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# COMMENTARY

## THE RELEVANCE OF LEGAL SCHOLARSHIP: REFLECTIONS ON JUDGE KOZINSKI'S MUSINGS

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*"It is wrong to think that the task of physics is to find out how nature is[.] . . . Physics concerns only what we can say about nature."*<sup>1</sup> Neils Bohr

### I. INTRODUCTION

In that great American classic film *The Blues Brothers*, starring Dan Ackroyd and the late, great John Belushi, Jake and Elwood Blues find themselves in a hole-in-the-wall redneck bar, and they ask the tavern keeper what kind of music the patrons like. The bar owner says, "We like both kinds of music here, country and western." Now actually this line was stolen from Dizzy Gillespie, who once said that there are only two kinds of music, good and bad. My thesis is the Gillespie thesis: There are only two kinds of legal scholarship, good and bad. Judge Kozinski has created a slightly different dichotomy; he has suggested that there are some scholars who try to influence judges and others who could not care less.<sup>2</sup> I think that that distinction is not quite

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1. JAMES GLEICK, *GENIUS: THE LIFE AND SCIENCE OF RICHARD FEYNMAN* 244 (1992) (internal quotations omitted).

2. See Judge Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*,

right; I think that anyone who writes wants to have influence. Actually, and what I should say to be more precise, is that anyone who publishes his or her writing wants to have some influence. Karl Kraus once said that people write because they lack the character not to. In fact, the question of why people write is rather complicated, but the question of why they publish is not: They publish because they believe that what they are saying matters.

Nobody would ever think to ask whether an article or a book written by a lawyer or a judge had relevance. If this assertion is correct, it means that when the question arises as to the relevance of legal scholarship, the particular scholarship that is being examined is that produced by law professors. In 1998, the *Mercer Law Review* published a bibliography of books, articles, and colloquia that deal with legal scholarship; the bibliography ran to nearly thirty printed pages.<sup>3</sup> There are apparently more titles that deal with what law professors are supposed to write than there are titles about Abraham Lincoln, which is remarkable considering that more has been written about Lincoln than about any other figure in American history. To appreciate just how bizarre this phenomenon is, try to imagine the *New England Journal of Medicine* publishing an article about what it ought to be publishing. Why is that so unimaginable? The reason is that medical journals publish articles about medicine.

If someone were to ask, "What is a physics professor supposed to do?", the obvious answer would be "physics." Likewise, a mathematics professor is supposed to do mathematics. Indeed, if someone were to peruse a recent issue of the *Review of Modern Physics*, that person (assuming he or she could understand the article) would have no doubt as to whether the article was about physics (or possibly mathematics).

This comparison between law, on the one hand, and medicine or physics or mathematics, on the other, suggests that the question concerning the relevance of legal scholarship actually masks a far more provocative question: What exactly is it that law professors are supposed to do? At one level, the answer to this question is as easy as the others: Law professors are supposed to do law. There is, however, a salient difference between these questions: Whereas there is not a significant

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*supra*, at 296-98.

3. See Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 *MERCER L. REV.* 741 (1998).

debate about what doing physics or mathematics is—about what it means—there is no clear answer to what it means to “do law.” One reason this is so is that the word “law” itself is profoundly protean.

My thesis is that in an important respect, law is almost everything. Think about the way that art and literature influence our thinking about the First Amendment; think about the way that history, especially as told by women or racial minorities, influences our conception of the Equal Protection Clause—or even the meaning of freedom of contract. If it is correct to say that law is nearly everything, the implication is that articles or books that many lawyers or judges or even law professors might scorn as irrelevant are in fact exceedingly relevant, and by dismissing them as irrelevant, we impoverish our law and ourselves.

## II. WHAT IS LAW?

Let me begin my defense of this thesis by lingering for a moment over the meaning of the word “relevance.” The dictionary definition is “pertinence . . . bearing upon . . . the matter at hand.”<sup>4</sup> But the etymology is more illuminating than the simple definition. The word relevance derives from Latin; it is the present participle form of the Latin word “relevare.”<sup>5</sup> The stem of this word also underlies the English word “elevate,” which means to lighten or to lift up.<sup>6</sup> The etymological pathway from lighten to enlighten is not entirely known, yet still it is certain that there is some connection.<sup>7</sup> Relevance is related to elevate, to lighten, and hence to enlighten: first cousins thrice removed. Something that lifts us up, that elevates us, is something that enlightens us; something that enlightens us is relevant. If law is nearly everything, which it is, and something is relevant if it enlightens, then something that teaches us something about nearly anything is relevant as legal scholarship.

Wittgenstein says somewhere that philosophy “leaves everything as it is.”<sup>8</sup> Many have quoted this line as proof that philosophy has no relevance:<sup>9</sup> For if philosophy leaves things as it

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4. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1917 (1993); *see also* 8 THE OXFORD ENGLISH DICTIONARY 404 (1970).

5. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1917 (1993).

6. *See id.* at 735.

7. *See* 5 THE OXFORD ENGLISH DICTIONARY 267 (2d ed. 1989).

8. RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS 533 (1990).

9. *See id.*

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finds them, it changes nothing; if it changes nothing, it has no impact on the world; and if it has no impact on the world, it has no relevance. But those who ascribe this view to Wittgenstein misread him badly, for what he was emphasizing is that what philosophy seeks to do is not to change merely the physical world, but rather to change the way we look at the physical world. And in seeking to change the way we look at things, the philosopher Wittgenstein was attempting to change everything.<sup>10</sup>

Following this line from Wittgenstein, I would like to suggest that there are two categories of legal scholarship that correspond to two types of scholars: One type tries to change the physical world proximately, by directly influencing lawmakers, lawyers, judges, and law students. This type of scholarship will be cited in opinions and read by lawyers; law professors who write such scholarship will be called to testify before legislative committees and asked by judges to serve as special masters. Their hornbooks and treatises will be consulted by practicing lawyers on a daily basis. Law professors who practice this type of scholarship will send reprints to Judge Kozinski and Judge Hughes and may in turn be rewarded by being cited and then receiving from the judge a copy of the slip opinion that contains the citation.

I do not mean for a moment to demean such scholarship or the scholars who write it. In fact, I write this kind of scholarship. I do mean to suggest, however, that there is a second type as well. The second type of scholarship aims at changing the way we look at things; it aims at changing everything. It is radical in its ambition. These articles may never be cited; indeed, the authors of such scholarship may not care whether they are cited, but this detail does not mean that this scholarship does not matter; it does not mean that these articles or books lack relevance. It certainly does not mean that these scholars disdain law. Lawyers and judges may not consult such writing; yet they do absorb it, sometimes without even knowing it.

These two types of scholarship reflect that law is both something that you can touch and something you cannot. You can touch the Constitution and statutes and regulations. You can walk over to the library and pull law from the shelves. I doubt anyone would say there is anything wrong with scholarship that tries to explain these sources of law, or that elucidates them, or

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10. See *id.* (“Wittgenstein’s remark about philosophy—that it ‘leaves everything as it is’—is often quoted. But it is less often realized that, in seeking to change nothing but the way we look at things, Wittgenstein was attempting to change *everything*.”).

that argues in favor of (or against) changing them. But law is also something entirely intangible, something magical and even mystical really: It is the force that orders human relations. It is how we live our lives and live with each other. Robert Boswell has a line in his wonderful novel *Mystery Ride* where he says that “[t]he realities of farming often ma[k]e it difficult to enjoy the wonder of it,”<sup>11</sup> and one could say exactly the same thing about law. The daily reality of law involves enacting statutes, prosecuting criminals, drafting contracts, and resolving disputes. But it is really something much more than that. Law is how we live together.

Like Wittgenstein’s philosophy, legal scholarship that addresses matters of how we live together is trying to change everything. The influence of this type of scholarship is stealthy; it can affect you without your even knowing it. To be sure, just as not all eccentricity is a sign of genius, not everything that is untraditional turns out to matter, but some of it does, and some of it matters greatly. I will try to illustrate this claim with a brief excursion into American legal history.

### III. EVERYTHING MATTERS

During the Progressive era, many states enacted measures designed to ameliorate some of the harsher consequences of the industrial revolution and widespread industrialization. Many of these state statutes are familiar to any student of constitutional law. For example, in *Holden v. Hardy*,<sup>12</sup> the Supreme Court upheld the constitutionality of a Utah law that established maximum hours limitations for the amount of time that employers could require employees to work in mines.<sup>13</sup> Albert Holden had been convicted of violating the law that prevented mine owners from having their employees serve more than eight hours a day in a mine, and Holden argued that this statute interfered with his Fourteenth Amendment right to contract with a willing employee on any basis the two parties chose.<sup>14</sup> He lost.

On the other hand, in *Lochner v. New York*,<sup>15</sup> the Court struck down a similar New York law that attempted to limit the number of hours bakery owners could force their employees to work.<sup>16</sup> This decision in turn led to the so-called “Lochner era,” a

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11. ROBERT BOSWELL, *MYSTERY RIDE* 26 (1993).

12. 169 U.S. 366 (1898).

13. *See id.* at 380, 398.

14. *See id.* at 381-82.

15. 198 U.S. 45 (1905).

16. *See id.* at 52-53, 58.

period during which the Supreme Court, by invoking an extremely robust notion of the liberty to contract, persisted in striking down state laws aimed at protecting workers from massive inequality of bargaining power.<sup>17</sup> The *Lochner* era did not formally come to an end until the Court decided *West Coast Hotel Co. v. Parrish*<sup>18</sup> in 1937. But a case that was decided during the height of the *Lochner* era teaches an interesting lesson about legal scholarship. That case is *Muller v. Oregon*,<sup>19</sup> and in point of fact, the case itself is less important than the way the case was argued.

*Muller* involved a challenge to an Oregon statute which provided that women could not work in factories or laundries for more than ten hours a day.<sup>20</sup> Today, liberals and progressives would regard such a statute as somewhere between quaint and insultingly paternalistic, but in the early part of last century, it was championed by progressive reformists. Curt Muller owned a laundry in Portland, Oregon, and he employed a woman named Gotcher, whom he forced to work for more than ten hours one September day in 1905.<sup>21</sup> He was convicted of a misdemeanor and fined ten dollars, and, aware of *Lochner*, he appealed to the Supreme Court.<sup>22</sup> The Court, however, upheld the statute by a vote of nine to nothing.<sup>23</sup>

The reason the case is famous is that the Attorney General of Oregon authorized the National Consumers' League to hire Louis Brandeis to defend the statute.<sup>24</sup> Brandeis wrote a brief that was 113 pages long.<sup>25</sup> Two of those pages discussed cases and legal doctrine; 110 pages presented data from medical journals, psychological texts, and conclusions from a variety of legislative bodies.<sup>26</sup> In other words, measured against any brief that had ever before been filed, the Brandeis brief was not a brief at all. Brandeis called it a brief, but it was in truth something entirely new.

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17. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8.2, at 567-68 (2d ed. 1988).

18. 300 U.S. 379 (1937) (upholding as constitutional a minimum wage law aimed at protecting women and minors).

19. 208 U.S. 412 (1908).

20. See *id.* at 416-17.

21. See *id.* at 417.

22. See *id.* at 417-19.

23. See *id.* at 416.

24. See *id.*; see also ALFRED LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 135-36 (1936).

25. See Brief for Defendant in Error, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107).

26. See LIEF, *supra* note 24, at 136-37.

Justice Brewer, one of the Court's most conservative members at the time, not only wrote the opinion in *Muller*, but also went out of his way to commend Brandeis's brief.<sup>27</sup> The fact that the brief is eponymously named for the lawyer who first employed it should not obscure an important detail: Although Brandeis may have been the first to put such data in a Supreme Court brief, he was not the first to insist that it had relevance to legal disputes. In a series of law review articles published between 1903 and 1905, Roscoe Pound decried the so-called mechanical jurisprudence that was then in vogue and developed what became known as sociological jurisprudence.<sup>28</sup> Pound's jurisprudence, which many students of jurisprudence and legal history regard as a precursor to the Legal Realist Movement, recognized that judges should look to nontraditional sources when deciding legal disputes; they should, in Pound's view, seek broad enlightenment because law is not a science:<sup>29</sup> It is not a collection of self-contained and self-referential rules.<sup>30</sup>

The measure of Pound's influence on American law can hardly be judged by how often he is cited. In the *United States Reports*, there are only twenty-five citations to Pound's work, and most of those are to volumes he edited or to his appellate procedure hornbook.<sup>31</sup> There is not a single citation to what is

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27. See *Muller*, 208 U.S. at 419-20 (including in his opinion an excerpt from Brandeis's brief)

28. See, e.g., Roscoe Pound, *A New School of Jurists*, 4 U. NEB. STUD. 249 (1904); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907). For a discussion of sociological jurisprudence, see generally Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, pt. I, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, pt. II, 25 HARV. L. REV. 140 (1912); and Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, pt. III, 25 HARV. L. REV. 489 (1912). For a superb discussion of Pound's work and impact, see JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY* 164-70 (1990).

29. See generally Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

30. This fact, by the way, is why Judge Traynor was right and Judge Kozinski is wrong on the issue of the use of extrinsic evidence in contracts cases. See Kozinski, *supra* note 2, at 298-301.

31. Citations to Roscoe Pound can be found in *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 94 n.3 (1990) (noting Pound's trial advocacy work); *Schiavone v. Fortune*, 477 U.S. 21, 33 & n.1 (1986) (Stevens, J., dissenting) (recalling Pound's critique of the "sporting" theory within the administration of justice); *Batson v. Kentucky*, 476 U.S. 79, 131 (1986) (Burger, C.J., dissenting) (same); *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring) (same); *Morris v. Slappy*, 461 U.S. 1, 15 (1983) (same); *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 710-11, 717 n.14 (1974) (citing a Nebraska Supreme Court opinion written by Pound); *Chapman v. California*, 386 U.S. 18, 48-49 (1967) (Harlan, J., dissenting) (noting Pound's involvement in reforming the judicial system); *Griswold v. Connecticut*, 381 U.S. 479, 518 n.12 (1965) (Black, J., dissenting) (quoting Pound's Ninth Amendment work); *Crooker v.*

among his most important articles, *Mechanical Jurisprudence*,<sup>32</sup> and there are only a handful of citations to this major piece in all of the reported federal cases.<sup>33</sup>

Nevertheless, this dearth of citations is irrelevant as a measure of the article's importance. It is irrelevant as a measure of Pound's relevance. There is a straight line between Pound's jurisprudence and the Brandeis brief, and in turn between the Brandeis brief and the post-Lochner era.

Roscoe Pound was hardly alone as a great original thinker whose greatness is far from evident merely by reading judicial opinions. Karl Llewellyn, the father of the Legal Realists, was not cited by a single Supreme Court decision during his lifetime and has been cited by only five opinions altogether.<sup>34</sup> This paucity of citation is simply stunning. Surely, however, it is

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*California*, 357 U.S. 433, 444 n.2 (1958) (Douglas, J., dissenting) (recounting Pound's critique of police interrogations); *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 239 (1956) (Frankfurter, J., concurring) (citing Pound's writings on contracts); *Cox v. Roth*, 348 U.S. 207, 210 (1955) (citing Pound's writing on death statutes); *Stein v. New York*, 346 U.S. 156, 202 n.\* (1953) (Frankfurter, J., dissenting) (noting Pound's involvement in the area of criminal law); *NLRB v. E. C. Atkins & Co.*, 325 U.S. 838, 839 (1945).

Citations to Roscoe Pound can also be found in *Seminole Tribe v. Florida*, 517 U.S. 44, 135-37, 157 (1996) (Souter, J., dissenting) (quoting Pound's account of early American common law history); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting) (citing Pound's discussion on the regulation of the law profession); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.10 (1984) (referring to Pound's writings on the common law); *Pulliam v. Allen*, 466 U.S. 522, 546 n.5 (1984) (Powell, J., dissenting) (relying on Pound's civil appellate work); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 283 n.12 (1984) (Stevens, J., dissenting) (citing Pound for his work on the common law); *Barclay v. Florida*, 463 U.S. 939, 989 n.21 (1983) (Marshall, J., dissenting) (citing Pound's civil appellate work); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting) (noting the importance of the right to trial by jury); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 474 n.6 (1978) (Marshall, J., concurring) (quoting Pound's legal ethics writings); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374 n.30 (1977) (same); *Johnson v. Louisiana*, 406 U.S. 356, 383 n.2 (1972) (Douglas, J., dissenting) (citing Pound's writings on jury trials); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 386, 391-92, 404 (1970) (citing Pound's historical account of American and stare decisis).

32. 8 COLUM. L. REV. 605 (1908).

33. See generally *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Union Pacific R.R.*, 3 F.3d 200, 207 & n.2 (7th Cir. 1993); *United States v. Jannotti*, 673 F.2d 578, 616 & n.15 (3d Cir. 1982) (Aldisert, J., dissenting); *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880, 882 n.2 (2d Cir. 1970).

34. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 263 & n.16 (1994) (commenting on Llewellyn's observations regarding statutory construction); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991) (Stevens, J., dissenting) (citing Llewellyn's writings on the common law); *County of Los Angeles v. Kling*, 474 U.S. 936, 940 n.6 (1985) (Stevens, J., dissenting) (same); *United States v. Bass*, 404 U.S. 336, 340 n.6 (1971) (discussing statutory interpretation and citing Llewellyn); *Pierson v. Ray*, 386 U.S. 547, 561 n.1 (1967) (Douglas, J., dissenting) (same).

neither a measure of Llewellyn's greatness, nor a measure of his relevance. The simple fact of the matter is that there is not a single lawyer or law student or judge in America whose life and education has not been affected in a fundamental way by Llewellyn's scholarship and the Legal Realist Movement. Today, we are all realists, and one thing that it means to be a realist is to realize how law develops.<sup>35</sup>

The most often-quoted line from Holmes's essay *The Common Law*<sup>36</sup> is his statement, "The life of the law has not been logic: it has been experience."<sup>37</sup> But the more provocative line is the one that follows. Holmes went on: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."<sup>38</sup> If Holmes was right, and there can be little doubt that he was, the role of legal scholarship is to illuminate all of these things: The role of legal scholarship is to invoke moral and political theories, to discuss public policy, to identify prejudices and their operation. Such scholarship will rarely, if ever, be cited in judicial opinions, perhaps, but it will, if it is good, influence lawyers and judges, and it will, therefore, over time, help to transform the world.

#### IV. THE SPIRIT OF LIBERTY

While on the subject of Holmes's essay, let me also say a word about another of his essays, *The Path of the Law*. Holmes might have more aptly called it *The Path of the Lawyer*, for Holmes's essential message was that although the law student must master orthodox materials—codes and statutes and treatises—the student does not become a great lawyer until he or

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35. For this reason, I find it perplexing that Judge Kozinski acknowledges the effect of legal realism, but then says that the jury is still out on the critical legal studies (CLS or "Crits") movement. See Kozinski, *supra* note 2, at 317. The influence of the CLS movement does not by any means depend on its being "adopted" by a majority of academics or judges (whatever that would mean). The jury has long since rendered its verdict. CLS has had a profound impact; it has taught us many things. Of course, there are examples of good CLS and bad, just as there are examples of good traditional scholarship and bad, but there can simply be no doubt that the Crits have taught us something about law, and that is the measure of relevance.

36. OLIVER WENDELL HOLMES, *THE COMMON LAW* (Mark DeWolfe Howe ed., 1963).

37. *Id.* at 5.

38. *Id.* One of the finest pieces of legal realism was written not by a lawyer, but by a philosopher. See John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

she espies the connection between one thing and everything else. “The remoter and more general aspects of the law,” said Holmes, “are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”<sup>39</sup>

Several years ago, in what proved to be an extremely provocative law review article, Judge Harry Edwards divided the world of legal scholarship into the practical and the theoretical.<sup>40</sup> He said that law schools are failing to train practitioners properly and that law professors are failing to produce scholarship that judges can use.<sup>41</sup> Judge Edwards identified the “law and” phenomenon as proving his point: The rise of law-and-economics, law-and-literature, and other seemingly hybrid disciplines signaled, in Judge Edwards’s view, that law schools were not doing what they are supposed to do.

I should emphasize that Judge Edwards did not paint a caricature; he insisted that practical scholarship can, and often should, employ theory.<sup>42</sup> He also suggested that any law faculty should include both practically oriented teachers as well as others who are more theoretically oriented.<sup>43</sup> Nevertheless, despite this ostensible flexibility or nuance to his view, the basic dichotomy he envisioned—the practical versus the theoretical—animated his thesis.<sup>44</sup> And it is this dichotomy that is quite

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39. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).

40. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

41. See *id.*

42. See *id.* at 35.

43. See *id.* 35-36.

44. See *id.* at 34-36. The same issue of the *Michigan Law Review* included a number of papers commenting on Judge Edwards’s view. The following are several I found especially illuminating: Derrick Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners*, *id.* at 2025; Lee C. Bollinger, *The Mind in the Major American Law School*, *id.* at 2167; Paul Brest, *Plus Ça Change*, *id.* at 1945; Robert W. Gordon, *Lawyers, Scholars and the “Middle Ground”*, *id.* at 2075; Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, *id.* at 1921; James Boyd White, *Law Teachers’ Writing*, *id.* at 1970; Barbara Bennett Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, *id.* at 1977.

For additional commentary on Judge Edwards’s argument, see Sanford Levinson, *Judge Edwards’ Indictment of “Impractical” Scholars: The Need for a Bill of Particulars*, *id.* at 2010; James L. Oakes, *Commentary on Judge Edwards’ “Growing Disjunction Between Legal Education and the Legal Profession”*, *id.* at 2163; Louis H. Pollak, *The Disjunction Between Judge Edwards and Professor Priest*, *id.* at 2113; George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, *id.*

wrong. It is Dizzy Gillespie, not Judge Edwards, who constructed the appropriate dichotomy. There are only two types of legal scholarship: good and bad. The difference is that the good teaches us something about something other than the writer, and the bad does not.

Even the most theoretical scholarship will have practical ramifications if it teaches somebody something. It will have practical ramifications because it will change the way someone sees the world.<sup>45</sup> The world we have made changes incrementally, and incremental change results from incremental changes in understanding, incremental accretions to what lawyers and judges know. Indeed, even ostensibly cataclysmic revolutions—like the Brandeis brief—follow decades, if not centuries, of incremental change.

At the outset I said that law is everything. What I mean by that is that law influences everything human and is in turn influenced by everything human. That is why Judge Learned Hand said that in passing on a question of constitutional law,

“[I]t is as important [for the] judge . . . to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class.”<sup>46</sup>

Hand's reference to class or parish is also a reminder that modern constitutional democracies have their historical roots in the humanism of the Renaissance.<sup>47</sup> Who were these humanists? They were thinkers, some (like Buonaccorso da Montemagna) professors of law,<sup>48</sup> who studied and wrote about the interconnectedness of grammar, rhetoric, history, and moral

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at 1929.

45. Judge Hughes and (ironically) Judge Kozinski are two cases in point. See Kozinski, *supra* note 2, at 312-13, 316-17; Judge Lynn N. Hughes, *Neoscholasticism: Technique, Purpose, and Law Reviews*, *supra*, at 323-24.

46. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 405-06 (1994).

47. See generally 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1978); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 *IOWA L. REV.* 1, 11-17 (1990).

48. See 1 SKINNER, *supra* note 47, at 81.

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philosophy. It was this period that began to see the emergence of popular sovereignty: the notion that the individual is sovereign.<sup>49</sup> This is the world that lawyers created and the world in which lawyers and judges live and work. More important, lawyers and judges maintain this world; it is nothing short of the activity of law that preserves this world we have made.

If there is a single word that best characterizes this world that lawyers have constructed, that word would be “liberty.” In Judge Hand’s most widely quoted sentences, he asked,

“What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right . . . ; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded . . . .”<sup>50</sup>

Oftentimes an arcane piece of legal scholarship will strike a lawyer or a law student or even a judge as lacking relevance, and perhaps some legal scholarship really does. Yet many texts that on first glance appear to lack relevance are in truth as relevant as anything that we read, because they enlighten us about the world. We read these texts and might not at first see the point. Yet, perhaps even without realizing it, our way of seeing the world has changed, and as a consequence, the world itself has changed. These seemingly irrelevant texts show us sparrows that we otherwise would never have seen.

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49. See Dow, *supra* note 47, at 11-17.

50. GUNTHER, *supra* note 46, at 549 (emphasis omitted). Judge Hand also famously stated:

“[Liberty] is the product, not of institutions, but of a temper, of an attitude towards life; of that mood that looks before and after and pines for what is not. It is idle to look to laws, or courts, or principalities, or powers, to secure it . . . It is secure only [in] that sense of fair play, of give and take, of the uncertainty of human hypotheses, of how changeable and passing are our surest convictions.”

*Id.* at 405 (emendations in original).