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Doctrine and Reputation

Abstract
Mary Hiscock and David Allan are both comparative lawyers of distinction who have promoted the cause of the internationalisation of Australian law. Their work highlights the role of academic lawyers in the development of the law and the status of legal writings as a source of law. It also raises the question of how one measures a professional reputation. The purpose of this article is to consider the relationship between these questions.

Keywords
legal doctrine, reputation, influence of academics, academic law

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DOCTRINE AND REPUTATION

*John Farrar**

Mary Hiscock and David Allan are both comparative lawyers of distinction who have promoted the cause of the internationalisation of Australian law. Their work highlights the role of academic lawyers in the development of the law and the status of legal writings as a source of law. It also raises the question of how one measures a professional reputation. The purpose of this article is to consider the relationship between these questions.

General Comparisons of Approach

The common law is largely the product of the judiciary .On the continent of Europe, until the codifications of the nineteenth century, learned writings (which are usually referred to as doctrine) were a fundamental source of law. In England and Australia learned writers have traditionally played a subordinate role and their writings have never enjoyed the status afforded to continental doctrinal writings before the codifications. The position on the continent since codification seems to be that doctrine still enjoys high prestige but is now really an important secondary source in areas governed by the codes and other legislation.[1] This latter role should not be underestimated since, as David and Brierley[2] point out, doctrine creates the legal vocabulary and ideas used by legislators, and influences the methods of statutory interpretation.

Scots law seems to invest certain learned writings with very high authority and it is possibly true to say that these enjoy something of the status of the pre-codification continental doctrine.[3] Not all the works of such writers are

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1 Rene David and John Brierley, *Major Legal Systems in the World Today,* (3rd ed) (1985) p 147.

2 For the continental practice generally see David and Brierley, *op.cit.*, and J. H. Merryman, *The Civil Law Tradition* 2nd ed., Chap. IX. See also Martin Vranken *Fundamentals of European Civil Law* (1997), 66-7. It may, however, be dangerous to generalise as the amount of codification and legislation and the nature of legal literature differ from one civil law jurisdiction to another. These have some bearing on the precise weight to be afforded to doctrine.

3 For Scots law see Lord Macmillan, "Scots Law as a Subject of Comparative Study" in *Law and Other Things*, (1937) p 111; *The British Commonwealth* series Vol. II –

necessarily regarded as having this institutional status and the position of writings by subsequent authors varies according to reputation. Scots lawyers are loath to invest them with institutional status.

The Position of Doctrine in the Common Law

The position of learned writings in the common law has varied at different periods of legal history.[4] Certain classical authors are recognised as authorities and there has gradually been a relaxation of the strange, necromantic rule allowing only citation of dead authors.

In this article we shall look at four great writers who wrote at critical stages in the development of English law – Bracton, Coke, Blackstone and Pollock - assess their authority at the present day and then we shall attempt to describe the modern practice.

Bracton wrote at an early stage in English legal history when the common law was only just beginning to acquire autonomy as a system and there were distinct traces of a Roman law influence in his work. Coke marks the end of the early period and an attempt to preserve the learning of the past in the service of the future. Blackstone presents an accurate and elegant restatement of the common law as it had developed by the mid eighteenth century , prior to the movement for reform. Pollock manifests the preservation of the old learning blended with a wide general culture and an interest in the rational development of the law, while at the same time avoiding the excesses of Bentham. Let us now look at each of them in turn.

Bracton[5]

Bracton was an ecclesiastic who served as a judge in the thirteenth century. He is an important figure in the early common law. His principal treatise was an exposition of the laws and customs of England unrivalled either in literary style or completeness until Blackstone's *Commentaries* in the eighteenth century. His work was influenced to some extent by Roman law but the precise extent is a matter of conjecture. The book shows that even at this early date English law had become based on the forms of actions (i.e. specific formulae into which a cause of action must be fitted) and decided cases. Indeed Bracton states expressly 'If like matters arise let them be decided by like, since the occasion is a good one for

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Scotland by T.B. Smith, pp 32-33; and *Principles of Scottish Private Law* (2nd ed.), Vol. 1, by D.M. Walker, pp 27-28.

4 See Sir P. Winfield, *The Chief Sources of English Legal History*, (1925) p 254. See also D.L. Carey Miller, "Legal Writings as a Source in English Law" (1975) 8 C.I.L.S.A. 236.

5 See further Sir William Holdsworth, *Some Makers of English Law*, (1938) Lecture 1.

proceeding *a similibus ad similia*.'[6] At this time there were no published reports so he had to rely on his knowledge of the plea rolls – the formal record. After his death Bracton's reputation fluctuated. With the growth of a legal profession centred around the Inns of Court and learned only in its own system, the common law eschewed general principle and became in Pollock and Maitland's words 'an evasive commentary upon writs and statutes.'[7] In the sixteenth century Bracton was known to and cited by Coke to liberalise the common law. Sir Matthew Hale in his *History of the Common Law* put the authority of Bracton's treatise on a level with that of the records of the courts[8] and Blackstone also recognised it as authoritative.[9]

Coke[10]

Sir Edward Coke was first a law officer of the crown, then a judge, then later a politician. During his lifetime he was an important figure in the constitutional struggles of the early seventeenth century, but we are only concerned here with his writings as a source of law.

Coke was learned in the law and a skilful pleader although his writings are often verbose and lacking in form. His most important works are his *Reports* and his *Institutes*. In his day there was no agreement as to the form a report should take. Coke's reports come in all shapes and sizes - ranging from summaries of the law to very detailed reports of important cases, all containing his own comments. The *Institutes* met the need of the time for the old law to be restated in modern form. There are four *Institutes*. The first is his commentary on Littleton (an earlier writer of considerable reputation) which deals with land and some of the law of obligations and procedure. The second deals with statutes, the third with criminal law and the fourth with the jurisdiction of the courts.

Parts of Coke's writings are unreliable from the point of view of strict historical scholarship, but all of them have been influential. His knowledge of the ancient law has never been rivalled; he communicated his research in English instead of the Latin and law French of the original materials.

The authority of his writings can be judged from the following judicial remarks:

(a) in *Garland v. Jekyll* (1824) 2 Bing. 296 Best C.J. said: "The fact is Lord Coke has no authority for what he states on the particular point, but I am afraid

6 See Bracton, *Laws and Customs of England* (Thorne ed.) (1968-), Vol. 2, p 21.
7 Pollock and Maitland, *History of English Law*, (1895) Vol. 1, p 204.
8 *History of the Common Law*, (1713) p 189.
9 *Commentaries*, Vol. 1, p 72.
10 See Holdsworth, *op. cit.*, Lecture VI.

we should get rid of a good deal of what is considered law in Westminster Hall if what Lord Coke says without authority is not law."

(b) *Garland v. Jekyll* was referred to by Darling J. in *R. v Casement* [1917] 1 K.B. 98, 141 when he delivered the judgment of the Court of Criminal Appeal. He said:

> It has been said to us that we should not follow Lord Coke because Stephen in his commentaries and other writers have spoken lightly of the authority and learning of Lord Coke. It may be that they have done so. Of course they have all the advantage. They are his successors. If Lord Coke were in a position to answer them, it may be that they would be sorry that they had entered into argument with him ... he has been recognised as a great authority in these courts for centuries.

Blackstone[11]

Blackstone was the first Professor of English Law at Oxford and published his lectures under the title of *Commentaries on the Laws of England* in 1761. In 1770 he was made a judge.

From the point of view of style the *Commentaries* are admirable. The books were aimed beyond the legal profession to the educated public at large. Blackstone's classification follows Roman law to some extent. Thus the order is the nature of law, rights of persons, rights of things, private wrongs and public wrongs.

From the point of view of substance the work has been criticised. There is a lack of profundity and critical acumen[12]. Bentham in particular resented its complacency.[13] Nevertheless the work was a success, particularly in the colonies and the United States where it was the only available source of the common law for many frontier lawyers and judges. Blackstone's *Commentaries* are regarded as authoritative because of their clear style, comprehensiveness and accuracy. Despite Bentham's strictures the *Commentaries* facilitated reform because of their clear statement of the existing law.

Pollock[14]

Sir Frederick Pollock lived from 1845 until 1937. He was an academic lawyer who came from a family of eminent practising lawyers. His knowledge was prodigious and his literary style was graceful. The writer of *The Times* obituary described

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11 Ibid., pp 240 *et seq*.
12 Max Radin, *Handbook of Anglo-American Legal History*, (1936) p 287.
13 See *Fragment on Government* (1776).
14 Holdsworth, *op.cit.*, pp 279 *et seq*.

him as 'perhaps the last representative of the old broad culture.' He was the author of leading textbooks on the law of contract, tort, possession and partnership and was the draftsman of the Bill which became the Partnership Act 1890. His principal contribution was to show students and practitioners that English law was no mere collection of precedents and statutes but a system of rules, principles and standards which was logically coherent and yet eminently practical because it was the product of long experience.[15]

Lord Wright wrote of him in the *Law Quarterly Review* – 'the writings of a lawyer like Pollock, constantly cited in the courts and quoted by the judges, are entitled to claim a place under his category of unwritten law, even in a system like ours which does not normally seek its law from institutional writers.'[16]

The Status and Influence of Doctrine

We have mentioned above four leading writers. There are others such as Glanvil, Hale, Hawkins, Fry and Lindley who could also be mentioned. Can we make meaningful general remarks about them? It seems that unlike certain Roman jurists who enjoyed what is known as the *jus respondendi*,[17] they do not enjoy the status of a primary source of law and there is no English equivalent of the Roman law of citations to determine their standing amongst each other.[18] The earlier English writers are sometimes the only source of knowledge or information about the old law but even where this is not the case they are accepted as a valuable secondary source. Nevertheless as Lord Goddard C.J. said in *Bastin v. Davies* the court 'would never hesitate to disagree with a statement in a textbook, however authoritative or however long it has stood, if it thought it right to do so.'[19] The formal, precedent-based nature of English common law leaves limited scope for the influence of the academic lawyer.[20]

However, to be contrasted with the characteristically robust attitude of Lord Goddard is the undoubted influence that doctrine played in the development of contract principles in the nineteenth century. This has been summed up well by Professor Patrick Atiyah when he wrote[21]:

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15 Ibid., p 286.
16 (1937) 53 L.Q.R. 152.
17 i.e. the privilege of giving *responsa* with the Emperor's authority. See *Digest* 1.2.2, 49 and Barry Nicholas, *An Introduction to Roman Law*, (1962) p 31.
18 See on this Carey Miller, *op. cit.* and Gray, *Nature and Sources of Law* (1909).
19 [1950] 2 K.B. 579, 582. See also *Button v. D.P.P.* [1966] A.C. 591.
20 See Atiyah and Summers, F*orm and Substance in Anglo-American Law*, (1987) at p 403 where the authors contrast the limited influence of academics under the formal English system with their considerably more powerful role under the more substantively based American common law system.
21 P.S. Atiyah, *Rise and Fall of Freedom of Contract*, (1979) pp 682-683.

> These writers were academics, unlike all their predecessors. They were learned men, and men given to theorizing, not in the pejorative sense which the word still bears among legal practitioners, but theorizing in a more acceptable tradition; they were theorists in the sense that they sought to construct a theoretical and systematic framework of legal principle into which specific legal decisions could be fitted. They were also deeply versed in Roman law, and Pollock, at least, was well acquainted with modem civil law countries such as France and Germany, as well as with some of the developments in the United States. When these men came to write about the law of contract, they were not content to follow the traditional English practitioner's method of jumbling cases around without any sort of rational order or classification, or at best following a classification deriving from the forms of action. They found 'no literary tradition of expounding the law of contract in a form which invites the reader to proceed in the solution of problems by applying general principles of substantive law, principles under which the messy business of life is subsumed under ideal aseptic types of transaction, the types themselves being analysed and their legal consequences presented in a systematic form.' They found it necessary to set about creating a new shape to the law of contract. In one sense, it was they who actually created the general law of contract which we still know today, for it was they who formulated it and made explicit much of which had been implicit in the cases.

The Citation of Modern Writers

The old rule of practice was that the works of living authors could not be cited but could be plagiarised by counsel by incorporation into their own submissions to the court. [22] Various reasons have been given for this[23] - the fear that living authors would change their minds and render the law uncertain; the growth of law reporting rendered it unnecessary to cite secondary sources; and the notion that the passage of time would result in the elimination of errors by subsequent editors. Sir Robert Megarry, who spoke with considerable knowledge and experience in these matters, in his *Miscellany-at-Law*[24] added the further reason that:

> there are a number of living authors whose appearance and demeanour do something to sap the confidence in their omniscience which the printed page may have instilled; the dead, on the other hand, so often leave little clue to what manner of men they were save the majestic skill with which

22 See, e.g., *Greenlands Ltd. v Wilmshurst* (1913) 29 T.L.R. 685, 687, *per* Vaughan Williams L.J. and *Tichborne v Weir* (1892) 67 L.T. 735, 736, *per* Lord Esher M.R.

23 See Carey Miller, *op. cit.*

24 *Miscellany-at-Law* (1955), p 328.

> they have arrayed the learning of centuries and exposed the failings of the bench.

The old rule has become honoured more in its breach than its observance. There is an interesting exchange between counsel and the Bench in *R. v. Ion* (1852) 2 Den. 475, 488.

> "Metcalfe (counsel) ... In the 11th edition of a work, formerly edited by one of your Lordships, *Archbold on Criminal Pleading* by Welsby, Mr. Welsby, who may be cited as authority , comments on the words 'utter or publish' ...
> Pollock C.B. - Not yet an authority.
> Metcalfe. - It is no doubt a rule that a writer on law is not to be considered an authority in his lifetime. The only exception to the rule, perhaps, is the case of Justice Story.
> Coleridge J. - Story is dead.
> Cresswell J. - No doubt the cases are carefully abstracted by Mr. Welsby in the passage you refer to.
> Lord Campbell C.J. - It is scarcely necessary to say that my opinion of Mr. Welsby is one of sincere respect."

The reporter, Denison, appends a footnote to the effect that the rule seemed to be more honoured in the breach than in its observance and he refers to a number of writers who had been cited in their lifetimes.

There are numerous conflicting passages in the reports on the application of the rule,[25] but certainly the practice has now developed of citing living authors. It may be, as Hood Phillips maintained, that the judges allow themselves more latitude than they do counsel.[26] In 1947 Lord Denning wrote in the Law Quarterly Review[27] that 'the notion that [academic lawyers'] works are not of authority except after the author's death has long been exploded. Indeed the more recent the work, the more persuasive it is.' This view has not been universally accepted but there seems to be an increasing tendency to accept academic writings as a convenient secondary source of law or alternatively as a source of suggestions of what the law should be where there is a gap or the law is unclear. As Lord Denning said, such books "are written by men who have studied the law as a science with more detachment than is possible to men engaged in practice." Certainly, the views of Professors J. C. Smith and Glanville Williams were frequently cited in criminal cases. Indeed, the critical reception given by the latter to a House of Lords decision on criminal attempts was cited by the House a

25 See, e.g., the authorities cited by Megarry and Carey Miller, *op. cit*.
26 *A First Book of English Law* (7th ed.) (1977) p 238.
27 (1947) 63 L.Q.R. 516.

year later when it overruled that particular case.[28] However, against this is the evidence that only few of the Law Lords regularly read the leading law journals, e.g. the L.Q.R. or M.L.R.,[29] and one might hazard a guess that judges in lower courts have far less time available for such reading.

In Australia there has been perhaps greater use of treatises and articles and a considerable increase in citations of living authors. This is particularly noticeable in the High Court. For example, the judgments of Justices Kirby and Gummow are usually replete with such citations and their honours are people with strong connections with universities. Indeed Justice Kirby wrote the foreward to a Monash festschrift for David Allan.

Sir Robert Megarry , who has been both a writer and a judge, expressed the matter a little more cautiously in *Cordell v. Second Clanfield Properties Ltd.*[30] when he said:

> [T]he process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation and intermittent opportunities for reconsideration. But he is exposed to the peril of yielding to preconceptions, and he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law. This is as true today as it was in 1409 when Hankford J. said: 'Homme ne scaveroit de quel metal un campane fuit, si ceo ne fuit bien batu, quasi diceret, le ley per bon disputacion serra bien conus'; (Just as it is said 'A man will not know of what metal a bell is made if it has not been well beaten (rung)' so the law shall be well known by good disputation) and these words are none the less apt for a judge who sits, as I do, within earshot of the bells of St. Clements. I would therefore give credit to the words of any reputable author in a book or article as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print, often in apt and persuasive language. But I would do no more than that; and in particular, I would expose those views to the testing and refining process of argument. Today, as of old, by good disputing shall the law be well known.

The current Scottish position appears to be that where there is a statement of the law in an institutional work which has not been contradicted the judges will look

28 *R. v Shivpuri* [1987] A.C. 1, overruling *Anderton v Ryan* [1985] A.C. 560.
29 See A. Paterson, *The Law Lords*, (1982) p 14.
30 [1968] 2 Ch. 9, 16.

upon that statement as representing the law of Scotland.[31] The authority of such a statement has sometimes been said to be equivalent to that of a decision of the Inner House of the Court of Session to the same effect. There seems to be consensus between Lord Normand[32] (extrajudicially) and Professors Smith[33] and Walker[34] on this point, although Professor Walker adds that the evaluation of any such statement depends largely on whether the legal context has changed, whether the passage has been approved of or criticised, and on its consistency with the law on related topics.

It must be admitted that even with the latest shift in practice we still seem to differ to some degree from Civilian systems in our treatment of learned writings.

Doctrine and the Study of Reputation in General

Doctrine to some extent is linked with reputation. The concept of reputation is vague and it in turn is closely linked with the more modern concepts of celebrity and fame.[35] The *Oxford English Dictionary* gives its main definition of reputation as 'the common or general estimate of a person with respect to character or other qualities; the relative estimation or esteem in which a person or thing is held.' The idea of reputation is often connected with the quality of being highly regarded or valued. It means "widely regarded in a good light"[36] although the media manipulation of fame has cast doubt even on that.

In a very interesting work by Judge Richard Posner, *Cardozo: A Study in Reputation*[37] the author makes the following points about reputation in general:

1. Posthumous reputation is facilitated by the generality, variety and ambiguity of the person's work. This marks its adaptability to social, political and cultural change.[38]
2. Luck plays a great role in reputation.[39] Sometimes paradoxically this is reflected in the time and circumstances of a person's death, eg the assassination of Lincoln or Kennedy.
3. Luck, however, is rarely the whole story.[40]

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31 See Lord Benholme in *Drew v Drew* (1870) 9 M. 163, 167 and Lord Inglis in *Kennedy v Stewart* (1889) 16 R. 421, 430.
32 *The Scottish Judicature and Legal Procedure*, (1941) p 40.
33 Smith, *op. cit.*, p 32.
34 Walker, *op. cit.*, p 27.
35 See Richard A. Posner, *Cardozo: A Study in Reputation* (1990), Chap. 4 ("Posner 1") and Clive James, *Fame in the 20th Century* (1993).
36 Posner 1, *ibid* 58.
37 Posner 1, 60 *et seq*.
38 Ibid 60-1.
39 Ibid 62.
40 Ibid 62-3.

4. Politics plays a role.[41]
5. Sometimes there are inexplicable and unjust disparities in reputation.[42]
6. Reputation feeds on itself.[43] This may lead to uncritical acceptance of a person's work.

To these one can add being the right place at the right time and manipulation of the media.

We all know of cases where something like the fallacy of authority[44] applies. A person is appointed to a prestigious chair at a famous university and people assume that the person is distinguished. The reasoning is easily circular.

Timing is also important and often this can be fortuitous - an example of luck perhaps.

The manipulation of the media is important in developing a modern concept of fame, if not reputation. This consists of making maximum and creative use of media occasions and cultivating journalists. Again this is often facilitated by place. The media in Australia is centred in Sydney and Melbourne.

Can one be more systematic? The Department of Education, Science and Training operates a rigid system of citation.[45]

Citation is generally carried out to identify a source of information or avoid plagiarism.[46] Self citation is a form of self advancement. It can also be done as respect for the pecking order in a discipline or love of one's friends. The developing modern practice in law reviews is to cite more recent literature, thus often not acknowledging the original source of ideas. This is compounded by computerised search engines which often have a short memory.

Citation studies have been developed in connection with Science and Social Science.[47]

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41 Ibid 66.
42 Ibid 66-7.
43 Ibid 68.
44 See R. J. Aldisert, *Logic for Lawyers* (1992), 11-10, 11-12.
45 DEST, Higher Education Research Data Collection (Register of Refereed Journals). See <http://www.dest.gov.au/highered/research/index.htm>.
46 See Richard A. Posner, 'The Theory and Practice of Citations Analysis with Special Reference to Law and Economics', John M. Olins Law and Economics Working Paper No. 83 (2nd series) (http://papers.ssrn.com/paper.taf?abstract_id=1799655), 5. ("Posner 2").
47 Posner 1, 71.

There are drawbacks in applying this to legal reputation: for instance, some significant law reviews are edited by students and do not count. General survey articles tend to be cited for convenience.[48] This does not mean that they are creative or important. Innovators may be less often cited at least in the early days.[49] There may be a difference between influence and quality.[50] Judge Posner sums up 'Citations are thus an imperfect proxy for reputation and reputation itself an imperfect proxy for quality.'[51] It is interesting in the light of this to see that according to a recent survey Posner is by far the most cited legal scholar. This to some extent is a result of his incredible productivity and it is paradoxical that he is much more productive as an author since he became a judge than he was as a law professor.

Clearly more work needs to be done into the theory and practice of citations in relation to legal reputation. Posner was writing mainly about judges but the points are perhaps more apposite for jurists.[52]

An issue of the *Journal of Legal Studies*[53] in 2000 dealt with 'Interpreting Legal Citations'. This covered a sample of topics which included law school ranking and use in hiring staff as well as most cited law reviews, books and scholars in the USA.

Another imperfect method of measuring reputation in Australia is in the number of Australian Research Council Grants obtained.[54] This has become such a complex bureaucratic and political exercise that it is becoming a self-perpetuating and flawed method of assessing reputation. Key players know how to work the system in a way which is sometimes laughable for those who assess applications. Law as a hybrid discipline tends to suffer badly in this exercise unless an attempt is made to develop an empirical dimension to a particular project. Doctrinal research as such is not favoured for larger awards.[55] At the same time the empirical work is often of little value.

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48 Ibid 70.

49 Ibid.

50 Ibid 71. See the materials cited by him and see also Richard A. Posner, *Frontiers of Legal Theory* (2001), Chap. 13. For another useful critique see F. R. Shapiro, "The Most-Cited Law Review Articles" (1985) 73 California L. Rev. 1540. For a general survey see Blaise Cronin, *The Citation Process: The Role and Significance of Citations in Scientific Communication* (1984), 50-73.

51 Ibid.

52 See Neil Duxbury, *Jurists and Judges*: *An Essay on Influence* (2001)

53 (2000) 24 Journal of Legal Studies Pt. 2.

54 See their website on Grant Programs <http://www.arc.gov.au/grant_programs/default.htm>.

55 For a useful critical evaluation of the types of legal research see *Law and Learning*. Report to the Social Science and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law (1983).

The Future

Add to all this the question of measuring reputation in the Internet Galaxy[56] and we may need to abandon the concept altogether. In this age anyone can become famous for fifteen minutes. The emphasis is on new information rather than its quality. Tracking sources is made more difficult and there is a risk that conventional scholarship will be totally undermined. The Internet is in fact a network of networks. The origins of the Internet lie in Defence activity later extended to key universities in the sciences.

New networks of scholarship in law are now developing[57] but these are sometimes used as a form of intellectual property protection for an idea rather than a fully developed piece of work. In fact, in spite of the revolution in communication and its obvious advantages we are at risk of entering a new Dark Age when reputation has been replaced by fame, and fame is ephemeral. The concepts of doctrine and reputation may thus belong to a bygone age which celebrated more conservative values.

56 Manuel Castells, *The Internet Galaxy* (2001).
57 Such as the Social Science Research Network.