own goals.<sup>31</sup>

Great ironies are also in the eye of the beholder. Marc Galanter no longer has such trouble in placing his work in law reviews,<sup>32</sup> and he and his colleagues are now taken seriously

---

28. See Friedman, *The Law and Society Movement*, 38 *STAN. L. REV.* 763, 774-75 (1986).

29. See Shapiro, *The Death of the Up-Down Distinction*, 36 *STAN. L. REV.* 465 (1984).

30. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

31. Letter from Robert B. Reich to Marc Galanter (May 9, 1972) (copy on file with U. MICH. J.L. REF.). For a brief account of Galanter's travail in having this article published, see *This Week's Citation Classic*, 5 *CURRENT CONTENTS: SOC. & BEHAVIORAL SCI.* 24 (1983).

32. See, e.g., Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983).

enough to be publicly dismissed by a Chief Justice of the United States.<sup>33</sup> That is progress.

---

33. See W. Burger, Opening Remarks at 63rd Annual Meeting of the American Law Institute (May 13, 1986), *reprinted in* 63 A.L.I. PROC. 32, 34 (1987). *But see* Galanter, *Chief Justice Burger: Review the Facts*, Legal Times, Sept. 29, 1986, at 14.