ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

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ABOUT THIS BOOK

During this course, we are going to create an entire new book tailored to your needs as an RPG student. It will fill a large, 2-ring loose-leaf binder. It will, in the end, contain much more information than we can possibly discuss in class. Hence, it is both a course text and syllabus, as well as a resource for the future.

This book has grown out of a long-established traditional class in Advanced (Legal) Research Methodology (ARM) at the University of Hong Kong (HKU) Faculty of Law, Department of Law. It is a required class for all Research Postgraduate (RPG) Students in law, but it often includes undergraduates, non-law students, students from other universities, and many others who want to learn more about sophisticated legal research techniques. My first encounter with the class was as an RPG student when I started my PhD studies in 2001. The teacher was Professor Jill Cottrell, whose book, *Legal Research: A Guide for Hong Kong Students*, is still a standard work on the subject and is now being revised and updated.[1] In following semesters, I had the privilege of team-teaching the class with Jill, and these pages reflect much of her influence and pedagogical philosophy. Her text is still one of the foundational sources for the ARM course, and I assign it for two reasons. First, it teaches the skills of basic legal research. Second, and just as importantly, it is jargon-free. Jill writes with simplicity and springboard lucidity—skills I want my RPGs to see and practice. I also team-taught the class with Professor Michael J. Dilena for one semester, and his counsel on "how to get a PhD" is also reflected here. As was the practice of both Jill and Michael, I invite guest lecturers to share their personal experiences and wisdom (we call them "war stories") with each class. Among our regular guests have been Fu Hualing (department head) and Albert Chen (my own PhD supervisor)—of the HKU Faculty of Law—and they have all told us some tremendous (and often harrowing) war stories. I thank all of them.

[1] A useful follow-on text is John Bahrij, *Hong Kong Legal Research: Methods and Skills* (Hong Kong: Sweet & Maxwell Asia, 2007).

The idea of "war stories" is what makes this book very personal and even, perhaps, idiosyncratic. RPG students are a special breed, and they often work in uncharted territory. They are the elite. They need the basics of advanced research certainly, but they need something more. They need to see in their leader a role model, a coach, a mentor—someone who has been through what they are going through and succeeded. It is very easy, sitting in a study room with a computer and a pile of books for several years, for an individual RPG student to feel alone and to start believing that the doubts and fears and discouragement that beset all RPG students are unique to him/herself. War stories dispel those bugaboos. War stories say, *I fought in the same trench you are fighting in, and I survived. Here I am, alive and kicking. If I can do it, so can you. I'll be with you all the way to the other side.* Whoever uses this book should see it as a model for this kind of approach.

The book can be used by anyone studying law for research purposes, even if that study is not within the context of the law school.[2] It is especially designed, however, for "students *in* Hong Kong." "Students in Hong Kong" includes, of course, Hong Kong students, but it is intended to mean all students (Chinese and non-Chinese) who come to Hong Kong to study law as RPG candidates. It attempts to include in its vision the answers to questions such as: What does it mean to study in Hong Kong as opposed to studying somewhere else? How can I leverage my being in Hong Kong to bring something special, even unique, to my work that I could not do elsewhere? What difference does it, or should it, make that I am studying here? These are important questions, and without good answers to them, one's study in Hong Kong could turn out to be mere happenstance—one could just as well be in Nairobi, or Vancouver, or online. *Being there* means something important. Beyond that, to the extent this book contains lessons of the general principles of advanced legal research, it can be used by anybody anywhere.

As an RPG student, I was also required to take a short course offered by the HKU Graduate School called "Introduction to Thesis Writing," for which there was a section for the sciences and another for the "humanities and related disciplines." I took the latter because I was assigned there due to the common perception that "law is one of the humanities." Shortly after I finished that class, most (but not all) of the course materials were published by the HKU Press as *Dissertation Writing in Practice: Turning Ideas Into Text* by Linda Cooley and Jo Lewkowicz. This book, also, along

[2] Robert J. Morris, "Improving Curriculum Theory and Design for Teaching Law to Non-Lawyers in Built Environment Education" (2007) 25(3/4) *Structural Design* 279.

with the many other resources listed in the chapters that follow, is one of the foundational sources for my ARM class.[3]

Both the "Introduction" class and the book are excellent, but as any law student who engages either will admit, there is something of a misfit. Law has many connections with the humanities, as with the social sciences and, indeed, the sciences—but it is not any one of them. It defies being categorized in any one academic locale. Law, and therefore legal research and writing, are *sui generis*, as law students and teachers in "Introduction to Thesis Writing" themselves admit. The reason for this is not difficult to understand. There is no subject or activity of our modern lives that law does not touch and concern. If other subjects, categories, and pideonholes—sciences, social sciences, arts, humanities—are the islands, law is the sea.[4] Hence, there is a gap, and a rather large one, between what those materials can teach a law student and all that a law student must know and master in order to conduct successful RPG work.

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

One of the tasks of the law school is to teach its students the practice of "thinking like a lawyer," just as the medical school, for example, must teach its students to think like doctors, and the Philosophy Department must teach its student to think like philosophers.[5] And "thinking like a lawyer" is, in many ways, different from

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

[4] Robert J. Morris, "Globalizing and De-Hermeticizing Legal Education" (2005) 1 *Brigham Young University Education and Law Journal* 53.

[5] Robert J. Morris, "Not Thinking Like a Non-Lawyer: Implications of 'Recogonization' for Legal Education" (2003) 53(2) *Journal of Legal Education* 267.

thinking like anything or anybody else. Thus, pure legal research itself has many aspects that researchers in other fields would find strange and foreign. "Pure" research means the study of statutes, rules, regulations, cases, and constitutions—in other words, texts, "black-letter law"—and their intellectual manipulation into legal analysis. If a student undertakes to study other matters such as the prison system, the operations of government, the statistics of police arrests, the operations of the legislature or the governor's office, or the Legal Aid system, those are studies properly described as The Legal System instead of The Law.[6]

In sum, then, it is the misfits—these *lacunae*—that form the gaps which this book designs to fill. I have not designed these materials to substitute for the other resources mentioned above. The user of these materials will soon discover that I recur to the other resources again and again throughout the course. But these materials reflect the special nature of the ARM class itself. First and most importantly, ARM is not based on lectures. Nor is it based on a standard "cookie-cutter" curriculum such as, say torts or contracts which provide a certain body of knowledge that must be "covered" and mastered. I never prepare a class syllabus or calendar ahead of time, and I do not know until the first day of class, when I first meet the students, what shape the course will take that semester. Even then, I only get a glimmer. It is in that first meeting that I ask them to complete the Diagnostic Quiz and the Personal Information Worksheet so that we can get some idea of what they want and need from the class. I do not assume that they know entirely what they want or need—or that I know beforehand who they are or what they need. Surely, I know, they need the basics, and the basics must be reinforced and taught again and again. The Bible is useful here, for it teaches that we must be *doers* and not just hearers.[7] We must "go and DO likewise" the things our teachers have taught us.[8] We must *internalize* the lessons and *put them into practice*. Even today, after all these years of researching and publishing, I still recur to these basics. The truth is that even for RPG students, much of the "advanced" class is an introduction to legal research.

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

[7] *New Testament*, James 1:22 (你們應按這聖言來實行，不要只聽).

[8] *New Testament*, Luke 10:37 (你去，也照樣做吧).

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

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

One "regular" visitor every semester is our Law Librarian, Irene Shieh, whose PowerPoint presentation covers a wide gamut of library skills and insights that we refer to in virtually every session thereafter. Her materials are included in this book, with profound thanks. This supplements other courses in such skills as computer-assisted research available in the law library, the self-taught walking tour, and training in Westlaw and Lexis-Nexis. I try to schedule her visit within the first two or three sessions of the semester because the skills she has to teach are fundamental and cannot be delayed. The only reason we wait for a week or two before her presentation is so that we can cover the initial orientation materials and I can "prepare the ground" a bit in anticipation of her arrival. In inviting our other guests, I try to choose people whose research expertise and experience match the

needs of the students as discovered in the ongoing tailoring exercise. But even then, the guests always bring up some surprises, some aspects of their backgrounds and practice that we did not anticipate and that send us in new and exciting directions.

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

In ARM we don't do much writing. This is advanced *research* methodology, as our official syllabus commands, and we have our hands full just getting through all we need to do in the semester's study of research methods. Were I to require much writing, the requirement could arguably be viewed as *ultra vires* of our syllalbus. Ideally, we would undertake both research and writing in a circular feedback and re-folding into each other, as the two activities potentiate and complement each other. In this era of "outcome-based education," in which pedagogical success is measured by the students' end results, not the teacher's resume, this is what we should be doing.[9] However, that would require two full consecutive semesters, and the time is not, as of now, available. Also, we hope that each student's supervisor will keep close tabs on the writing itself. In order to facilitate a kind of mutual assistance in this regard, I make it a point to extend a personal invitation to the supervisor of each student in the class to join our sessions as often as practicable. Some accept the invitation; some do not. In any case, we measure progress by demonstrable reported achievement in solving knotty research problems in creative ways. Thus, we try to learn both theory and practice. As Sunzi taught: "You may *know* how to win without being able to *do* it."[10]

Over thirty years ago, I sat in Professor Wayne Thode's combined torts and civil procedure class at the University of Utah College of Law. It was the first day of law

[9] Robert J. Morris, "Doing Like a Lawyer: Criteria-Referenced Assessment, Outcome-Based Education, and Work-Integrated Education in Law Studies for Non-Law Students" (manuscript).

[10] **《孫子兵法》**勝可知，而不可為。

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

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

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TABLE OF CONTENTS

(This Table of Contents will be subject to on-going revision throughout the semester as we tailor the class to the emerging needs of each class member. Individual materials may not necessarily be delivered in the order given in the Table, and some may not be delivered at all if experience demonstrates there is no need for them.)

BASIC PHILOSOPHY AND *WELTANSCHAUUNG* OF RPG WORK I

Bacon's Triangle

Nibley's Philosophy

Chopin's Pedal

Llewellyn's Cure

FUNDAMENTAL RPG MINDSETS, ATTITUDES & *WELTANSCHAUUNGEN* II

Chicken and Egg

Introduction, Background, Prerequisites; Editing & Proofreading

United States Law

Chinese-Language Texts on Thesis and Dissertation Writing/Legal Studies

Notes & Highlights from Phillips and Pugh

Notes & Highlights from Cooley and Lewkowicz

Staking Your Claim

Intellectual & Academic Rigour

Exercise Quiz on Plagiarism

Curiosity & Inquisitiveness

Murphy's Law

BASIC CONUNDRUMS & SKILLS; THE LIBRARY; LANGUAGE

Dictionary Work

Common English Problems of Second-Language Learners (ESL)

Serendipity: A Library Exercise

Footnoting Exercise

Citations (Footnotes…..)

Timetabling Your Research Project

Note-Taking

Dr. Sun's First Lecture

SOPHISTICATED TECHNIQUES & CONCEPTS

Law Librarian's PPT Presentation

Archived Materials

Citation Alert Services

The Literature Review (Notes on Hart)

Adjudicating Research Materials

Notes for Viewing The West Wing "Take This Sabbath Day"

Notes for Viewing The West Wing "The Short List"*

Persistence

Analysis

Analysis 2 (Plus IRAC)

US Constitution and *Declaration of Independence*

Bacon's Triad

Translations, Copies….A True Detective Story From Hawaii (Story #1)

Research in Support of the Practice of Law: A True Research Detective Story from Hawaii (Story #2)

Critical *Legal* Thinking & Adjudicating: How Do You Actually Do It?

EMPIRICAL RESEARCH

Empirical Research & Quantitative Analysis—A Primer

Professor McConville's Notes

The Bloom Problem

Ethics in Empirical Research

Notes & Highlights from Salter and Mason

Empirical Research Exercise

THE WARRIOR SPIRIT

Total War (Part 1)

Sunzi for RPG Students (Part 2)

Do You Love the Law?

PREPARING FOR PRESENTATIONS, ORAL EXAMS, & DEFENSES

Your Formal Research Proposal

Tocqueville's Introduction

Sample Pre-Admission Research Proposal

My Confirmation Presentation (Research Proposal)

Thesis Writing

Oral Exam Notes

FINAL MATTERS

Some Good, Pithy Legal, Literary, & Other Quotations (Suitable for Epigramming)

Coral Reefs, Play in the Joints, Deep Wells, and Reasonable Minds

Role Playing Exercise

The *Federalist* No. 1

A Personal View of the Hong Kong *Basic Law*

Final Assignment (Part 1): Questions for Your Review, Assessment, and Introspection

Final Assignment (Part 2): Questions for Supervisor's Review and Assessment

Endgame

Independence

Assignment Bank

Other

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COURSE BOOK (PART A)

WELCOME SPRING 2011

Dear Research Postgraduate Candidate, Students, Guests, Friends:

Welcome to ARM and to the "romance and high adventure" of RPG research! This course is designed to prepare you to succeed as an advanced legal researcher and, by extension, writer, scholar, author, teacher, and enthusiast. We don't want you to blunder into postgraduate study not knowing what you are doing. We don't want you to find out the hard way by making needless mistakes.

Postgraduate research and writing can be confusing and difficult even with the best of help. We want to do everything we can to help you know what you are doing, why you are doing it, and how you will do it. Then you will have a good chance of conducting sophisticated research and producing writing that will make a fresh and important contribution to legal studies.

When you become a research postgraduate student[1], you take the huge step from being a student who did what professors and lecturers told you to do – someone who took in knowledge and gave it back in the form of assignments and examinations ("repeat and report") – to being a co-professional – someone who **produces** knowledge – perhaps for the first time in your life. The step is huge, because when your final work has been accepted, you will be one of the world's experts in your special field.

You won't have an easy time getting to such expertise, but we want to help you make it simpler and less difficult than it might otherwise be. The most difficult time when you have to work out which particular gap in legal understanding your research will address. That means you will need to read **everything** relevant to your topic. You will have to work out what to do, how to do it, and how to write your research report as a well

[1] The term "research postgraduate" and "RPG" in these course materials include "taught postgraduate" and "TPG" and all other designations of postgraduate programmes and students at HKU.

structured piece of legal writing. This course will help you with the research part of that task. Along the way, you may be required to unlearn (忘卻、拋棄) old thoughts and methods that are erroneous, obsolete, and inadequate.

You will do best if you remember a simple principle of RPG research: It is a marathon (馬拉松賽), not a sprint (衝刺，短跑). This is true not only of your personal RPG project, but also of the work and assignments which we will do in this class this semester. It is your performance and endurance over the long haul that will give you success.

This course is designed so that it does not substantially duplicate or overlap other courses that you will take during your postgraduate years. We will touch upon and discuss some of the various methods of conducting RPG research: comparative law, empirical research, black-letter doctrinal research, and so on. However, we cannot focus intensely on any one or several of these methods for a variety of reasons.

First, such intensive study of each method is the subject of other, dedicated courses within the law school and other departments and faculties of the University.

Second, the development of each RPG student's particular methodological approach is within the purview of the advice and approval of the supervisor.

Third, it is assumed that the RPG student already has settled upon a preferred methodology and that that methodology is addressed and approved when the student first applied to the Graduate School for admission.

Fourth, dedicated study of one or a few particular methods of approach is not within the remit of the course's syllabus in the University regulations.

Throughout this Booklet, you will read the plural subject “we”. This class is truly a collaborative effort in which “we” are all part of an elite team.

For an example of world-class standards with regard to RPG research, to which you should aspire, take a look at the Postgraduate Training Guidelines of the UK Economic and Social Research Council (ESRC) here:

<www.esrcsocietytoday.ac.uk/ESRCInfoCentre/Images/Postgraduate_Training_Guidelines_2005_tcm6-9062.pdf>; seen June 30, 2009.

You will note that this document has many references to research in the law and the legal system. The ESRC home page also has a lot of useful information.

If you are not an RPG student or at present part of another program that requires a substantial writing component for grade, you must be prepared to explain in detail how you propose to satisfy the substantial writing assignments required for this course. Check this page on the University's Mission on RPG Education <www.hku.hk/gradsch/web/outcome/index.htm> to see if you truly belong in this class.

Learning Outcomes

By the conclusion of this course, each student will be able to—

1. **Produce by stages a formal research proposal that demonstrates the student's mastery of advanced legal research and citation techniques (including documentary, archival, empirical, interdisciplinary, statistical, library, and electronic), states the topic, thesis, and purpose of the proposed research, and presents the same in acceptable written format conformable to the requirements of the University, the Department, and international standards;**

2. **Produce a series of smaller written assignments and exercises that demonstrate, respectively, a mastery of academic legal English, writing structure, footnoting techniques and problems, empirical methods, the law library, forensic reading skills, and different types and methods of advanced legal research;**

3. **Produce a written Timetable of the entire RPG research project that organizes a complete research plan for the student's entire RPG tenure;**

4. **Participate actively in class discussions and role-playing exercises on research ethics and research integrity in the context of legal research, and sign each written assignment with the University's official "Declaration," demonstrating that the student understands and accepts the definition of plagiarism, understands the need for objectivity and honesty, and agrees to abide by the University's prohibition against plagiarism.**

5. **Participate actively in class discussions that demonstrate a mastery of the philosophical and theoretical issues that arise in doing advanced legal research.**

6. **Follow instructions.**

METHODOLOGY

1. Working together

This class, like the larger world of scholarship, is a "community of scholars." We want to share our experience with each other in order to help you be clearer about what you will do, why you will do it, and how you will do it. At the postgraduate level, your lecturers think of you as an adult professional, who is certainly more expert in some areas than they are. Very quickly, if not already, you will know more about your topic than they or we do. Even your supervisor will recognise that you are more expert on your topic than s/he is. That means we'll listen to you. We will expect you to tell us what you already know (we don't want to waste your time) and what you are not sure about.

2. Helping each other

In this course you will be dealing with both common issues and specific issues. You can help others and ask them to help you when you have questions. Soon, however, you will know so much more than others about your topic that you won't be able to help each other with *content*. But you can help each other in other ways such as *methodology* and *theory*. For part-timers particularly, postgraduate research can be lonely. Each of you will need a support network of friends and colleagues with whom you can share difficulties as well as triumphs. You should immediately identify 1-2 other classmates who can act as your coach and "buddy" in the event that you must miss a class session for any legitimate purpose (such as illness). They will share their notes of the class with you.

3. Learning by doing

During class sessions we will spend some time listening to lectures, sometimes using the Socratic Method, but we will also arrange it so that in each of the three-hour sessions you will do a good deal of talking yourself – giving your views, asking questions, responding to what others have said – much of the time in small groups or at the board. We'll also ask you to do things that will help you understand and internalize (内在化) key issues, tasks, and problems in advanced legal research.

ASSESSMENT

Every class member begins the semester with a presumptive grade of A+. Thereafter, the grade is lowered for every "demerit" (缺点, 过失, 短处) that occurs—incorrect work, poor work, failure to follow instructions, lack of attendance, poor performance on Bacon's Triangle, etc. Every demerit subtracts something from the presumptive A+. If there are no demerits, then the final grade remains an A+.

Your final grade for the semester is composed of two equal evaluations. **50%** is a Draft Research Proposal, which you will produce in several parts over a period of weeks. **50%** is a series of many course assignments, quizzes, exercises, and other classroom activities which are explained and defined in the course materials. Both are of equal weight and equal importance.

All assignments (including a completed draft research proposal or other project that we mutually agree upon) that go to make up the assessment for this course are designed to support the major aim of the course: **to prepare you to be good advanced legal researcher.** If you read widely and deeply so that you can identify an appropriate research problem, and then read to ensure that you have covered every aspect of your research topic, you are likely to produce research that is likely to make a contribution to your scholarly field.

The **criteria** for assessing your work are the measures routinely applied to mature, sophisticated postgraduate researchers in the law throughout the worldwide community of scholars, as well as HKU Law Faculty Standards.

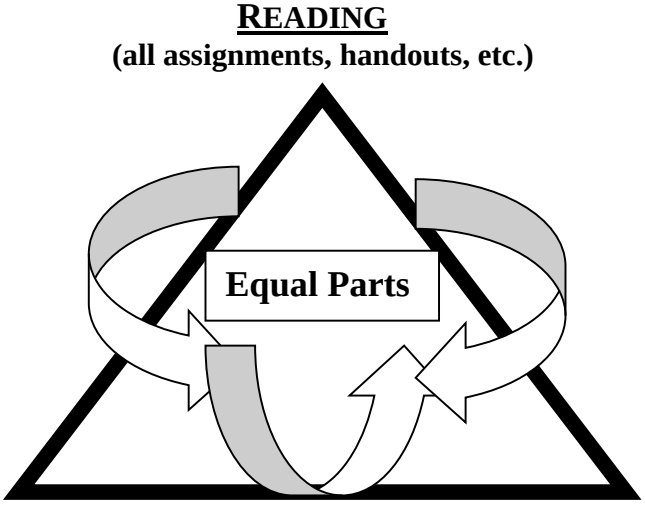
The expected **outcome** of this course is that you will be able to demonstrate that you have achieved the ability to operate within those criteria.

You are expected to read all the content in all the handouts and documents when you receive them--every word. You are also expected to begin work on any assignments included in them immediately and to complete the assignments promptly regardless of whether or when we discuss them in class. You can expect a number of unannounced short quizzes in class throughout the semester that will test your preparation and understanding of the assigned materials for that class session. See the Sample Quiz at the end of this document.

You are accountable to produce the written results of the assignments at any time in conformity with the rules for both content and format.

Finally, you are accountable to come to class prepared and ready to participate by asking questions, joining in discussions, offering opinions and adjudications, participating in role-playing exercise, giving presentations, and in all other ways demonstrating that you are an active and engaged participant in the class. Attendance in the class is not a spectator sport (觀眾的運動).

Thus, your final grade in the class will be a component of three (3) ***equal*** factors[2] as shown in the following diagram:



Assessment policy

[2] We will discuss these factors in many ways and contexts throughout the semester.

To get credit for this course you will need to pass all the assignments and submit all assigned projects on time. ***Late, partial, and incomplete work cannot be accepted***. You must also participate actively in all class discussions.

In-Class Assignment: Yourself as a Beginning Researcher (In-class; first session)

This assignment is designed to give everyone information yourself. This will help us tailor the class to this group's specific needs. Please be honest and open. We will ensure that any sensitive information sent to us by email will remain confidential unless you give permission to share it. When you present in class you can omit any sensitive, personal, private, or embarrassing information. We just want to learn the facts about your research work. We want you to tell us about:

- Your strengths

  Tell us very briefly what academic work you have done and what work experience you have had. Tell us about any particular abilities you have, any interesting things you have done. Don't be modest. This is where we learn what you are proud of. (We assume that your research will focus on a topic that you already know a lot about, but about which you have identified an important research gap.)

- Your anxieties

  At this stage it is normal to be worried about what you will do and how you will do it. Sometimes postgraduate students feel are worried. If you have your own anxieties, tell us what you are worried about. We'll reassure each other and show you what you can do.

- Your research area or topic

  Tell us what you propose to focus on in your research. Say why you chose this area or topic. If you can, tell us what you want to find out. Tell us why it will useful to find this out. Say how you will go about finding this out. Tell us what contribution your research is likely to make to legal studies.

- What you want from the class

  Everyone has different needs. Even if you don't know what you need, tell us what you are not sure about. If you have particular needs or wishes, tell us now. We'll do our best to give you what you need to succeed as a postgraduate candidate.

In all of our sessions, we'll talk about various ways in which postgraduate students have justified their research focus or topic by demonstrating that they are dealing with some aspect of law that is not yet fully understood. Sometimes we say candidates are dealing with "a gap in legal understanding". You will see that candidates identify a gap in legal understanding by trying to find out from the literature: 1) everything that is known about their topic and then working out: 2) what still needs to be understood.

Assignment 1: **Draft of Key Parts of Proposal, or Other Research Project**
Due Wednesday, March 23, 2011 (handed in at class)

For this assignment, please follow the guidelines provided in "Your Formal Research Proposal." You will be expected to produce a first draft of the following parts of your research proposal:

- Title page
- Table of Contents
- Abstract
- Preliminary Review of Literature (at least five quality sources)

Assignment 2: **Draft of Additional Key Parts of Proposal or Research Project**
Due Wednesday, April 6, 2011 (handed in at class)

For this assignment, please follow the guidelines provided in "Your Formal Research Proposal." You will be expected to produce a first draft of the following additional parts of your research proposal:

- Research Questions
- Thesis & Purpose Statements
- Research Methodology
- Research Plan Including Detailed Research Timetable
- References

Assignment 3: **Full Draft Research Proposal or Other Research Project**
Due Wednesday, May 4, 2011

Your task is to submit a carefully edited draft research proposal that follows the guidelines of "Your Formal Research Proposal."[3] The grading standards for this assignment are much higher than for the previous assignments, and so this writing much show substantial improvement and progress over the previous work.

Most RPG students are required to give some kind of Proposal in order to confirm their degree candidature. However, some are not so required. ***If you are in a programme that does not require an RPG research proposal, you may confer with your programme director and me to mutually agree upon another kind of research project that will satisfy this requirement.*** An "other research project" might be one of the following:

(1) the finished research coursework in one of your classes;
(2) an empirical research project where you do actual "field work";
(3) a 10-page research paper;
(4) a research project specifically designed by you and your supervisor, faculty contact, or mentor, and approved by me; OR
(5) any other form of substantial research work that you and I mutually agree upon.

The deadline for this Assignment 3 in all cases is Wednesday, May 4, 2011, not later than 5 p.m. It is to be handed in and receipted not in class but at the Law Faculty main office on 4/f K. K. Leung.

All items in the above three assignments, as with all assignments for the class, are to be in correct HKU regulation format and style for RPG theses and dissertations as published by the Graduate School and the Faculty of Law. Please use Times New Roman 12-point typeface in Microsoft Word format for all your documents All are to be approved and signed by your supervisor, program leader, or instructor. You can attach a separate signature sheet bearing your supervisor's signature to each group of documents if you wish.[4] Keep in mind this statement in the *Graduate School Handbook*, Appendix XV, p. 164, "Form of Thesis":

[3] For help please see the HKU Graduate School booklet, *How To Prepare Thesis Proposal: A Guide for MPhil and PhD Students* (2006).

[4] In special cases where your supervisor may be truly unavailable, an email signature or note will suffice. However, "truly unavailable" here means physically away from Hong Kong or ill and incapacitated, not just inaccessible because, for example, at the last minute you did not allow your supervisor sufficient time to work with you on the assignment.

"The form in which the thesis is presented and the care with which it has been prepared and illustrated are in themselves evidence of the candidate's capabilities and will receive consideration as such."

For all of your work in this class, both FORM and CONTENT are equally important.

Assignment 4: A Full and Complete Course Materials Binder
Due Wednesday, April 20, 2011 (handed in at class)

Your course materials binders are up-to-date, complete, thoroughly organised, and properly indexed and tabbed. Your Index should be of your own creation, not just the sample index I give. Your Index (along with your tabs) should exactly match the organisation and content of the materials in your binder and make it easy for you to find materials in your binder efficiently and quickly. This will be most important as we near the end of the semester and you will need to be reviewing all that we have studied so that you can "put it all together" in your minds. (It also helps you prepare for the quizzes.)

Also, please be reminded that you must bring your complete binders to class with you each class session. This is a standing assignment for the entire semester.

I suggest you work together in groups to compare binders in order to ensure that each of you has everything. That includes all materials sent to you in electronic form by email PLUS all handouts given in class. Show your binders to each other, and help each other get them into the proper condition. If anyone is missing anything, the others can provide a copy. This is especially important for anyone who has missed a class session and may have missed a handout provided in that class session.

Each and every piece of work you hand in for credit this semester--all assignments, exercises, worksheets, essays, quizzes, and other materials--must fully conform in both format and content to the rules and regulations of the University and the Department of Law for theses, dissertations, and other written work. There are no excuses for noncompliance. If you do not yet have your own personal copy of all the University's and the Department's rules and regulations, you must obtain them immediately and familiarize yourself with them.

This means, *inter alia*, that all work must be typewritten and not handwritten. This is why I provide you with the digital copy of each assignment so you can work with it on your own computer. The only exception to this rule is that where the

signatures of yourself and/or your supervisor are required as part of an assignment, those signatures must be both handwritten and original, and the printed name must accompany the handwritten signature. Wherever any document requires your signature and/or the signature of your supervisor or other person, both the signature and the printed name should appear in this manner:

Albert S. Einstein

Albert S. Einstein

Furthermore, according to the University's rules and regulations, every assignment you hand in must include the following signed DECLARATION:

DECLARATION

"I hereby declare that this Thesis (or Research Paper or Dissertation) represents my own work, except where due acknowledgement is made, and that it has not been previously included in a thesis, dissertation, or report submitted to this University or any other university or institution for a degree, diploma, or other qualifications."

_____

Your Signature

No work will be accepted, marked, or graded, and no credit will be given, without this signed DECLARATION, and no late or incomplete work will be accepted, marked, or graded. It is important that you complete all assignments in accordance with the established rules and regulations of the university and of this class. If an assignment does not comply, or is late or incomplete, and I must send it back to you for revision, it will be counted as "late" or no credit will be given.

In this class, cutting corners (省力; 減少費用) is not tolerated. Everything you do must measure up to the four-square (正方形，直率，真率) standard of RPG work.

In short, you are expected to be the kind of RPG student who exhibits exactness and honour in conducting all aspects of your work, who brings honour and distinction to your profession and your University, and who attracts grants and scholarships to your University and Department.

In order to help you accomplish all of these tasks, you will receive many materials in addition to this **Course Booklet Part A**. These materials in the form of handouts collectively will constitute **Part B** of this Course Booklet. They will recommend additional readings and resources for you to seek out. Further, our guest speakers will provide information to you in the course of their respective presentations.

In addition to all of that, you have the published regulations of the University, the Graduate School, and the Law Faculty, as well as the specific instructions of your respective supervisors. You should take all of these on board as the full texts and syllabus for the class.

Law is about following instructions, and this class is carefully designed to test your ability to read or hear, understand, and follow instructions exactly and fully. Doing so is part of the rigor of RPG work.

I urge you to put all of these materials together, along with your class notes, in a tidy, well organised notebook binder, which you can bring to each class session for easy access to all the course materials. As I provide these to you, I will always give you fair notice and warning of what is expected of you. There will be no surprises, tricks, or traps.

Finally, as you consider the many requirements and demands of this class as explained in this Coursebook Part A, you must honestly consider whether or not it is doable—whether or not you have the time, resources, commitment, determination, maturity, energy, and responsibility to undertake this work now—especially if you are not an RPG student. At a minimum, you are expected to spend three (3) hours out of class for every hour in class working on this subject alone. If you feel you are ready to take the class now and you do so voluntarily, that signifies your contractual commitment to do all the work as required honestly and completely.

Think about your decision carefully.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

SAMPLE QUIZ

Time: 10 minutes

_____

Name and Student Number

1. According to the Regulations of the Graduate School, the form (i.e., the structure) of the thesis or dissertation my be chosen by the RPG student in consultation with his/her supervisor..

TRUE FALSE

2. Explain the importance of “but for” with regard to Professor Bloom’s work.

3. What is the “testing out” methodology discussed in Cooley & Lewkowicz?

4. What is the lesson of Marbury’s Theorem?

5. Why is explication important?

I. Avoids plagiarism
II. Maintains scholarly decorum
III. Protects modesty and caution
IV. Is required in university regulations

A. All of the above
B. II and III only
C. I and IV only
D. None of the above

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

COURSE PROSPECTUS: SPRING 2011

General Overview

This course is a one-semester advanced legal research course which is generally required for all postgraduate students[1] in the Faculty of Law. This Prospectus expands upon the official Syllabus for the course, which may be found on the Faculty of Law "Postgraduate Degrees" Web page at a variety of locations at this address: <www.hku.hk/law/programmes/postgraduate_dd.htm>, under "Regulations and Syllabuses," which students are advised to consult. You may see also these pages:

<www.hku.hk/pubunit/pgdr2008> and
<www.hku.hk/rss/pp2009/reg_sylbs_form.html#law>

for further information. This Prospectus should be read in conjunction with those Syllabi and regulations as well as the *Course Booklet* and other class materials which each student receives for this course.[2] These are the laws and regulations that apply.

The course is designed to complement, integrate with, and build upon the courses offered to all postgraduate students by the HKU Graduate School, the Faculty of Law, the Main Library, and Law Library, including, but not limited to, the following:

[1] The terms "postgraduate," "research postgraduate" and "RPG" in these course materials include "taught postgraduate" and "TPG" and all other designations of postgraduate programmes and students at HKU.

[2] For the research postgraduate programmes, we have put the SJD regulations on the Faculty's website and PhD and Mphil regulations are also available on the Graduate School's website.

THESIS WRITING GRSC 6001 and MANY OTHER GRADUATE SCHOOL COURSES, a complete list and description of which may be found at <www.hku.hk/gradsch/web/student/course/gs/index.htm>.

TRAINING IN USING THE LAW LIBRARY and the MAIN LIBRARY

TRAINING IN WESTLAW and LEXIS-NEXIS plus any other ELECTRONIC RESOURCES (example: 北大法律信息網 Chinalawinfo.com) needed for the student's particular research

OTHER RELEVANT COURSES within the Faculty of Law that may fit the student's particular needs and interests, and which the student's supervisor(s) may recommend or require. Please consult the current and projected course lists for courses of possible interest to you.

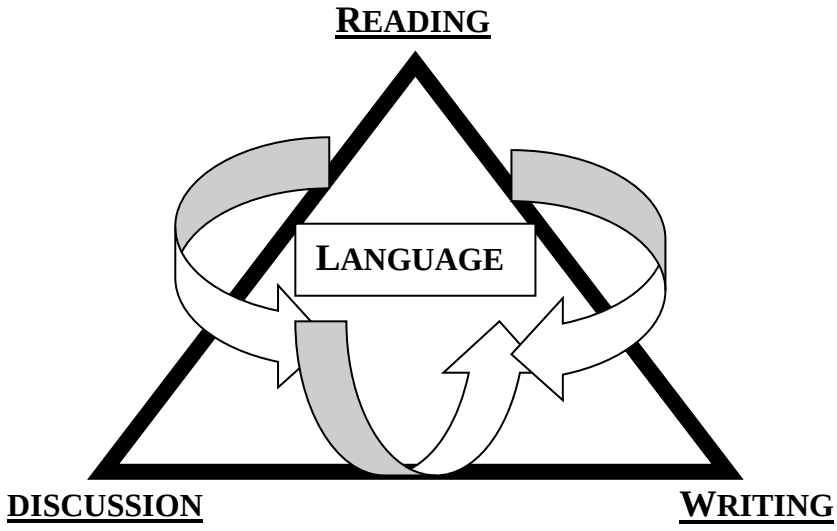
One of the purposes of this course is for students to interact with each other both in and out of the classroom and to offer advice and support to each other as a "community of scholars" in cooperation with the class instructor and their supervisors—and ultimately with the global academic community of which they aspire to become a part. The emphasis is upon the word *advanced*. The course assumes that all members of the class already possess *basic* research tools and skills. Your supervisor, faculty contact, or programme director is very much a part of, and a partner with you in, the work of this class. Working closely with your supervisor, you should strive to make the lessons of the class practical in your actual RPG research project or individual class projects.

Marking and Grades

Students' grades for the class will be based upon a major written research proposal or other substantial research project due April 13, 2011, plus a number of small assignments, problems, and exercises throughout the semester. Grades will also include assessment of the student's full participation in the oral discussions in class, sometimes through the traditional Socratic Method (蘇格拉底方法), but usually based on the discussion of assigned readings and handouts prepared by the instructor. The

grades will therefore depend on how aggressively and accurately each student completes each assignment on time.

The constant interactions of all these elements are depicted in this diagram. Please give it your careful thought:



The final grade will also be based in part upon faithful attendance at class sessions. Each student's attendance will be recorded meticulously at all class sessions, and discontinuation or reduction of grade may be imposed as a penalty for failure to attend regularly.

In sum, final marks for the course will be assigned based upon the *advanced* research standards, conduct, and performance expected of all research postgraduate students in law.

Course Content

Different types of research in law: an introduction to different types of legal and inter-disciplinary research drawing on current examples from the periodical literature and books, as well as electronic resources;

Reading research material: how to read critically and productively; specifically, how to adjudicate what is read;

Following Instructions: you must follow instructions exactly and produce exactly what is called for—nothing more and nothing.

Issues in research on law: a discussion of issues such as objectivity, honesty, and other theoretical and philosophical issues that arise in conducting research;

Advanced library research techniques: using both print and electronic sources;

Advanced online research techniques: using Internet and database sources;

Archival material: its location and purposes;

Empirical research techniques: An elementary introduction on how to read empirical (quantitative) research, and statistical material; how to use empirical techniques for law students (i.e., observation studies, interviews, questionnaires; the secondary use of primary statistical material; students needing more detailed help with empirical research methods should consult the relevant Graduate School courses shown at <www.hku.hk/gradsch/web/student/course/gs/index.htm> as well as relevant books and articles;

Formulating research topics: generating ideas, developing a true and useful THESIS STATEMENT, titles, statements of purpose, abstracts, research strategies, and the like;

Writing a solid proposal or other research project: the content and structure of the postgraduate law proposal;

Planning the writing; dealing with writer's block, organisation of material; different ways of structuring a substantial piece of scholarly writing;

The formalities of scholarly written presentation: citing, acknowledging, plagiarism and how to avoid it, issues of appropriate language;

Other Matters: other subjects, matters, items, and topics tailored to the specific needs of students to help them become advanced researchers within their individual disciplines and with regard to their own research projects.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

LEARNING OUTCOMES

The official "Course Description" for this course stated in the University *Regulations* is as follows:

> Different types of research in law: an introduction to different types of legal and interdisciplinary research drawing on current examples from, particularly, the periodical literature
>
> Reading research material
>
> Issues in research on law: a discussion of issues such as objectivity, honesty and other theoretical and philosophical issues that arise in doing research
>
> Advanced library research techniques—using paper sources
>
> Archival material
>
> Use of electronic resources
>
> Empirical research techniques: how to read empirical research, and statistical material. An elementary introduction to empirical techniques for law students: observation studies, interviews. The secondary use of primary statistical material.
>
> Formulating research topics, generating ideas, developing a 'thesis', research strategies
>
> Writing a proposal

Planning the writing; dealing with writer′s block, organisation of material, different ways of structuring a substantial piece of writing

The formalities of presentation: citing, acknowledging, plagiarism and how to avoid it, issues of appropriate language.

Pursuant to this official description, and consistently with it, the following six (6) Learning Outcomes are stated:

By the conclusion of this course, each student will be able to—

1. **Produce by stages a formal research proposal that demonstrates the student's mastery of advanced legal research and citation techniques (including documentary, archival, empirical, interdisciplinary, statistical, library, and electronic), states the topic, thesis, and purpose of the proposed research, and presents the same in acceptable written format conformable to the requirements of the University, the Department, and international standards;**

2. **Produce a series of smaller written assignments and exercises that demonstrate, respectively, a mastery of academic legal English, writing structure, footnoting techniques and problems, empirical methods, the law library, forensic reading skills, and different types and methods of advanced legal research;**

3. **Produce a written Timetable of the entire RPG research project that organizes a complete research plan for the student's entire RPG tenure;**

4. **Participate actively in class discussions and role-playing exercises on research ethics and research integrity in the context of legal research, and sign each written assignment with the University's official "Declaration," demonstrating that the student understands and accepts the definition of plagiarism, understands the need for objectivity and honesty, and agrees to abide by the University's prohibition against plagiarism.**

5. **Participate actively in class discussions that demonstrate a mastery of the philosophical and theoretical issues that arise in doing advanced legal**

research.

6. **Follow instructions.**

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

DIAGNOSTIC QUIZ

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

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

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

TRUE FALSE

3. "Plagiarism" can be most properly defined as—

I Taking someone else's words as your own
II Taking someone else's ideas as your own

III Representing that you wrote something which you did not
IV Writing an erroneous footnote

A. I and II only
B. I, II, and III only
C. IV only
D. I and IV only

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

5. Regarding primary sources:

I Published material is the most important primary source for legal research.
II Archival material is the most important primary source for legal research.
III Quantitative material is the most important primary source for legal research.
IV Qualitative material is the most important primary source for legal research.

A. All of the above
B. None of the above
C. I and IV only
D. II and III only

6. What is a "thesis statement"?

7. The primary purpose(s) of a footnote is/are—

I To demonstrate your scholarship and erudition
II To impress your supervisor, editor, professor, and/or colleagues
III To help you avoid plagiarism
IV To assist others in finding your sources

A. All of the above
B. IV only
C. I only
D. I, III, and IV only

8. What is a “research gap”?

9. In doing postgraduate research work, as in your professional life generally, it is most correct to say that you are in competition with whom:

A. The professor
B. Yourself
C. The exam
D. Each other

10. Go to the law library and find the following book, which is on reserve at the circulation counter:

Jon Meacham, *American Lion*.

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

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

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

Be prepared to explain your experience in completing this assignment, including any

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

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

a) Poor English

b) Poor logic and argument

c) Poor footnotes and bibliography

d) Poor format and structure

12. What is justice?

13. Do you love the law?

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

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

FOLLOWING INSTRUCTIONS

One of the primary responsibilities of every RPG student is to follow instructions. Failure to do this accounts for a large percentage of problems and delays in completing an RPG degree. Therefore, an important portion of your grade for this class is your performance in understanding and carrying out your instructions.

Instructions come to you in many forms and many ways. They are contained in the official publications, rules, and regulations of the University, the Graduate School, and of the Law Faculty. They come to you from your instructors and supervisors. Some are contained in the ordinances, statues, rules, regulations, and caselaw of Hong Kong. These are just come of the many sources.

Instructions can be grouped into two general categories. One is the instructions that are actually handed to you or to which you are specifically referred in your RPG activities. These usually come to you in some context and with some explanation. The other is the instructions to which you receive no specific reference but which are nevertheless present and relevant to your work. You must ferret these instructions out for yourself. Instructions in both groups are equally important. Failure to follow any of them could result in serious negative consequences to you personally and to your RPG project.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

PERSONAL INFORMATION WORKSHEET

Name & Student Number:

Name to use in class:

Complete contact information:

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

When did you first matriculate at HKU?

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

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

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

Country of origin & native language:

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

:

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

Why have you chosen the HKU Law School?

What do you expect to get from this class?

How do you plan to leverage your residence at HKU in your research project? How will you operationalize that unique experience so that your finished product demonstrates "Hong Kong characteristics" / 香港特色?

Research Topic, Title, or Project:

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

Will your research project be—

_____ Black-letter/doctrinal

_____ Empirical (Quantitative, Qualitative)

_____ Archival

_____ Theoretical, Jurisprudential, Philosophical

_____ Other (specify)

The Research Gap to be filled:

The Thesis Statement:

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

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

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

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

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

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

SERENDIPITY [noun] (善於無意中發現新奇事物或珍寶的天賦.): A LIBRARY EXERCISE

Serendipity is sometimes called "luck," but it is much more than luck. At least it is not just "blind luck" or "dumb luck." It is the unexpected things you find when you, having a prepared mind, are looking for something else. Good researchers experience serendipity because they are skilled and prepared. The scientist (microbiologist and chemist) Louis Pasteur famously said, "Chance [luck] favors only the prepared mind."[1] If you prepare your mind, you will experience serendipity in your research. Things will come to you as gifts and blessings, but you have to be open to them.

This is a short exercise to give you practice in finding items listed in various authors' bibliographical materials. It is designed to enhance your research skills and to increase your ability to experience serendipity. It is in two parts.

Part 1

Go to the library and find all of the following items, which are taken from actual footnotes in published articles and books. When you do so, be sure to trace your steps so that you can explain to the class how you found these items by keeping a written Research Diary. After you have found each item, place a check mark in the space after the item (_x_) to indicate that you have found it and have really tracked down (追蹤到，追查到) and nailed down (釘牢) the full, complete, and correct answer—as we say in the law, "the truth, the whole truth, and nothing but the

[1] "Dans les champs de l'observation le hasard ne favorise que les esprits prepares", or, "In the fields of observation, chance favors only the prepared mind."

truth."—to the highest RPG standard.

Make Xerox copies as follows: For books, copy of the title page and the publication-data page (usually, but not always, these two pages are the front and back of the same page). For journal articles, copy the first page of the article plus the title-index page of the journal showing the title of the journal, volume and issue numbers, date, and the list of articles with authors' names. You will need this information in order to make your own footnotes and bibliography. For each item on the pages you copied, write the HKU library call number of the book or journal. This will help you re-locate the item easily if you need to. Bring these Xerox copies to class. You are encouraged to work with partners or in teams. Bring all your results to class. If you encounter any problems or discrepancies in completing this assignment, please be prepared to report to the class how you solved each problem—in other words, be prepared to tell your research "war stories."

Part 2

As you look for each of the sources above, take a moment with each one to glance at its "neighbors." If you are looking for a book, look to the right, the left, above, and below the book's position on the library shelf. You will find other books about the same topic, and you might find one that is useful to you. If you are looking for an article in a journal, do the same for other journals in the immediate area of the library shelves; also, when you find the article, look at that edition's Table of Contents to see if it has any other articles or chapters in the same volume that are related to your subject. Do you know how to do the same thing on the Law Library home page?

Research Items

Albert Chen, "The Impact of the 1997 Transition on Taiwan-Hong Kong Legal Relations" (1995) 23 *Hwa Kang Law Review* (Chinese Cultural University, Taiwan) 57-67 (in Chinese). (____)

Thomas G. Mahnken, "'One Country, Two Systems': A Theoretical Analysis" *Asian Affairs* 1987, 107. (____)

Ralph B. Perry, *How To Write the Research Project* (London: Routledge, 3rd ed, 2000). (____)

John R. Morris, "Re-Identifying American State Democracy" (2000) 21 *Hawaii University Law Journal* 11. (____)

Alan Chen, "Democracy as Hegemony, Globalization as Indiginization, or the 'Culture' in Taiwanese National Politics" (2000) 35(1) *Journal of African and Asian Studies* 7. (____)

Albert H. Y. Chen, "Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law" in Jan Michiel Otto, Maurice V. Polak, Jianfu chen, and Yuwen Li (eds), *Law-Making in the People's Republic of China* (The Hague: Kluwer Law International, 2000), pp. 55-74. (____)

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

HKU'S DEFINITION OF PLAGIARISM

What is Plagiarism?

First, let's define plagiarism. The Oxford English Dictionary says it means *'..to take and use as one's own the thoughts, writings, or inventions of another.*' (OED 1987). Universities often define plagiarism in their regulations to prevent any misunderstanding among staff and students. Here is how it is defined by The University of Hong Kong:

Plagiarism is defined as the unacknowledged use, as one's own, of work of another person, whether or not such work has been published.

Regulations Governing Conduct at Examinations, p100.
The University of Hong Kong Calendar 1998-99 .

In other words, we are talking about copying. It is clear that it doesn't matter whether the work which is copied has already been published or not. The significant points are that it was copied from someone else and that no acknowledgement has been made.

http://ec.hku.hk/plagiarism/introduction.htm

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

PLAGIARISM ROLE-PLAYING EXERCISE PART I

This exercise is designed to hone your skills at "thinking like a lawyer." It uses the subject of plagiarism in a role-playing game. This assignment is a test of your ability to follow instructions, conduct research, think like a lawyer, think and act like an RPG student, and participate in group and class discussions—all with excellence and rigor.

Paul is a research postgraduate law student in Hong Kong. His university[1] strictly forbids any form of plagiarism (抄襲, 抄書) and punishes it with sanctions that include reprimand, lower grades, suspension of studies, denial of degree, and possibly even expulsion from the university without graduation. His university's official definition of plagiarism is this:

> "Plagiarism is the claiming and passing-off of any work, words, ideas, or text, which you know or ought to know are someone else's, as your own, in order to gain some benefit."

This definition, along with many examples of plagiarism, are published in an official handbook that is distributed annually to every student, staff member, and faculty member of the university. It is also included in the student handbook and the university's book of rules and regulations published on its Web page. They are all part of the university's Honour Code and were written and adopted pursuant to law.

[1] Not necessarily HKU, and not necessarily HKU's definition of plagiarism.

When Paul became a student of the university, he signed a contract stating that he would obey all the rules and regulations of the university. He also represented that he had read and understood (1) the student handbook as well as (2) the handbook on plagiarism, plus (3) the law faculty's rules and regulations on plagiarism, and (4) the contract itself.

Paul was a member of an RPG class that received an assignment to prepare a short research paper. Although he was a postgraduate student, he had never had much formal instruction in how to conduct research, write his findings, or make proper scholarly citations (footnotes, endnotes, bibliographies). He did the best he could on his own, but he made several mistakes, and he did not consult his professor, tutor, or supervisor. Among these mistakes, he copied a large section of text from another person's Web page, inserted that text into his paper, but did not provide a footnote or reference to the Web page source. He also repeated an idea (not actual text or words) which he had received from an instructor but did not provide a footnote or reference giving that instructor credit for the idea. Thus, both the copied text and the idea appeared to be Paul's own.

When Paul's supervisor discovered this, he accused Paul of committing plagiarism and referred him to the university's disciplinary committee with the recommendation that Paul be expelled from the university What arguments will the supervisor make?

What arguments will Paul make?

What arguments will the university make?

Be prepared to advise each of them of his obligations, liabilities, duties, rights, and remedies.

Advise the disciplinary committee of its obligations, liabilities, duties, rights, and remedies.

What additional facts and information would you like to know?

Would it make any difference to your analysis if Paul were a young and inexperienced undergraduate student?

FOR EACH OF THE ABOVE QUESTIONS, BE PREPARED TO EXPLAIN AND DEFEND YOUR ANSWERS.

*** * ***

TWO ASSIGNMENTS

ASSIGNMENT 1: Look up HKU's official definition of plagiarism and make sure you understand all of its elements. How does it differ, if at all, from the definition in this role-playing exercise? Print and bring a copy of it with you to class.[2]

ASSIGNMENT 2: Look up the official definition of plagiarism of your home university and make sure you understand all of its elements. How does it differ, if at all, from the definition in this role-playing exercise? Print and bring a copy of it with you to class.

[2] For a greater understanding of plagiarism, you might want to read Terri LeClercq, 'Failture to Teach: Due Process and Law School Plagiarism" (1999) 49(2) *Journal of Legal Education* 236.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

PLAGIARISM ROLE-PLAYING EXERCISE PART II

This exercise is a continuation of Part I, and we'll change the facts slightly. If Paul were an RPG student at HKU, subject to the HKU rules, regulations, and definition of plagiarism, he would be required by the University's rules and regulations to know and abide by the University's definition of plagiarism:

> *"Plagiarism is defined as the unacknowledged use, as one's own, of work of another person, whether or not such work has been published."*

—and to include the following signed DECLARATION as part of his research paper, thesis, or dissertation:

DECLARATION

"I hereby declare that this Thesis (or Research Paper or Dissertation) represents my own work, except where due acknowledgement is made, and that it has not been previously included in a thesis, dissertation, or report submitted to this University or any other university or institution for a degree, diploma, or other qualifications."

Paul P. Paulson

Paul P. Paulson

Suppose that Paul did give all proper footnotes for the outside materials he included in his paper (including the Internet materials and the idea from his professor), so that the issue is not the absence of citations or the giving of proper credit to others. He actually did all the research and made all the proper citations in order to give "due acknowledgement."

But now suppose also that Paul hired a professional editor or ghost-writer (捉刀人/代筆人) to compose most or all of the final written product that became his paper based on Paul's research. In other words, Paul himself was not the actual "author." Is there any violation in this of the above DECLARATION, which Paul signed, as to its being his "own work"?

ASSIGNMENT

Go to this Web address: <www.lib.hku.hk/general/focus/sep09/2009Sept.pdf> and click on the article, "A Tale of Two Books." Read the article carefully. Learn its lessons carefully. Is Paul in trouble? Read also the Message From the Librarian: "Staying Within the Boundaries of the Law." Is Paul in trouble?

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

EXERCISE QUIZ ON PLAGIARISM (INCLUDING TURNITIN)

This exercise is designed to hone your skills at "thinking like a lawyer."

Paul is a research postgraduate law student in Hong Kong. His university[1] strictly forbids any form of plagiarism (抄襲, 抄書) and punishes it with sanctions that include reprimand, lower grades, suspension of studies, denial of degree, and possibly even expulsion from the university without graduation. The university's official definition of plagiarism is this:

> "Plagiarism is the intentional claiming and passing-off of someone else's work, words, ideas, or text as your own in order to gain some benefit."

This definition, along with many examples of plagiarism, are published in an official handbook that is distributed annually to every student, staff member, and faculty member of the university. It is also included in the student handbook and the university's book of rules and regulations published on its Web page. They are all part of the university's Honour Code and were written and adopted pursuant to law.

When Paul became a student of the university, he signed a contract stating that he would obey all the rules and regulations of the university. He also represented that he (1) had read the student handbook as well as

[1] Not necessarily HKU.

(2) the handbook on plagiarism, plus (3) the law faculty's rules and regulations on plagiarism.

Paul was a member of a class that received an assignment to prepare a short research paper. Although he was a postgraduate student, he had never had much formal instruction in how to conduct research, write his findings, or make proper scholarly citations (footnotes, endnotes, bibliographies) in English. He did the best he could, but he made several mistakes. Among these mistakes, he copied a large section of text from another person's Web page, inserted that text into his paper, and forgot to provide a footnote or reference to the Web page source. He also repeated an idea (not actual text or words) which he had received from an instructor but forgot to provide a footnote or reference giving that instructor the credit. Thus, both the copied text and the idea appeared to be his own.

When Paul's supervisor discovered this, he accused Paul of committing plagiarism and referred him to the disciplinary committee with the recommendation that Paul be expelled from the university.

You represent Paul before the disciplinary committee. What arguments will you make? What arguments will the university make? What arguments will the supervisor make? Advise each of them of his obligations, liabilities, duties, rights, and remedies.

Advise the disciplinary committee of its obligations, liabilities, duties, rights, and remedies.

What additional facts and information would you like to know?

Would it make any difference to your analysis if Paul were a young and inexperienced undergraduate student?

Explain how the use of TURNITIN might/might not have helped this situation (<www.turnitin.com>).

How does your university define plagiarism?

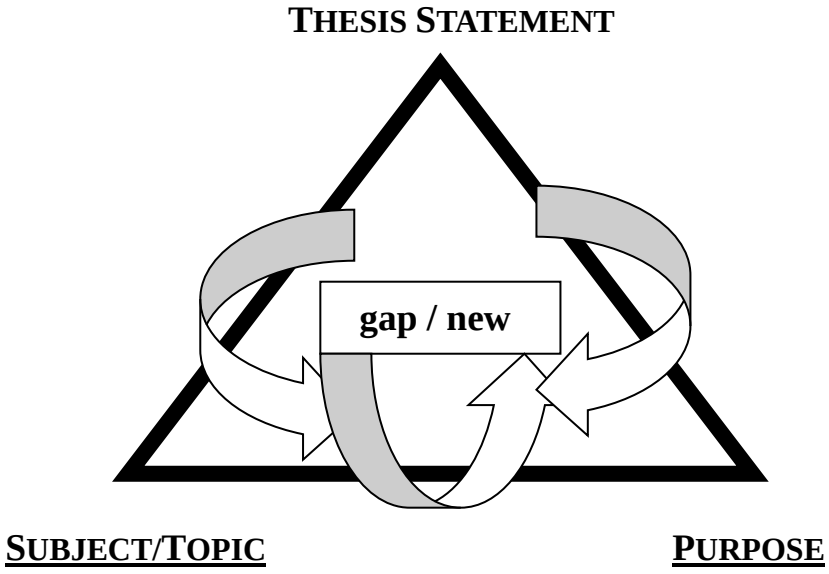
How would you assess the character and maturity of Paul? Paul's supervisor?

EXPLAIN AND DEFEND YOUR ANSWERS.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

THE THESIS-SUBJECT-PURPOSE TRIANGLE



ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

SOCIALIZING & FELLOWSHIPPING

I hope that all of you will use your time in this class during the entire semester to socialize with each other and fellowship each other. There will be time before, during, and after class for this, and you can do it every other day as well.

One of the purposes of RPG training is to teach you to become a full-fledged professional school who is a true peer of other scholars (researchers, professors, teachers, academicians, etc.). You are no longer in a student-teacher relationship but are on the way to becoming a co-equal with these professionals. You can start doing this right here among your peers in this class.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

"Jack-of-All-Trades" Academicians

The problems described above are, if not universal or even identical in all places, widespread enough to warrant concern, and they are often potentiated by another related problem: practicing or academic lawyers who think that a traditional law degree (JD, LLB, PCLL, etc.) qualifies them to research, write about, and pontificate upon, any and every subject that may interest them or that the law may touch and concern. I call this the Jack-of-All Trades Theory of legal research. It is the problem of the dilettante: "As a Legal Jack-of-All-Trades, I can and will undertake anything and everything I want to." It is a failure to define one's "core competence" and avoid anything that it does not include. Judge Harry Edwards notes this problem: "Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it."[1] There are two cautions here. One is that the RPG student is astute enough to identify the jack-of-all-trades syndrome in others; the second is that she does slip into simulating it herself.

It is no wonder, therefore, that it is only with the greatest difficulty that new RPG students learn to grasp the necessity and skills—let alone the *duty*—to adjudicate such materials as Judge Edwards describes. Within the huge volume of legal literature that is their source material, they find a plethora of writings by authors on subjects for which they have no visible qualifications or credentials whatsoever,[2] yet these are the

[1] Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 *Michigan Law Review* 34, 36; original emphasis.

[2] Lee Epstein and Gary King, "The Rules of Inference" (2002) 69(1) *University of Chicago Law Review* 1, collects numerous examples of such writings. Several other articles in the same issue augment or dispute Epstein and King, as do articles published in other venues. See, e.g., Richard L. Revesz, "A Defense of

(sometimes peer-reviewed) writings of the credentialed "masters" whom the students are supposed to emulate. This difficulty often occurs in the "law-and-___" fields, but is also common in studies with names like "The History of Chinese Commercial Law" or "Ancient Greek Jurisprudence." A similar problem occurs when authors untrained in empirical research undertake to do empirical research, especially with a statistical component, on a self-taught, on-the-job-training basis, or take courses outside the law school.[3] Socio-legal research, which encompasses all forms of empirical and archival research, is itself a complex discipline that requires expert training and credentialing.[4] In any of these situations, a traditional black-letter law degree, without more, is not enough. Yet, this is a common attitude among new RPG students. Just because the law itself touches and concerns something (it touches and concerns everything), *they* believe they can, too. They see others do it, so they do it. The Harvard paleontologist Stephen Jay Gould (1941-2002) confronted this problem when he responded to a book entitled *Darwin on Trial* by Berkeley (Boalt Hall) law professor and Christian "philosophical theist" Phillip E. Johnson. The book purported to enter the science-creation debate that is rampant in the United States. Gould's criticism is pungent:

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

[3] For example, the HKU Computer Centre offers courses in the use of statistical software for correlation and regression analysis of data; <www.hku.hk/cc>. The law school does not offer such courses.

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

> "Now, I most emphatically do not claim that a lawyer shouldn't poke his nose into our [the scientists'] domain; nor do I hold that an attorney couldn't write a good book about evolution. A law professor might well compose a classic about the rhetoric and style of evolutionary discourse; subtlety of argument, after all, is a lawyer's business. *But, to be useful in this way, a lawyer would have to understand and use our norms and rules, or at least tell us where we err in our procedures; he cannot simply trot out some applicable criteria from his own world and falsely condemn us from a mixture of ignorance and inappropriateness*…. I see no evidence that Johnson has ever visited a scientist's laboratory, has any concept of quotidian work in the field or has read widely beyond writing for nonspecialists and the most 'newsworthy' of professional claims."[5]

To Johnson's "false and unkind accusation that scientists are being dishonest when they claim equal respect for science and religion," Gould offers the ultimate retort: "Speak for yourself, Attorney Johnson."[6] New RPG students often manifest these kinds of problems when they declare their intended subject of research, and their problems often arise out of an excess of ambition and energy. For example, a student will declare her intention to write a thesis on the comparative law of China, the European Union, Brasil, and South Korea. (A surprising number of students get admitted on the strength of such proposals.) When I eventually see her in my Advanced Research Methodology (ARM) class, I will ask her the most fundamental question of all: "Do you have command of the languages of each of the areas you intend to study (i.e., China, the European Union, Brasil, and South Korea)—and not just the language generally, but the

[5] Stephen Jay Gould, "Impeaching a Self-Appointed Judge" (July 1992) 267(1) *Scientific American* 118-21; reprinted in Liz Rank Hughes (ed), *Reviews of Creationist Books* (Berkeley, CA: National Center for Science Education, 2nd ed, 1992), pp. 79-84, 79; emphasis added. A concise biography of Johnson may be found in Randy Moore and Mark D. Decker, *More Than Darwin: The People and Places of the Evolution-Creationism* Controversy (Berkeley: University of California Press, 2009), pp. 193-95.

[6] Gould, *ibid*. at p. 82.

special ‘covenant language of the law’ as it is inflected in each of those locales?” Are you trained to think like a lawyer in each of those systems? The answer, sadly, is almost invariably no. I then ask: “If you do not have those languages and that training, how then can you make a ‘new contribution to knowledge’? You must work from translations, and the discipline of translation studies tells us that translations, like translators and interpreters, are notoriously unreliable.[7] That will not be good enough for RPG work, especially if you need to conduct empirical research in each of those languages in the field.” Any purported “new contribution to knowledge” that might come from such a project would be immediately suspect in the global scholarly community. One key opens one lock; a different key opens a different lock (一把鑰匙開一把鎖). As Professor Hugh Nibley observed, you must either get all the tools, and precisely the right tools, necessary to your research project, or move on to some other project.[8]

> If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years— *or else shift to some other problem*.[9]

One implication of Nibley’s paradigm is that there is a difference between a lawyer writing about science (or a scientist writing about law) on the one hand, and a lawyer who *is* a scientist (or a scientist who *is* a lawyer) on the other. To push the examples further, suppose another matriculating RPG student, who has practiced commercial law, declares his subject to be “A History of Chinese Commercial Law,” the

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[7] Robert J. Morris, “Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation” (2006) 51(3) *Journal of Homosexuality* 225.

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

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

next relevant question is, “In addition to being qualified as a lawyer and specialist in Chinese commercial law, are you properly credentialed as a historian?” Or the reverse: “If you are properly qualified as a historian, do you also have the necessary credential in the law with a specialty in Chinese commercial law? If your answer is no, you must shift to some other topic. If you do plan to get the necessary qualifications, how do you plan to get them—and when?” Part of the problem of the Jack-of-All-Trades Syndrome arises out of the continuing conflation of the differences between legal research in practice on the one hand, and academic legal research on the other. Lawyers in practice confront a bewildering array of subjects and problems, even within their own areas of specialization. In many ways, their research for clients and the courts must be generalist in nature and must allow for the constantly shifting mix of facts and law in actual cases. They must be masters not only of substantive law but of procedure, evidence, rules of conduct, and so on. What a medical malpractice lawyer knows about medicine often rivals that of a physician. A lawyer whose only language is English may be called upon to represent a Muslim client and necessarily to work through translators and interpreters. In any case, the “new contribution to knowledge” in legal practice may be the winning argument in an appeal that becomes a new case precedent. And this model of generalism in legal practice can often influence RPG work, especially if the RPG student has a background in practice before crossing into the academic sphere. It has the same implications for faculty supervision of RPG students.

A recent example of the difficulty that arises when the two spheres get conflated can be seen in the book, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* by Michael Salter and Julie Mason,[10] written primarily for use in British-style educational and legal systems. The title contains two confusions, one explicit, the other implicit. The explicit confusion is the “writing” preceding the colon with the “research” following the colon. The implicit confusion is between writing in the

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

academy (dissertations) and what the bulk of the work really addresses, which is methods of writing for the courts (practice). It homogenizes the two as if they were interchangeable. Because the text itself conflates these two purposes throughout, it is necessary for readers to parse the text on a page-by-page basis in order to tease apart the materials that apply to the one or the other kind of research and writing. Although the authors pay lip-service to the conduct of socio-legal and empirical research, all of the sources they cite are *published* articles and books. They do not adduce any empirical or archival research of their own, nor do they cite any actual theses or dissertations. This might seem odd in a book on the subject of "writing law dissertations" until we recall that it is odd only within the context of the *global* academic community. This is a model of the conceptual problems under review here as well as of the research structures of many law schools with both traditional black-letter degrees and RPG degrees.[11]

[11] T. C. Daintith, "Postgraduate Legal Education—the EUI Example" in John P. Grant, R. Jagtenberg, and K. J. Nijkerk (eds), *Legal Education 2000* (Aldershot, Hants: Avebury, 1988), pp. 279-85

What Counts as "New"

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

> "find one new point, one new insight, one new way of looking at a piece of law, and organize *your entire article* around that. One insight from another discipline, one application of simple logic to a problem where it has never been made before *is all you need*."[12]

This is to be accomplished by reading everything that bears on your subject—"every significant idea, book, or article that is out there."[13] After you have "read everything" and documented that work so that you will be able to prepare adequate footnotes, *then* you are "ready to write."[14] There is no intervention here of empirical work "in the field," no consultation of unpublished archives, and the finished product is envisioned as a sort of lengthy literature review in which only one single new theoretical angle need be demonstrated. This is the basic model for legal research and writing for practicing lawyers, and it is the reason that (a) the adjective "legal" needs to be appended before the word "writing," and (b) other disciplines such as the sciences and social sciences do not recognize "legal research" as "research at all." Merely figuring out one new insight in literature that already exists does not, for them, qualify as "new." This traditional form of "thinking like a lawyer" may be sufficient for RPG work intended only for an audience strictly within the practicing legal community[15], but it will not serve

[12] Delgado, *op. cit*., p. 448; emphases added.

[13] *Ibid.* p. 450.

[14] *Id*. p. 451.

[15] Robert J. Morris, "Not Thinking Like a Nonlawyer: Implications of 'Recogonization' for Legal Education" (2004) 53(2) *Journal of Legal Education* 267, explores the meanings of "thinking like a lawyer" in the traditional black-letter sense.

for any kind of interdisciplinary "law-and-___" work that in intended to be examined, read, and accepted globally by scholars in other fields.[16] The issue for law school administrators is where to position their RPG programs between these two choices, or along their overla, and how to train and supervise candidates in "thinking like a lawyer who is thinking like a ___."[17]. *A fortiori*, a professor trained and working solely in black-letter law is not qualified alone to guide an empirical or archival RPG project.[18]

Computer-assisted searchable databases have revolutionized legal research. The forms and structures of published legal information, and the fact that they can be searched as a concordance, have influenced and changed how lawyers think about the law[19]—in other words, what counts as "thinking like a lawyer." The implications for both the law and the academy of this in terms of what counts as "new," as well as how something new is identified and structured, are vast. Anthropologist Allan Hanson, among others, discusses the contrasting worldviews of "classificatory" and "indexical" approaches to law and other subjects. The older classificatory approach prefers to learn or to make a "new contribution to knowledge" within structures of established knowledge—of "what is out there." On the other hand, the newer indexical approach (the concordance) organizes what is out there in terms of what they want to know.[20] This

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

[17] Richard Mohr (ed), "Legal Intersections" (2002) 6 *Law Text Culture*, Special Issue, which collects a group of articles that "discuss and critically assess the diverse research methods which can be employed in law-related research from 'conventional' legal doctrinal analysis to methods of empirical data collection and analysis drawn from other disciplines."

[18] Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (London: Oxford University Press, 2010 forthcoming), deals with the subject of qualifications; it may be previewed online at <http://fds.oup.com/www.oup.co.uk/pdf/catalogues/scholarlylaw/General_and_Reference.pdf>.

[19] Richard A. Danner, "Legal Information and the Development of American Law: Further Thinking about the Thoughts of Robert C. Berring" (2007) 99 *Law Library Journal* 193, summarizes the literature and analyzes these ideas.

[20] F. Allan Hanson, "From Key Numbers to Key Words: How Automation Has Transformed the Law" (2002)

represents the difference between a "new contribution to knowledge" that is *found* and one that is *made*. It is not a hard and fast dichotomy, and in fact many creative researchers combine "what is out there" and "what they want to know." Hanson argues that the shift to the indexical approach provides "greater flexibility and creativity" in legal research. He explains:

> "The person who would learn something, or make a new contribution to knowledge, must relate it to the structure of established knowledge. Established knowledge is taken to be certain, which is why proposed paradigm shifts provoke stiff resistance and why those that are ultimately successful are considered to be momentous developments. The certainty built into this view of things also means that when people encounter ways of thinking and behaving different from their own, their typical reaction is to assume that the alien ways are at best misguided, and at worst heretical and evil. Divergent notions about the structure of reality mean that many different worldviews are included within the classificatory type, and they often find themselves at odds with each other."[21]

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> "Non-automated techniques such as encyclopedias, treatises and the key number system are classified indexes. Much as other encyclopedias and library cataloging systems, they organize the law in a hierarchical system of categories that also serve as devices for finding legal information. For those imbued with such research techniques [using classified indexes], the

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94 *Law Library Journal* 92; F. Allan Hanson, "From Classification to Indexing: How Automation Transforms the Way We Think" (2004) 18(4) *Social Epistemology* 333.

[21] Hanson, "From Classification," p. 346.

> classificatory scheme underlying them reveals what the structure of the law really is. A good example is legal positivism: the view that the law exists in its own right and is out there, waiting to be discovered."[22]

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> "Legal research of any sort, be it in case law, regulatory law, or the academic literature, is being weaned away from the hierarchical categories embedded in the traditional research tools. As a result, lawyers are coming to think of the law as a collection of facts and principles that can be assembled, disassembled and reassembled in a variety of ways for different purposes This could call into question the notion that the law actually *has* an intrinsic, hierarchical organization, and that would signal a basic change in the perception of legal knowledge and of the law itself."[23]

This is more than a mere argument for computer and Internet literacy. If a scholar, through concordanced thinking, is free to assemble, disassemble, and reassemble legal facts and principles for new and different purposes, then the possibilities for "thinking like a lawyer" and making a "new contribution to knowledge" expand exponentially—but in ways different from the traditional models. Earlier I cited the example from my editing of a book manuscript of the author who raised a series of suggestions about participatory democracy in Africa from the exiting literature, to whom I replied: *Will YOU now provide this new thinking—these better ideas? What are YOUR more creative solutions? What is YOUR greater advocacy?* A moment's thought will reveal that even if this author undertakes to provide his own answers to these questions, but does so only by manipulating existing ideas from his literature review as suggested by Delgado and

[22] *Id*. at 348.

[23] *Id*. at 348-49; original emphasis.

similar writers, his offering will not count for much in the larger academic community as a “contribution” of anything “new,” for it is grounded in nothing more than his own abstract theory-making. In reality, it will be nothing better than the existing suggestion of the need for more “participatory democracy” and will merely reify that truism. A truism reified is still a truism. What the student produces in this case will not be a true RPG product but merely the “research paper” or “book report” of the middle-school kind. This is not to say that such a product is bad or wrong. It depends on the audience for the product. If the audience (say the court or a client) is expecting such a report as the result of legal “research,” with a legal conclusion and recommendation for action, then that is what it paid for and that is what counts as “new.” However, if the audience is the larger global RPG and academic community that includes humanists, scientists and social scientists, it will not count as a “new contribution.”

What Counts as "Knowledge"

If there are two contingent spheres of legal inquiry—practice and scholarship—then the preliminary question must be, Which knowledge are you talking about—the knowledge of the law, or the knowledge of the legal system? The common law rightly prides itself on its rules of evidence. These have been pruned and developed over long years of experience to include and exclude information based on its probity. Under the rules of evidence, "knowledge" means the information provided by a percipient witness as credible evidence. This, and only this, counts as knowledge. All else is opinion, speculation, faith, hearsay—and is usually inadmissible. The most notable exception to this rule is the opinion of "expert" witnesses, but even that is based upon the expert's special empirical and scientific training and experience, not mere textual exegesis.[24] A medical expert can give expert testimony only on her own area of personal expertise. "What do you know, and how do you know it?" is the key question—not the "grandiose reflections about political philosophy, legal history,[25] and social order" noted by Ely, written primarily for other professors and the occasional judge.[26] If this is true, then the only way for the RPG law student to make a real contribution of "knowledge" is to participate in substantial empirical and archival research—in other words, to become a percipient witness of something and then to "bear witness" of that something in a written thesis or dissertation. There is no way around this reality. But as Peter Shuck notes, empirical work is "grunt work," costly in time and money, and it is uncertain:

> "The payoff from empirical work is substantially contingent in a way that

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

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

[26] Ely *op. cit.* at 491.

> most traditional legal scholarship is not. Until one gathers and analyzes the data, one cannot know whether one will make important new findings or 'merely' confirm what everybody (especially is retrospect) 'already knows.' In contrast, the [black-letter] articles that we typically write [for law reviews] exhibit a kind of predestination; once we have thought our ideas through, we know where we are headed."[27]

This unsettling reality defines the crucial difference. The audience in "the law" expects such predestination. The audience in "the legal system" does not. This difference can arise with shocking surprise early in the career of any RPG law student, and it might send that student fleeing to the comforting arms of black-letter predestination. Increasingly, RPG examinations are seeing questions about empirical and archival research being raised in what the candidate proposed only as a black-letter subject. Conversely, some proposals that are strongly empirical or archival are challenged as to the lack of robustness in their black-letter underpinnings. Either way, in addition to new questions of methodology and theory, the inclusion of empirical work implicates a whole set of ethical concerns. In "predestinated" black-letter research, we usually teach the prohibition against plagiarism and its cognates as the greatest ethical problem. In empirical research, the study of human subjects implicates an additional cluster of regulations and precautions (informed consent, privacy, invasiveness, insurance, liability) that apply only in that arena.[28] And the regulations caution:

> "***Competence*** Researchers should undertake only such research that they and their fellow researchers and research students are competent to,

[27] Peter H. Shuck, "Why Don't Law Professors Do More Empirical Research?" (1989) 39 *Journal of Legal Education* 322, 331.

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

> so that the safety of all research participants, and the ethical integrity of the research, might not be compromised for reasons of incompetence.[29]

Of course, this automatically excludes the jack-of-all-trades and the dilettante. But it says much more than that. The ensuring of "competence" is the first ethical responsibility, and lack of it is as serious as plagiarism.[30] Only such competence can generate acceptable "knowledge." Phillips and Pugh tell RPG students that they are on their way to becoming full-fledged members of a worldwide peer group of scholars, membership in which confers upon them the status to examine other people's theses and dissertations with authority.[31] It is therefore essential for such scholars-to-be to understand fully the respective "rules of the game" that apply to that part of the club they are joining, and to understand them in the incipiency of their candidature.

[29] The full list of requirements for such "Research Ethics" may be read at <http://web.edu.hku.hk/research/research_ethics/Policies_&_Principles.pdf>.

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

[31] Phillips and Pugh, *How To Get a PhF*, pp. 20-23.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

THE LITERATURE REVIEW

All RPG students know that one of the first and most important steps in accomplishing a productive research project is to undertake a high-quality literature review.[1] This is the *sine qua non* of any RPG research project. It is part of the "uniqueness thinking" of true RPG work. Without this foundation solidly in place, it is impossible—impossible!—to formulate a proper thesis statement, state appropriate research questions, or establish a useful framework, model, and methodology for the research project. This is so because without a true quality literature review, you cannot know where the research gaps lie or consider possible ways to fill them. Like the Roman god Janus, in order to see the future, you must see the past. For this moment, you are the gatekeeper of both. It helps to ask some questions:

What is a literature review and why is it important?

What must the literature review accomplish—what jobs must it do?

A good literature review is antecedent to all of the other elements of your research project. It is the foundation and basis for your entire research map—in fact, it *is* your research map. Everything else grows out of, and is built upon, this. Your work will not be accepted or considered for publication without the groundwork and evidence of a

[1] Phillips and Pugh; Cooley and Lewkowicz.

proper literature review.

Your literature review does not (or should not) begin when you first become an RPG student. It should have started much earlier. It is assumed that you come to the Graduate School and the law school's RPG program already well-read in the literature of your chosen field and your intended subject of study. As a research *post*graduate, you should already be at a high level of expertise in your field, and that you already have a fairly clear idea of what you intend to accomplish during your RPG tenure.[2] From that position, your RPG project is supposed to take you to the *next* highest step in your academic progress (更上一層樓). RPG work is not for beginners. It is not designed to give you a place where you can start from scratch () at the bottom—that is for undergraduates. The literature review helps you take the next highest step by showing you precisely where you stand *at this moment* in relation to all other top scholars with regard to the progress of your area of research. As Sir Isaac Newton famously said: "If I have seen further, it is only by standing on the shoulders of giants."[3]

The literature review shows you all the previous steps on all the previous storeys and levels and decks leading up to the place where you now stand and the shoulders of the giants upon which you stand. This is why your literature review—and the research gap, thesis statement, research questions, framework, model, and methodology derived from it—are so important. They are unique. There is nothing else quite like them in the whole world. Your contribution need not be massive; it can be incremental. But you must surely add something of your very own to this ship. This is why your ultimate contribution to knowledge is "new," meaning that it is unique.

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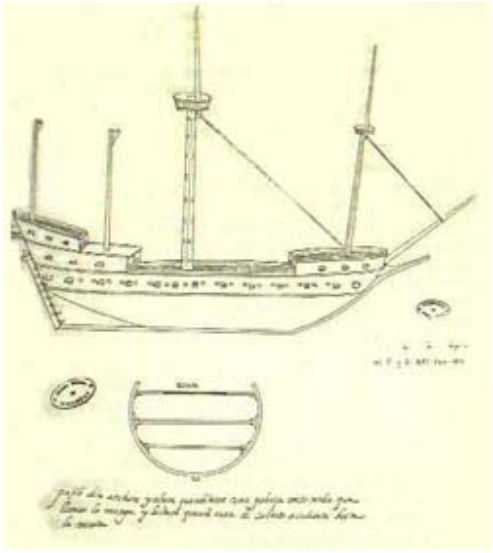
[2] All of this should already be evident in your research proposal which you submitted to the Graduate School as part of your application for admission. However, if this is not true of you, then you are already in trouble. You need to correct this situation *immediately*!

[3] Letter to Robert Hooke, February 15, 1676. The statement is Newton's rendering in English of the Latin: Pigmaei gigantum humeris impositi plusquam ipsi gigantes vident.

出入平安

I. In

You can think of your RPG project as a special kind of shipbuilding (造船). Most boats and ships are built in dry dock () on the land, then launched into the water when the construction is completed. Shipbuilding is a highly technical profession that requires great skill and years to learn



However, your project is different: *it is to build the boat while you are standing in it already on the water*. The instructions that you receive are complex and difficult to understand. They may be in another language. You will have to practice applying them in your own project. The German scholar Otto Neurath (1882-1945) calls this “starting

in the middle."[4] In his metaphor, you are already upon the water in an incomplete boat which was started and launched by others and which you must remodel and augment plank by plank as you stay afloat in it. You cannot jettison any part of it, if at all, until you have something better as a replacement for that part. You must keep the boat afloat, but you will not finish the construction of the boat. It will always be a work in progress (進行中).

Janus

You will add your part (your "new contribution" to knowledge) like a new deck of the ship (更上一層甲板).and then others will follow you in the future who will continue your work, just as you (like the Roman god Janus) have continued the work of your predecessors of the past.[5] You stand in the middle of them. They, like the water itself, surround you. The Harvard scholar Willard Van Orman Quine (1908-2000) expands upon Neurath's metaphor this way:

No inquiry [is] possible without some conceptual scheme…. Analyze theory-

[4] Otto Neurath, "Protokollsätze" (1932) 3 *Erkenntnis* 204-14. The kernel of Neurath's idea is this:

> "Wie Schiffer sind wir, die ihr Schiff auf offener See umbauen müssen, ohne es jemals in einem Dock zerlegen und aus besten Bestandteilen neu errichten zu können." (p. 206)

[5] We will consider your role, as an RPG student, like Janus as well as shipbuilder in several contexts throughout this course. In either role, you are the "master" of the situation. If you have not yet started to think of yourself in this role, you need to do so immediately.

> building how we will, *we all must start in the middle*. Our conceptual firsts are middle-sized, middle-distanced objects, and our introduction to them and to everything comes *midway* in the cultural evolution of the race."[6]

> "…the ship which, in Neurath's figure, we cannot *remodel* save as we stay afloat in it…may owe its structure partly to blundering predecessors who missed scuttling it only by fool's luck. But we are not in a position to jettison any part of it, except as we have substitute devices ready to hand that will serve the same essential purposes."[7]

Take a look at this photo and imagine yourself in the place of that shipbuilder working in that ship:

<www.abc.se/~pa/mar/img/iberia/traditi2.jpg>

That is you constructing your research project by first constructing your literature review. Imagine yourself as Janus looking backward (at the portion of the ship already built in the past) and forward (at the portion of the ship that you have right now in your imagination to build in the future). You are not starting out to build a new boat or a new kind of boat. Rather, you are remodeling and adding to an existing boat. In order to add your unique part to the construction of the boat, you must first know intimately the kind of boat you are standing in and what parts of it have already been completed. You must know what kind of boat it is—its purpose, its peculiarities, its demands, and its place among other boats. The tools, methods, and materials used to build battleships are very different from the tools, methods, and materials used to build submarines.

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[6] Willard Van Orman Quine, *Word and Object* (Cambridge, MA: Massachusetts Institute of Technology and New York and London: John Wiley & Sons, 1960), pp. 3-6 *passim*; emphases added.

[7] *Ibid*. p. 124; emphasis added.

Before you can begin your own work, you must survey the entire boat and assess the work at hand. You must know how your boat floats, how it sails, the operations of all its rigging and machinery, who began its construction, and what parts of it have yet to be completed (the "gaps"). You must also know the shipbuilders who have preceded you. If your scholarly predecessors were "blundering," then the gap you must fill is to help correct their blunders without yourself scuttling the ship or repeating their blunders. If the ship is off course, then the gap you must fill is to correct its course. If they have left the machinery of the ship incomplete or broken, then the gap you must fill is to complete or repair it. Otherwise, you will simply be adrift—without rudder or compass. You must leave the ship in a better and more complete condition than you found it. *All of this starts with the literature review*.[8]

If your research for the literature review reveals few or no substantial peer-reviewed sources, it could mean 1) that your topic cannot effectively be researched, and/or 2) that reputable scholars consider your topic to be unworthy of serious research. If you encounter this situation, be very cautious before you proceed. You may have no boat upon which to build at all.

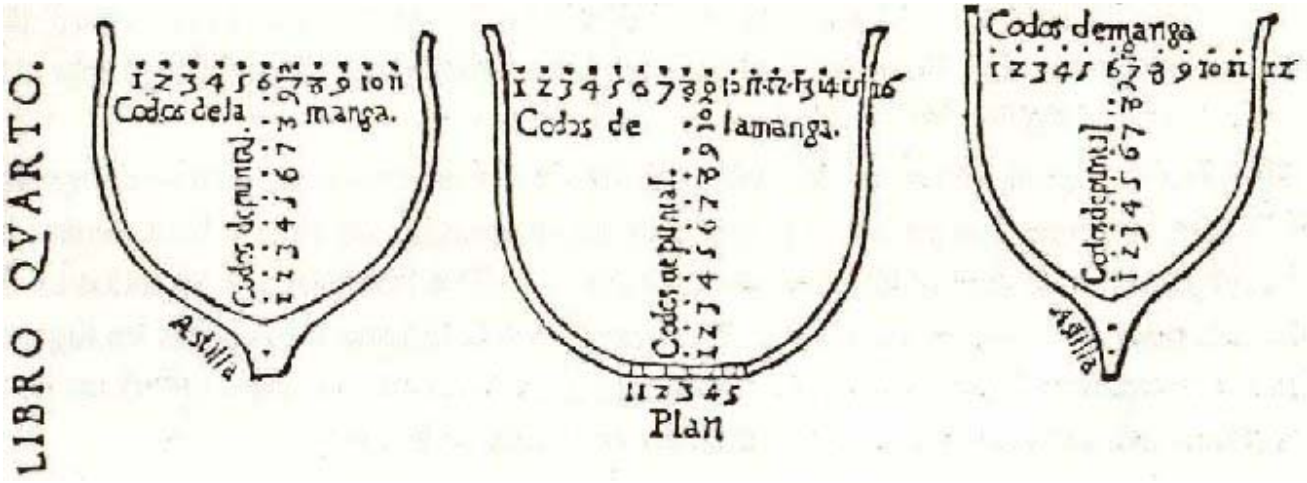
II. Out

Your literature review is not just a list of books and articles which you have read. It is not merely a "repeat and report" summary of them and their contents (such as you wrote in middle school for a "book report").[9] *It must be analytical*. Remember that you are

[8] For an excellent example of this "shipbuilding" process at work by a scientist, see chapter 26 ("How Many Inventors Does It Take To Make a Lightbulb?") in David Sloan Wilson, *Evolution for Everyone: How Darwin's Theory Can Change the Way We Think About Our Lives* (New York: Delacorte Press, pb. ed., 2008), pp. 202-14. HKU library call no. 576.801 W7. The chapter deals with research gap, framework, methodology, research questions, and comparative technique.

[9] This is the stage of your work where you demonstrate that you know how to write footnotes and

already upon the water in a partially built ship. You came there voluntarily. You wanted to be there. You applied to be there. When you applied for admission to the Graduate School and the Faculty of Law, you represented that you already had a good understanding of this particular ship, and that you saw a way to add a new and unique contribution to it because you could recognize research gaps even among subjects that appeared to be very similar or complete. You were accepted and given a position as an RPG student on the basis of that promise. This is an important part of your "uniqueness thinking" also. It requires forensic observation of things that at first glance might appear to be the same but which, upon careful inspection, are different. This is the true meaning of the medical word "diagnosis"—*dia* (two) + *gnosis* (knowledge). It is having the skill to see the subtle differences between two things that to the untrained eye appear identical.



There is no escape from the ship. If you are a true RPG warrior, you cannot jump overboard. You will not abandon ship. If you keep your promise, you cannot run from the job of adding your portion to the structure of the ship. "No cure for law but more

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bibliographical entries in the proper format.

law." If you are to survive, you must *think* your way out of the situation. This means that you must make your ship seaworthy bring yourself and the ship safely into port.

In his novel *Time Enough for Love*, author Robert Heinlein (1907-1988) discusses this idea:

> "Teaching consists of causing people to go into situations from which they cannot escape, except by thinking."[10]

This is the situation of your RPG research project. It teaches you. It is your teacher. You must think your way through it and ultimately out of it. There is no other escape. Remember Langdell's Cure: "No cure for law but *more law*." Your literature review will show you how to think your way *through*, and ultimately *out of*, your research situation so that you finish with an end product which is truly worthy of a postgraduate degree and which commands respect among your peers worldwide. Your literature review will show you what "more law" you need to study, analyze, and write about in order to add your own unique "new knowledge" to the ship you are helping to build. And it will show you how to bring yourself and your ship safely into port as the ship's master without being swamped or sunk, and yourself being drowned. As the Hawaiian proverb says, "It is not the wave outside the canoe, but the wave that gets inside the canoe that swamps it." All of this is part of the discipline of RPG work. US Supreme Court justice Oliver Wendell Holmes, Jr., put it this way:

> "The mark of a master is, that facts which before lay scattered in an inorganic mass, *when he shoots through them the magnetic current of his thought*, leap

[10] Robert A. Heinlein, *Time Enough for Love: The Lives of Lazarus Long* (New York: Ace Books, 1988), pp. ___. This is one of the central ideas that inform the theory of this course.

into an organic order, and live and bear fruit."[11]

This is the analytical part of your literature review. This is where you adjudicate the quality of your sources and compare and rank them according to their quality. This is where the "magnetic current" of your intellect "shoots through" all the multifarious material you have studied and organizes it into an organic whole. Your literature review must bear the evidence that your intellect has worked upon its parts in order to analyze them and bring the whole of it "into an organic order." Those authors and writings which you adjudicate to be good in your literature review will become your teachers (Newton's "giants"), and they will cause you to go *into* intellectual situations from which you cannot get *out*, "except by thinking." What, for example, will they teach you? Among other things, they will teach you what kinds of research you must conduct. If the bulk of your literature review consists of empirical studies, then you will know that you, too, must conduct empirical research. If the bulk of your literature review shows you that the primary methodology in your field is doctrinal (black letter) research, then that is the path you must follow. The same rule applies to statistical analysis and all other possible models, frameworks, and methodologies. *Remember that you are not starting construction on a new ship; rather, you are adding construction to an existing ship that is already upon the water, and that the construction you are adding must be of the same kind as the existing material*. As Professor David Sloan Wilson writes:

> If you think that the lightbulb was invented by a single person such as Thomas Edison, think again. It required dozens and dozens of people, who existed in a culture that enabled them to work as they did, which in turn was the creation of hundreds and thousands of people stretching back into the mist of time.[12]

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[11] Oliver Wendell Holmes, Jr., "The Use of Law Schools" in Oliver Wendell Holmes, Jr., *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), pp. 35-48, 37; emphasis added.

[12] Wilson, *op. cit*., p. 214.

Recognizing and accepting your place and function in the context of this long line of "shipbuilders" is where you start to become a "master." This is what distinguishes RPG work from other sorts of intellectual endeavor—even the work of practicing barristers and solicitors. Your finished product, your contribution to the "boat," the "fruit of your RPG labors, must bear the same evidence of the "magnetic current of [your] thought." Holmes also said, "The law is the calling of thinkers."[13] This is the calling you have voluntarily chosen. This is the situation you are in. It is unique.

[13] Sheldon M. Novick (ed), *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (Chicago: University of Chicago Press, vol. 3, 1995), p. 472; cited and discussed in Robert J. Morris._____.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

WRITING ASSIGNMENT (ALTERNATIVE B)

A LITERATURE REVIEW

The assignment is to write an analytical and annotated **LITERATURE REVIEW**. For instructions on the nature and purpose of a literature review, see the accompanying notes provided on the book, Christ Hart, *Doing a Literature Review*.

This is a semester-long assignment to give you practice conducting legal research and writing. This is a practical exercise designed to demonstrate your research abilities.[1] It is due not later than 5 p.m. on Friday, April 19, 2011, to be handed in at the 4/F Faculty of Law General Office of the K. K. Leung Building. It is suggested that you conform the format of your paper to the Style Guide of the *Hong Kong Law Journal*, which may be found online and downloaded at <www3.hku.hk/hklj/03cont/03-cont.php?style>. Remember at all times to avoid plagiarism. You will receive advanced instruction regarding these skills, including use of the Law Library and computer-assisted legal research. Your work is expected to reflect those advanced standards.

Your research topic will, of course, be the topic you have declared as the subject of your RPG project. You should make sure the topic you have choosen is of personal

[1] You will learn the rudiments of computer-assisted legal research in the Westlaw and Lexis/Nexis training sessions. You will learn how to find things in the Law Library using the self-instructing Walking Tour. You should also use the resources available from the Hong Kong Bar Association, the Hong Kong Law Society, and the Hong Kong Judiciary, as well as the relevant statutes, ordinances, rules, and regulations. It is presumed that you have basic good-writing skills from both your previous educational experiences as well as your professional work.

interest and is one that you want to research further in order to add to your professional knowledge.

Your finished Literature Review should be as long as necessary to survey the appropriate literature in your field. For examples of good published writings that contain literature reviews, I suggest you read the publications of your supervisor and your teachers, particularly those in the *Hong Kong Law Journal*.

According to the University's rules and regulations, every assignment you hand in, including this one, must include the following DECLARATION signed as shown:

DECLARATION

"I hereby declare that this Thesis (or Research Paper or Dissertation) represents my own work, except where due acknowledgement is made, and that it has not been previously included in a thesis, dissertation, or report submitted to this University or any other university or institution for a degree, diploma, or other qualifications."

Albert S. Lim
Albert S. Lim

No work will be accepted, marked, or graded, and no credit will be given, without this signed DECLARATION, and no late or incomplete work will be accepted, marked, or graded. It is important that you complete all assignments in accordance with the established rules and regulations of the University and of this class.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

NIBLEY'S PHILOSOPHY

My old professor and friend, Dr. Hugh W. Nibley, taught the following about scholarship and research:

> The ever-increasing scope of knowledge necessary to cope with the great problems of our day has led to increasing emphasis on a maxim that would have sounded very strange only a few years ago: 'There are no fields—there are only problems!'—meaning that one must bring to the discussion and solution of any given problem whatever is required to understand it: If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years— *or else shift to some other problem*. *Degrees and credentials are largely irrelevant where a problem calls for more information than any one department can supply or than can be packaged into any one or a dozen degrees*.[1]

This means that if you plan, for example, to do interdisciplinary or comparative RPG work, or include empirical research in your program, you must have all the necessary skills—those that are attained through globalized and interdisciplinary education. Without them, you must "shift to some other problem."

Do you at present have, or do you know how to obtain, all the skills needed for

[1] Hugh Nibley, "A New Look at the Pearl of Great Price, Part I: Challenge and Response (Continued)" (Feb. 1968) 71 *Improvement Era* 14 (emphasis added).

your RPG work?[2]

[2] This subject is discussed at length in Robert J. Morris, "Not Thinking Like a Nonlawyer: Implications of 'Recogonization' for Legal Education'" (2004) 53(2) *Journal of Legal Education* 267.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

CHOPIN'S PEDAL (鋼琴踏板, 腳蹬)[1]

The great Polish "poet of the piano" Frédéric François Chopin (蕭邦) (1810 - 1849) famously remarked:

> "Everything depends on good fingering. Suppleness is of extreme importance. Do not use a flat hand. The correct use of the pedal remains a study for life."[2]

When we think of playing the piano, of course we think of the fingering and the supple movements and positioning of the hands and wrists. That's what we watch at a concert or a recital. But the pedal? How can the pedal be so important? No one watching someone play the piano pays any attention to the pedal. And yet Chopin says the correct use of the pedal is a life-time study.

It is an important lesson for advanced legal researchers. You must pay attention to *every* detail and *every* aspect of your craft—even those things that seem "lowly," small, or of lesser importance. Even the smallest details of your research craft will always remain "studies for life." You must learn to coordinate them as part of your research program and integrate them into your research activities. "The devil is in the details."

What are some things you or other RPG students might consider to be the "pedals" of your research work? List them here:

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[1] Excerpted from and discussed in Robert J. Morris, "Globalizing and De-Hermeticizing Legal Education" (2005) *BYU Education and Law Journal* 1.

[2] Frédéric Chopin, quoted in Lowell M. Durham, *Program Notes*, March 9, 1977, Utah Symphony Orchestra performance of Chopin's *Concerto in E Minor for Piano and Orchestra*, Janina Fialkowska, pianist. Thanks to Professor Durham for providing this source in response to my email.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

CHICKEN & EGG

Which comes first: the chicken or the egg?

雞先定蛋先?

雞先或蛋先?

Which of the following comes first in RPG work?

A.		**B.**
Research first to determine—		**Determination first of—**
Subject/Topic		**Subject/Topic**
Purpose		**Purpose**
(Hypo)thesis	**OR**	**(Hypo)thesis**
Argument		**Argument**
Gap		**Gap**
Strategy		**Strategy**
Research Question(s)		**Research Question(s)**
—to develop plan or map		**—to guide / control research plan or map**

If you are in Group A, you must move as quickly as possible to Group B. If you choose A first and stay there for very long, you are getting "the cart before the horse" or 本末倒置. One of the reasons you must develop your (hypo)thesis, purpose, strategy, etc. (group B above) at the beginning of your research project is to ensure that the research methodology you design will really answer your research question(s). In other words, there MUST be a real match between your—

RESEARCH QUESTION(S)

RESEARCH METHODOLOGY & STRATEGY

If you do not do this quickly at the start of your RPG program, the result will be GIGO (Garbage In, Garbage Out). Without a proper thesis statement early in your research to guide your research, your efforts will not be properly focused but will be

scattered (分散, 散開) like the charge from a shotgun (獵槍, 霰彈槍). If you do not do this first, you may waste a lot of time exploring all kinds of avenues, topics, questions, and research possibilities which, while interesting and perhaps exciting, you will not ultimately use. One word for this is "floundering" (掙扎) after the small flatfish (鰈形目魚) that flip-flops everywhere aimlessly and out of control (胡亂, 掙扎, 踉蹌). In other words, you will be like a ship without a rudder (舵, 艄).

There are many kinds of study you might decide to undertake: doctrinal study, comparative research, interdisciplinary studies, statutory interpretation, historical review, case studies, archival research, empirical research, statistical analysis. There are many combinations of these, and there are many more possibilities than these.[1] But the kinds of research questions you ask within these areas are usually the following: Normative Questions, Practical Questions, and Theoretical Questions. Therefore, the relation between your Questions and your Methodology should be as follows:

Normative Question(s)

Normative Research

Practical Question(s)

Practical Research

[1] See, e.g., Bridget M. Hutter and Sally Lloyd-Bostock, "Law's Relationship with Social Science: The Interdependence of Theory, Empirical Work, and Social Relevance in Socio-Legal Studies" in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (Oxford: Clarendon Press, 1997), pp. 19-43.

Theoretical Question(s)

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Theoretical Research

Whether your research methodology is truly designed to answer your research question(s) is a common problem that examiners raise in their reviews of RPG theses and dissertations as well as in presentations for confirmation of candidature. The examiners will ask you: *Does your research methodology truly match your research question(s)? Is there a high likelihood that your methodology will address and answer your research question(s)?*

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

UNITED STATES LAW

UNITED STATES LAW. Several students have indicated the need for special instruction in researching American (US) law, and for the need to do this as soon as possible as part of research projects in comparative and interdisciplinary law. In support of this, you may wish to consult the following two books that deal with US legal research:

Elizabeth Fajans and Mary R. Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers* (St. Paul, Minn: West Group, 2nd ed, 2000);

Helen S. Shapo, Marilyn R. Walter, and Elizabeth Fajans, *Writing and Analysis in the Law* (New York: Foundation Press, 4th ed, 1999).

Both books are written specifically for US law students writing for US editors, law journals, and other US audiences. You will find extensive examples of *Blue Book* style, methods of quoting, citation of cases and statutes, etc. Because US law is a specialist study which is not really comparable in methodology to any other common-law jurisdictions, you will note many large and important differences between US-style legal research and writing as compared with, for example, UK, Hong Kong, and PRC. Studying research methodology in these jurisdictions will not really prepare you to conduct research in US law. Both publishers (West Group and Foundation Press) are law

book publishers. West Group is the owner and author of the online research database WESTLAW,[1] with which all of you should be familiar.

If you are doing research on US law, it is essential that you understand what the Shepard's Citator is, what "Shepardizing" means, and how to access Shepard's Online. For example, in the electronic database Lexis-Nexis Academic Universe under "Basic Legal Research" you will find a link to "*Shepard's*® citations of U.S. Supreme Court cases." Whenever you write about US law, it is expected that you have thoroughly "Shepardized" all cases to which you refer.[2] This is part of the unique system of indexing the law in the US system. You must also know these two books:

Uniform System of Citation (commonly referred to as the "Blue Book") (Law Library Call No. R K114 B65), and the

ALWD Citation Manual (Law Library Call No. KL155 J68 l). ALWD stands for the Association of Legal Writing Directors. Both of these manuals are used primarily in United States law journals; the Blue Book is the most preferred. Make sure you look at the <u>latest edition</u> of each.

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[1] For an interesting comparison of legal thinking between, for example, US law and Chinese law, see Liu Hsuan-tsui, "A Discussion on the Logic of Would-Be" (1935) 8(1) *The China Law Review* 11.

[2] You can access Shepard's using Lexis.com.

(a) When the full text of a (US) case is retrieved, the "Shepardize" button will appear on top of a page. Or, if you have a result list of cases, then each case in the result list will be preceded with a clickable colour icon for Shepardizing.

(b) Alternatively, click "History" on the screen top to bring up a separate list of tabs – a "Shepardize" page is available from there.

If you ever have to "Shepardize" or trace the history of a case for HK or commonwealth cases, you will use "Case Analysis" on Lexis.com, or KeyCite on Westlaw, instead of Shepard's.

Whenever you research US law, it is also expected that you fully understand the US federal system of jurisdictions. There is a separation between the federal (national) government and the state governments. There are (a) one federal jurisdiction, (b) 50 state jurisdictions, plus (c) the District of Columbia (Washington D.C.). Each of these jurisdictions has its own judicial, executive, and legislative system. This is part of the "separation of powers."

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

NOTES & HIGHLIGHTS FROM PHILLIPS AND PUGH

SOME HIGHLIGHTS FROM Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Buckingham: Open University Press, 3rd ed, 2002).

E. M. 菲利普斯, D. S. 普夫著 ; 黃靜, 姚一健譯, *如何獲得博士學位 : 研究生與導師手册* (北京 : 中國農業出版社, 1996).

Page numbers in the following notes refer to the English edition. This summary is merely a guide and is not a substitute for reading the entire book carefully.

This book and these notes should be compared and cross-referenced to Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003)[1], which is the text based on the HKU Graduate School Course, "Introduction to Thesis Writing", GRSC 6001.

Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (New York; Pearson/Longman, 2007).

In order to be an effective postgraduate research student, you need to know and utilize every resource and opportunity available to you. (p. 14)

[1] Despite the title, the book applies equally well to all other RPG work, including MPhil, SJD, LLM, etc.

A doctorate is a license to teach as a member of a university faculty—to be an authority in full command of the subject matter right up to the limits of current knowledge and the astuteness to discover where you can make a meaningful contribution. Your professional peer group is worldwide. It is the learning of both knowledge and skills—knowing *that*, and knowing *how*. It is the status to examine other people's PhD theses with authority. (pp. 20-23)

There are different standards and expectations for MPhil, PhD, SJD, etc,, and you must be aware of the standards for your particular programme. (pp. 23-24)

You must contribute to the analysis and explanation of your topic, not just explain it. You must know what analysis is. (p. 38)

Research means finding good questions as well as good answers. It requires actively challenging old explanations. (p. 39)

Your research (thesis, dissertation, article) must have a "thesis statement" that gives your position, the point you wish to argue. (42)

Your research must build upon existing research cumulatively; it must add up to something; and it must turn over new ground. (p. 43)

One of the best paradigms for legal researchers is "testing-out," but there are others that may be more suitable to your situation and topic. (pp. 50 et seq.)

Your "contribution to new knowledge" need not be massive; it can be incremental. (pp. 63-64)

A thesis or dissertation has a specific, accepted, traditional form to which you must adhere. (pp. 73)

Uncertainty is inherent in the doctoral process. (p. 74) Your goal, therefore, is to achieve the "progressive reduction of uncertainty." (pp. 85-88)

In this process as you progress in your research, you must become independent from your supervisor, your instructors, and all others; you must become your own supervisor. (pp. 77-78) You must progressively "wean yourself away" from (斷奶;

斷絕/放棄) dependence on your supervisor or anybody else—because you are on your way to becoming their colleague. (pp. 95, 179-82)

In the process of research, the "thesis statement" of your thesis or dissertation may be redefined, modified, and manipulated many times. (pp. 42, 92-93)

You are expected to manage your supervisor and your time with him/her. (pp. 100-120)

Both the supervisor and the RPG student should keep DIARIES of their meetings with records of all that is discussed and decided. (p. 111)

"Be sure to make a short summary of what occurred during each tutorial. This single sheet of paper should be photocopied with both student and supervisor keeping a copy. In this way both can refer to what has been agreed, and both have a continuous record of how the work and the supervision is [*sic*] progressing." (p. 112)

Your supervisor, your examiners, and all others involved in guiding you through the PhD process want you to succeed and become one of them. (pp. 189-90) This means that you should "plug into" your supervisor's own network of connections and colleagues. (p. 14)

By the time you come to your oral defense, you should know your own material so intimately that you can point to the content of every paragraph. To help you do this, prepare an outline of your thesis using the "grid technique." (pp. 152-55)

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E. M. 菲利普斯, D. S. 普夫著 ; 黃靜, 姚一健譯, *如何獲得博士學位 : 研究生與導師手册* (北京 : 中國農業出版社, 1996).

Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (New York: Pearson/Longman, 2007).

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[1] Despite the title, the book applies equally well to all other RPG work, including MPhil, SJD, LLM, etc. As you study this book, be sure to pay special attention to the many excerpts from examiners' reports of actual theses and dissertations. These are shown in the gray areas on the pages. The first of these occurs on pp. 21-22 as Task 1.2. The examiners' comments will help you understand what examiners are looking for not only in your written work, but also in oral presentations.

Similarly, the book also contains many excerpts from actual RPG writings and published journal articles showing examples of the topics under discussion—also in gray areas on the page. Pay special attention to these also. At the end of each chapter, you will find summary sections entitled, "Bringing It All Together" and "Checklists." These sections will help you understand the main points discussed in each chapter. The "Follow-Up Tasks" at the end of each chapter are good exercises to help you learn these things by practice.

Extended pieces of RPG writing (theses, dissertations, research papers, articles) have certain linguistic characteristics, including "readability," for which you, the RPG student, are responsible.[2] (pp. 3, 152)

You must identify a research space or gap and perform for your audience three tasks: (1) explain the background that led to your study, (2) describe how you carried out the study, and (3) discuss your findings and conclusions. (pp. 4, 7)

There are many kinds or "types" of RPG writing. Perhaps the most relevant for law studies is Type 3, topic-based or text analysis. However, other types or combinations of types may also be useful. (pp. 8, 129-31) Compare this with the "given-new" methodology. (pp. 155-62, 169)

Regardless of which type or combination of types you use, you must explain to your audience how you will make changes to an existing "building" that is in need of renovation, extension, or repair.[3] (pp. 9, 95-96)

When you identify your research gap, you must explain why other researchers in the field have not already examined the area you intend to explore. This explanation will serve as a justification for your own research. (p. 13)

Be sure to state the delimitations of your work. (p. 14)

The literature review must be relevant, selective, and focused. It should be organized thematically rather than chronologically. (pp. 22-23)

The literature review must be right up-to-date as of the time of submission, and it must be adjudicative and analytical. (pp. 26, 34) Otherwise, some other scholar may "scoop" (搶在, 搶先) you.

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[2] The book contains much information in every chapter about the use of English in scholarly writing. Pay special attention to all of these notes, regardless of whether English is your native or your second language. Remember that you must become "quite a master" of the language in which you are working. (p. 167) At HKU, that is standard, academic legal English.

[3] The "building" is, of course, the existing body of research and knowledge to which you will add your own new contribution.

The literature review must be summarized from point to point within the review, with the main points drawn together and related to each other. (p. 28)

Hypotheses and research questions must be crafted with care according to the needs and nature of your research. (pp. 31-32)

As an RPG student, you are joining a club for experts.[4] You must demonstrate your familiarity with the information which other members of that club ought to (and do) already know. (p. 38)

Criticisms of other members of the club are rare, and if you make them, you must have the evidence to support your assertions. (p. 41) One way to do it politely and properly—so that you do not create offence—is by "hedging." (pp. 60, 66, 78, 93) You must therefore learn and master the vocabulary and techniques of hedging.

There are many reasons for citing source materials, just as there are many methods of citing those source materials in footnotes and bibliographies. (pp. 37-67)

The overall purpose and goal of citations is "informativity." (p. 45)

Words indicating "proof" and "prove" must be used with extreme care. (p. 48)

There are both differences and similarities between experimental research and non-experimental research, although some of your rhetorical moves in reporting such research may be the same in both. (p. 69)

You write your first (Introduction) chapter last. (p. 95) There must be an explicit link between the introduction (first chapter) and the conclusion (last chapter). (p. 123)

Although they may be part of the same final chapter, "Conclusion" and "Summary" are not the same thing. You must know the differences. You must state your findings, spell out the new contributions of your study, state their implications, and make recommendations for your audience. (pp. 102-04)

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[4] The "club" is the worldwide community of scholars in your field of expertise.

Resist the “urge toward teleology [目的論].” (p. 108)

The Abstract is one of the most important sections of the writing and, like the first chapter, is written last. (pp. 112-23)

The IMRAD formula will help you establish the important links between the various sections of your writing. (pp. 123-25)

Signposts and summaries within the body of your text are crucial. They function like the Roman god Janus[5], looking at once both backward and forward. (pp. 131-48)

Proofreading, editing, and spell-checking are all different tasks, and none of them can be omitted or substituted for the others. (pp. 151, 169)

The structure of information in writing (what some people refer to as “architectonics”)—meaning the order or form in which information is presented to your audience—is crucial to good research and writing. (pp. 152-56)

[5] Janus image from the British Museum, downloaded August 3, 2008.

Pay attention to grammar, syntax, diction, vocabulary, and other linguistic and stylistic factors. (pp. 157-61)

Use repetitions (“tags”) across sentence boundaries. (p. 159) Beware of meaningless sentence connectors. (p. 160)

It is necessary for you to become “quite a master” of the language. (p. 167)

Remember Seneca’s bee. (p. 180)

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

NOTES & HIGHLIGHTS FROM HART

SOME HIGHLIGHTS FROM Chris Hart, *Doing a Literature Review: Releasing the Social Science Research Imagination* (Los Angeles, London, New Delhi, Singapore: Sage, 2008).[1]

The literature review is a major tool to help you understand what it means to be a research student. (p. ix)

It is not a mere list or annotated bibliography or book report. Rather, it is an analytical exercise designed to justify your particular approach to your research project. (pp. 1, 174)

It is an exercise in learning how to manage information, without which your work will lack the technical standards required of RPG work. (p. 3)

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[1] Much of what Hart says is consistent with other authors and texts which we consider in this course. Therefore, this summary does not repeat those points but emphasizes the points that are new or peculiar to Hart. Selection of items for this summary does not imply that omitted items are of lesser value. These notes should not be considered as substitutes for reading Hart's actual text—this is the reason his page numbers are given in parentheses.

The book contains many useful charts, tables, and diagrams, as well as case studies, that are not summarized here but which you should examine with care. Hart is especially good at using the examples of other scholars to illustrate his arguments. See, e.g., Table 4.2 Issues for Research Design (p. 86), Table 7.2 Possible Structures for Your Argument (p. 188), and Table 7.5 Five Main Components of an Introduction (p. 196). Hart, of course, writes within the social sciences context. Law is not one of the social sciences, but his ideas are close enough that we can usefully analogise them to the needs of RPG legal research. And indeed the law touches and concerns all of the social sciences, as it does the sciences, the arts, and the humanities.

The goal of a modern RPG student is to develop transferable multidisciplinary research skills that transcend the methodological biases, disciplinary boundaries, and misunderstandings that are taught in most academic disciplines.[2] (pp. 5-6)

The Economic and Social Research Council (ESRC) in the UK publishes many useful guidelines on RPG research. (p. 7)

There is a difference between producing a piece of competent research and a piece of research that demonstrates scholarship.[3] (p. 8)

Key elements of good scholarship are integration and the ability to cause others to re-think their knowledge. (pp. 8-9) This is what Clifford Geertz called "refiguration." (p. 9)

Argument[4] and open-mindedness are central to RPG work. (p. 10)

Open-mindedness means understanding scholarly traditions from within their own context and not as evaluated from another standpoint.[5] (p. 11)

Definition of literature review: what it is, and what it is not. It is the analytical story of your literature search from a "particular standpoint."[6] (p. 13)

A rigorous literature review ensures the researchability of your proposed project. It helps the essential narrowing of the proposal and correcting the erroneous assumption that breadth of research equates to higher value.[7] (p. 13)

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[2] For an example of such world-class standards, to which you should aspire, take a look at the *Postgraduate Training Guidelines* of the UK Economic and Social Research Council (ESRC) here: <www.esrcsocietytoday.ac.uk/ESRCInfoCentre/Images/Postgraduate_Training_Guidelines_2005_tcm6-9062.pdf>; seen June 30, 2009. You will note that this document has many references to research in the law and the legal system. The ESRC home page also has a lot of useful information.

[3] This is not an either-or choice.

[4] "Argument" here means legal argument. It is not a fight or a brawl but rather a principled, reasoned assertion and defense of a position or point of view.

[5] This is a crucial insight for comparative studies.

[6] This, of course, means your point of view, your thesis, your research question(s), your model, and your framework. All of chapter 1 deals with this key subject. (pp. 1-25)

[7] Note the crucial point that the initial literature review comes *before* the writing of the initial proposal. It is the foundation for that proposal and is included as part of it. (p. 207) You will have trouble if you reverse

Figure 1.2 Some of the Questions the Review of Literature Can Answer is a key visualization of the process. (p. 14)

There are a few important differences between master's work and PhD work.[8] (pp. 14-25)

A substantial part of RPG work, especially at the PhD level, is to develop the personal character to successfully manage a sophisticated research project.[9] (p. 20)

Because sophisticated scholarship is developmental, those RPG students who have a full-time academic career, with its long intellectual apprenticeship, have an advantage over part-time students or new academicians in conducting RPG work successfully.[10] (pp. 20-21)

The only tangible evidence of your research and of what you know about your subject is the written product. (p. 22) You must demonstrate and explicate your command of the relevant information for an intelligent but uninformed audience. (pp. 44, 48)

The length and nature of your literature review will vary depending on the differences in the bodies of knowledge you are reviewing (theoretical, empirical, historical, philosophical, etc.). (p. 22)

Examiners of your research will look to see if you have provided a truly analytical argument to support your thesis and to see whether it is imaginative and unique, or at least original. (p. 23)

A literature review can help excite your imagination (想像) by putting together many

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the order of these steps. Many RPG students waste too much time on projects that end up being unresearchable and/or over-broad. More about this follows.

[8] Most of the differences are not greatly relevant to the research portion of your project but are more relevant to the writing-up and presentation portion of your work. Maturity includes honesty and responsibility.

[9] Probably the primary attribute of character of a good RPG student is maturity.

[10] This does not mean that part-time students cannot succeed—only that they have special challenges and must make special efforts in order to compensate for these differences.

ideas in close proximity so that you can "play" with them. (This is called free association.) You let your mind make connections among things that you would not normally see or expect as connectable.[11] (pp. 23-24)

The literature review is the foundation of the research project and serves both a personal function and a public function in developing your skills as a researcher.[12] (p. 26)

Research techniques and methodology are not the same thing. (pp. 28, 50)

One of the most essential skills of a good researcher is "housekeeping." (p. 32)

The mere citation (footnote, bibliography) by an author (yourself or others) of another authority is not necessarily an endorsement or a judgment of quality or importance. Frequency of citation is merely a nominal count—nothing more. (p. 33)

Relevance and internal quality are more important.[13] (p. 39)

You must demonstrate your familiarity and experience with research so that you actually know what good research looks like.[14] (pp. 1, 51)

You must teach yourself how to read research.[15] (pp. ix, 58)

Understanding argument is the basis of hypothesis. (p. 79)

As in law, the social sciences exclude the kinds of arguments found in formal logic. (p. 80)[16] Hence, it is not necessary for the RPG law student to be an expert in formal

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[11] Can you think of ways to excite your *legal* research imagination? Doing this creatively can become your "new contribution to knowledge." Note that C. Wright Mills, *The Sociological Imagination,* (p.29), is available in the HKU library in both English and Chinese.

[12] As the "foundation," it is step #1—the antecedent of all else. It comes *first*. Misunderstanding of this crucial fact can be fatal to your research project.

[13] If a judgment or endorsement is intended, the author should state it clearly for the audience. All adjudication must be explicit, not implied. There are serious problems when an author only implies adjudication instead of making it explicit. (p. 63) Remember that the initial assumptions you must make about your audience are that the audience is (1) intelligent but (2) uninformed about your academic specialty.

[14] This, of course, comes from much practice looking at many literature reviews in many books, articles, chapters, theses, and dissertations—and adjudicating them. Practice, practice, practice!

[15] All education is self-education.

[16] Legal argument is much different—more subtle, suppositional, inferential, and assertive—than the arguments found in formal logic. Robert J. Morris, "Not Thinking Like a Nonlawyer: Implications of

logic or philosophy. (p. 81)[17]

It is your responsibility as an RPG student to understand and master the special language ("jargon" [行話、之乎者也]) of any subject you study. (p. 113)

You must also have a thorough understanding of, and the ability to use, the official scholarly language(s) in which you are working.[18] (p. 120)

If you intend to challenge the established assumptions and paradigms of your chosen discipline as your "new contribution to knowledge," you must understand the consequences of doing so, and your arguments must be especially careful. (p. 127) Such work can be very rewarding, but it can also be fearsome and dangerous.[19] (pp. 198-206)

In all comparative research, selecting the proper points or "nodes" of comparison is both crucial and difficult because you must ensure that they are truly comparable. (p. 131)[20]

Researchers often make serious mistakes because they make quick assumptions that lack a sufficient knowledge base about the history of ideas. (p. 136) This occurs when

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'Recogonization' for Legal Education'" (2004) 53(2) *Journal of Legal Education* 267. Indeed, attempting to use the rules of formal logic in legal reasoning can be seriously misleading, at least with regard to the common law. The rules of formal logic are perhaps more useful in avoiding logical fallacies in the *writing* of research papers, theses, and dissertations. This illustrates the fact that there are two types of fallacies in RPG work: 1) fallacies other people make in their arguments, and 2) fallacies you make when evaluating their arguments. (p. 97)

[17] Unless, of course, the very subject of the research is "law and philosophy" (jurisprudence).

[18] This is vitally important. Many, perhaps most, RPG students are deficient in this aspect of their skills set, and they need to correct this problem promptly. You can never safely assume that you can stop studying language—even if you are working in your native language. Remember Nibley's rule. Thus, if you are working primarily in English, your verbal skills should be equal to or better than those required for passing the Test of English as a Foreign Language (TOEFL): <www.ets.org/toefl>, seen June 21, 2009. Your general RPG skills should be equal to or better than those required to pass the Graduate Record Examination (GRE): <www.ets.org/gre>; seen June 21, 2009. As a means of improving your RPG skills, and if you have not already taken and passed the GRE and the TOEFL, you might want to take both the GRE and TOEFL practice exams that are widely available online and in test-preparation books. Test yourself!

[19] This case study of Atkinson's approach to Durkheim's work (both available in the HKU library) is perhaps Hart's most useful application for RPG legal researchers. Remember, also, the uses of "hedging" as discussed in Cooley and Lewkowicz.

[20] As the old saying goes, "You cannot compare apples and oranges."

the research effort is shallow, “quick and dirty,” rather than painstaking, slow, and thoughtful (p. 26)

Often, the difficulty of understanding an argument lies not in the concepts of the argument itself but in the way the argument is constructed, expressed, or categorised.[21] This has profound implications for comparative study. (pp. 137-39)[22]

There are two kinds of problems that affect our understanding: problems of ignorance, and problems of confusion. (p. 141)

The main task of the RPG researcher is to extract from the literature the ways in which the core ideas, concepts, and methodologies have been employed in argument and operationalised for empirical work. (p. 142)[23]

Mapping the ideas in the research literature requires you to acquire both declarative knowledge and procedural knowledge. (pp. 145, 155)

Tree constructions enable you to determine where your particular research can be placed. (p. 151)

Just as the thesis or dissertation is not merely a record of the research done[24], the literature review is not merely a book report. The literature review is not necessarily a continuous piece of writing but may have several sections dealing with different concerns at different levels and at different locations. (p. 172)

The literature review has several purposes. It gives a clear and balanced picture of current leading concepts. It is the tool for planning and organizing your research project, and it presents your argument. (p. 173)

Through argumentation, it makes a compelling case to justify your research. (p. 174)

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[21] This may be seen as primarily a writing problem, but it is also a planning problem.

[22] The discussion of Ryle’s work on these pages is particularly important for anyone wishing to undertake comparative studies.

[23] McConville is a most useful example of this. DeGolyer is also an excellent example.

[24] That is your personal research diary.

It is common in an RPG research project that where you start (your proposal and hypothesis) and where you finish (the final thesis or dissertation) can be two very different things.[25] (p. 175)

Argumentation requires analysis. It is not merely a list of issues or problems but a principled and structured explanation that explains and justifies the reasons why you think the issues and problems are important. (p. 177)[26]

All data require interpretation; data do not speak for themselves and are not objectively "true." (p. 179)

In addition to the evils of plagiarism, beware of falsification, fabrication, sloppiness, and nepotism.[27] (p. 181)

The purpose (the "aims") of your research project must be stated with great care and precision. The aims are the main reference point for the literature review. The literature review must realize those aims in a way that is clear, systematic, and direct. (p. 186)

In order to justify your topic, your literature review must accomplish many tasks before you undertake the other portions of your research and writing. (p. 198, 201)

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[25] This is one of the ironies (反語) of RPG work: The process is non-sequential and circular. In order to write a research proposal and get admitted to an RPG research project, you must first conduct your research and write a literature review so that you can then write a research proposal that includes a literature review and then continue with further research! (pp. 13, 23, 175, 185, 187, 198, 203-04, 207) This is the irony expressed in Bacon's Triangle and, if you think about it, in Archimedes's lever. As you work through this non-linear process, you always have the right to change your mind and amend your project (with the approval of your supervisor) as your research leads you to new understandings. (p. 175)

A similar irony is that in adjudicating the shortcomings of previous research for your literature review, you are at the same time saying that these shortcomings are good for your own research because they identify a gap in the research and provide you with your own approach to the topic. (p. 187) Can you deal with such ironies?

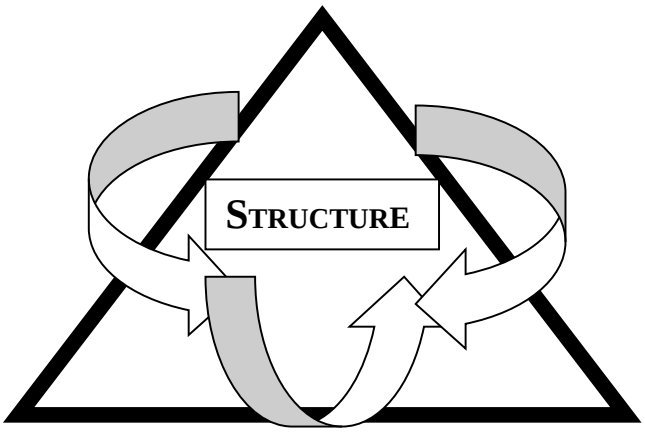
[26] The best example in legal practice is the reply briefs that attorneys file in the courts, which respond to the other side's arguments by providing statements of the legal issues plus reasoned analysis of both case and statutory law in support of each party's position. One of the most forceful ways of making a legal argument is to take an opponent's own evidence and argument and show a different—even opposite—conclusion. (pp. 179-80) If you have not actually done this in the practice of law, a good way to study the method is by reading the archives of court records and lawsuits stored in the law library.

[27] And, I would add, narcissim.

This is especially important if you intend to conduct research in what may appear to be an over-researched topic for which it seems there can be no "new contribution to knowledge." (p. 199)

Research usually is non-sequential. It is circular or looping, and it is repetitive. (pp. 203-04)[28] Failure to understand this by insisting on a simplistic sequential research plan may impede the correct formulation of the research questions and cause serious empirical difficulties. (pp. 204, 206) Remember the interfolding arrows around the triangle:

THESIS/ARGUMENT



THESIS/ARGUMENT **THESIS/ARGUMENT**

Appendix 1: Good paradigm of a research proposal. (p. 207)

Appendix 4: Good paradigm of managing the research project (p. 215)

References: See especially the works of Anderson, Atkinson, Fisher, Garfield,

[28] This is, of course, the paradigm of Bacon's Triangle with its looping arrows.

Garfinkel, Geertz, Giltrow, Hinderer, Jonassen, Kahneman[29], McCloskey, Orna and Stevens, Pattern, Phillips and Pugh[30], Ryle, Tesch, Thomas, Thouless and Thouless, and Toulmin. (pp. 220-23)

[29] Discussed in Morris, *op. cit.*

[30] Plus Cooley and Lewkowicz, of course.

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SUMMARY OF HART

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It is an exercise in learning how to manage information, without which your work will lack the technical standards required of RPG work. (p. 3)

[1] Much of what Hart says is consistent with other authors and texts which we consider in this course. Therefore, this summary does not repeat those points but emphasizes the points that are new or peculiar to Hart. Selection of items for this summary does not imply that omitted items are of lesser value. These notes should not be considered as substitutes for reading Hart's actual text—this is the reason his page numbers are given in parentheses.

The book contains many useful charts, tables, and diagrams, as well as case studies, that are not summarized here but which you should examine with care. Hart is especially good at using the examples of other scholars to illustrate his arguments. See, e.g., Table 4.2 Issues for Research Design (p. 86), Table 7.2 Possible Structures for Your Argument (p. 188), and Table 7.5 Five Main Components of an Introduction (p. 196). Hart, of course, writes within the social sciences context. Law is not one of the social sciences, but his ideas are close enough that we can usefully analogise them to the needs of RPG legal research. And indeed the law touches and concerns all of the social sciences, as it does the sciences, the arts, and the humanities.

The goal of a modern RPG student is to develop transferable multidisciplinary research skills that transcend the methodological biases, disciplinary boundaries, and misunderstandings that are taught in most academic disciplines.[2] (pp. 5-6)

The Economic and Social Research Council (ESRC) in the UK publishes many useful guidelines on RPG research. (p. 7)

There is a difference between producing a piece of competent research and a piece of research that demonstrates scholarship.[3] (p. 8)

Key elements of good scholarship are integration and the ability to cause others to re-think their knowledge. (pp. 8-9) This is what Clifford Geertz called "refiguration." (p. 9)

Argument[4] and open-mindedness are central to RPG work. (p. 10)

Open-mindedness means understanding scholarly traditions from within their own context and not as evaluated from another standpoint.[5] (p. 11)

A rigorous literature review ensures the researchability of your proposed project. It helps the essential narrowing of the proposal and correcting the erroneous assumption that breadth of research equates to higher value.[6] (p. 13)

There are some differences between master's work and PhD work.[7] (pp. 14-25)

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[2] For an example of such world-class standards, to which you should aspire, take a look at the *Postgraduate Training Guidelines* of the UK Economic and Social Research Council (ESRC) here: <www.esrcsocietytoday.ac.uk/ESRCInfoCentre/Images/Postgraduate_Training_Guidelines_2005_tcm6-9062.pdf>; seen June 30, 2009. You will note that this document has many references to research in the law and the legal system. The ESRC home page also has a lot of useful information.

[3] This is not an either-or choice.

[4] "Argument" here means legal argument. It is not a fight or a brawl but rather a principled, reasoned assertion and defense of a position or point of view.

[5] This is a crucial insight for comparative studies.

[6] Note the crucial point that the initial literature review comes *before* the writing of the initial proposal. It is the foundation for that proposal and is included as part of it. (p. 207) You will have trouble if you reverse the order of these steps. Many RPG students waste too much time on projects that end up being unresearchable and/or over-broad. More about this follows.

[7] Most of the differences are not greatly relevant to the research portion of your project but are more relevant to the writing-up and presentation portion of your work. Maturity includes honesty and

A substantial part of RPG work, especially at the PhD level, is to develop the personal character to successfully manage a sophisticated research project.[8] (p. 20)

Because sophisticated scholarship is developmental, those RPG students who have a full-time academic career, with its long intellectual apprenticeship, have an advantage over part-time students or new academicians in conducting RPG work successfully.[9] (pp. 20-21)

The only tangible evidence of your research and of what you know about your subject is the written product. (p. 22) You must demonstrate and explicate your command of the relevant information for an intelligent but uninformed audience. (pp. 44, 48)

The length and nature of your literature review will vary depending on the differences in the bodies of knowledge you are reviewing (theoretical, empirical, historical, philosophical, etc.). (p. 22)

Examiners of your research will look to see if you have provided a truly analytical argument to support your thesis and to see whether it is imaginative and unique, or at least original. (p. 23)

A literature review can help excite your imagination (想像) by putting together many ideas in close proximity so that you can "play" with them. (This is called free association.) You let your mind make connections among things that you would not normally see or expect as connectable.[10] (pp. 23-24)

The literature review is the foundation of the research project and serves both a

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responsibility.

[8] Probably the primary attribute of character of a good RPG student is maturity.

[9] This does not mean that part-time students cannot succeed—only that they have special challenges and must make special efforts in order to compensate for these differences.

[10] Can you think of ways to excite your *legal* research imagination? Doing this creatively can become your "new contribution to knowledge." Note that C. Wright Mills, *The Sociological Imagination*, (p.29), is available in the HKU library in both English and Chinese.

personal function and a public functions in developing your skills as a researcher.[11] (p. 26)

Research techniques and methodology are not the same thing. (pp. 28, 50)

One of the most essential skills of a good researcher is "housekeeping." (p. 32)

The mere citation (footnote, bibliography) by an author (yourself or others) of another authority is not necessarily an endorsement or a judgment of quality or importance. Frequency of citation is merely a nominal count—nothing more. (p. 33) Relevance and internal quality are more important.[12] (p. 39)

You must demonstrate your familiarity and experience with research so that you actually know what good research looks like.[13] (pp. 1, 51)

You must teach yourself how to read research.[14] (pp. ix, 58)

Understanding argument is the basis of hypothesis. (p. 79)

As in law, the social sciences exclude the kinds of arguments found in formal logic. (p. 80)[15] Hence, it is not necessary for the RPG law student to be an expert in formal logic or philosophy. (p. 81)[16]

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[11] As the "foundation," it is step #1—the antecedent of all else. It comes *first*. Misunderstanding of this crucial fact can be fatal to your research project.

[12] If a judgment or endorsement is intended, the author should state it clearly for the audience. All adjudication must be explicit, not implied. There are serious problems when an author only implies adjudication instead of making it explicit. (p. 63) Remember that the initial assumptions you must make about your audience are that the audience is (1) intelligent but (2) uninformed about your academic specialty.

[13] This, of course, comes from much practice looking at many literature reviews in many books, articles, chapters, theses, and dissertations—and adjudicating them. Practice, practice, practice!

[14] All education is self-education.

[15] Legal argument is much different—more subtle, suppositional, inferential, and assertive—than the arguments found in formal logic. Robert J. Morris, "Not Thinking Like a Nonlawyer: Implications of 'Recogonization' for Legal Education'" (2004) 53(2) *Journal of Legal Education* 267. Indeed, attempting to use the rules of formal logic in legal reasoning can be seriously misleading, at least with regard to the common law. The rules of formal logic are perhaps more useful in avoiding logical fallacies in the *writing* of research papers, theses, and dissertations. This illustrates the fact that there are two types of fallacies in RPG work: 1) fallacies other people make in their arguments, and 2) fallacies you make when evaluating their arguments. (p. 97)

[16] Unless, of course, the very subject of the research is "law and philosophy" (jurisprudence).

It is your responsibility as an RPG student to understand and master the special language ("jargon" [行話、之乎者也]) of any subject you study. (p. 113)

You must also have a thorough understanding of, and the ability to use, the official scholarly language(s) in which you are working.[17] (p. 120)

If you intend to challenge the established assumptions and paradigms of your chosen discipline as your "new contribution to knowledge," you must understand the consequences of doing so, and your arguments must be especially careful. (p. 127) Such work can be very rewarding, but it can also be fearsome and dangerous.[18] (pp. 198-206)

In all comparative research, selecting the proper points or "nodes" of comparison is both crucial and difficult because you must ensure that they are truly comparable. (p. 131)[19]

Researchers often make serious mistakes because they make quick assumptions that lack a sufficient knowledge base about the history of ideas. (p. 136) This occurs when the research effort is shallow, "quick and dirty," rather than painstaking, slow, and thoughtful (p. 26)

Often, the difficulty of understanding an argument lies not in the concepts of the argument itself but in the way the argument is constructed, expressed, or categorised.[20]

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[17] This is vitally important. Many, perhaps most, RPG students are deficient in this aspect of their skills set, and they need to correct this problem promptly. You can never safely assume that you can stop studying language—even if you are working in your native language. Remember Nibley's rule. Thus, if you are working primarily in English, your verbal skills should be equal to or better than those required for passing the Test of English as a Foreign Language (TOEFL): <www.ets.org/toefl>, seen June 21, 2009. Your general RPG skills should be equal to or better than those required to pass the Graduate Record Examination (GRE): <www.ets.org/gre>; seen June 21, 2009. As a means of improving your RPG skills, and if you have not already taken and passed the GRE and the TOEFL, you might want to take both the GRE and TOEFL practice exams that are widely available online and in test-preparation books. Test yourself!

[18] This case study of Atkinson's approach to Durkheim's work (both available in the HKU library) is perhaps Hart's most useful application for RPG legal researchers. Remember, also, the uses of "hedging" as discussed in Cooley and Lewkowicz.

[19] As the old saying goes, "You cannot compare apples and oranges."

[20] This may be seen as primarily a writing problem, but it is also a planning problem.

This has profound implications for comparative study. (pp. 137-39)[21]

There are two kinds of problems that affect our understanding: problems of ignorance, and problems of confusion. (p. 141)

The main task of the RPG researcher is to extract from the literature the ways in which the core ideas, concepts, and methodologies have been employed in argument and operationalised for empirical work. (p. 142)[22]

Mapping the ideas in the research literature requires you to acquire both declarative knowledge and procedural knowledge. (pp. 145, 155)

Tree constructions enable you to determine where your particular research can be placed. (p. 151)

Just as the thesis or dissertation is not merely a record of the research done[23], the literature review is not merely a book report. The literature review is not necessarily a continuous piece of writing but may have several sections dealing with different concerns at different levels and at different locations. (p. 172)

The literature review has several purposes. It gives a clear and balanced picture of current leading concepts. It is the tool for planning and organizing your research project, and it presents your argument. (p. 173)

Through argumentation, it makes a compelling case to justify your research. (p. 174)

It is common in an RPG research project that where you start (your proposal and hypothesis) and where you finish (the final thesis or dissertation) can be two very different things.[24] (p. 175)

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[21] The discussion of Ryle's work on these pages is particularly important for anyone wishing to undertake comparative studies.

[22] McConville is a most useful example of this. DeGolyer is also an excellent example.

[23] That is your personal research diary.

[24] This is one of the ironies (反語) of RPG work: The process is non-sequential and circular. In order to write a research proposal and get admitted to an RPG research project, you must first conduct your research and write a literature review so that you can then write a research proposal that includes a literature review and then continue with further reserch! (pp. 13, 23, 175, 185, 187, 198, 203-04, 207) This is the irony

Argumentation requires analysis. It is not merely a list of issues or problems but a principled and structured explanation that explains and justifies the reasons why you think the issues and problems are important. (p. 177)[25]

All data require interpretation; data do not speak for themselves and are not objectively "true." (p. 179)

In addition to the evils of plagiarism, beware of falsification, fabrication, sloppiness, and nepotism.[26] (p. 181)

The purpose (the "aims") of your research project must be stated with great care and precision. The aims are the main reference point for the literature review. The literature review must realize those aims in a way that is clear, systematic, and direct. (p. 186)

In order to justify your topic, your literature review must accomplish many tasks before you undertake the other portions of your research and writing. (p. 198, 201)

This is especially important if you intend to conduct research in what may appear to be an over-researched topic for which it seems there can be no "new contribution to knowledge." (p. 199)

Research usually is non-sequential. It is circular or looping, and it is repetitive.

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expressed in Bacon's Triangle and, if you think about it, in Archimedes's lever. As you work through this non-linear process, you always have the right to change your mind and amend your project (with the approval of your supervisor) as your research leads you to new understandings. (p. 175)

A similar irony is that in adjudicating the shortcomings of previous research for your literature review, you are at the same time saying that these shortcomings are good for your own research because they identify a gap in the research and provide you with your own approach to the topic. (p. 187) Can you deal with such ironies?

[25] The best example in legal practice is the reply briefs that attorneys file in the courts, which respond to the other side's arguments by providing statements of the legal issues plus reasoned analysis of both case and statutory law in support of each party's position. One of the most forceful ways of making a legal argument is to take an opponent's own evidence and argument and show a different—even opposite—conclusion. (pp. 179-80) If you have not actually done this in the practice of law, a good way to study the method is by reading the archives of court records and lawsuits stored in the law library.

[26] And, I would add, narcissim.

(pp. 203-04)[27] Failure to understand this by insisting on a simplistic sequential research plan may impede the correct formulation of the research questions and cause serious empirical difficulties. (pp. 204, 206)

Appendix 1: Good paradigm of a research proposal. (p. 207)

Appendix 4: Good paradigm of managing the research project (p. 215)

References: See especially the works of Anderson, Atkinson, Fisher, Garfield, Garfinkel, Geertz, Giltrow, Hinderer, Jonassen, Kahneman[28], McCloskey, Orna and Stevens, Pattern, Phillips and Pugh[29], Ryle, Tesch, Thomas, Thouless and Thouless, and Toulmin. (pp. 220-23)

[27] This is, of course, the paradigm of Bacon's Triangle with its looping arrows.

[28] Discussed in Morris, *op. cit.*

[29] Plus Cooley and Lewkowicz, of course.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

NOTES & HIGHLIGHTS FROM SALTER AND MASON

SOME HIGHLIGHTS from Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson/Longman/Pearson Education Limited, 2007).

As the somewhat confused title indicates, this text purports to give guidance on both legal research and RPG writing. As the title fails to indicate, much of the advice is actually about conducting research and writing *for the courts*. It is therefore necessary to parse the text in order to distinguish these different kinds of research and writing. For purposes of this course and this summary, only those parts of the book directly relating to RPG legal research will be considered.

CAVEAT: I do not generally recommend this book as a whole. It has many, many problems. In my judgment, it is poorly and sloppily written; poorly organized; careless with the facts; full of errors, omissions, and *non sequiturs*; and written in needlessly turgid prose—so much so that I do not trust it as a reliable source. *If this book were submitted to me as an RPG thesis or dissertation and I were its examiner, I would fail it*. Indeed, you may want to read it as a negative example. Use it with great caution. As but one ironic example of how this book goes wrong, all the scholarly sources which the authors cite are *published articles and books*—not to PhD and MPhil theses and dissertations! Published sources are indeed important, but you need to look at, read, and study all kinds of theses and dissertations as examples in order to see what they look like and how they are constructed and organized—to visualize what your own thesis or dissertation will look like when it's finished. You must know how to find and obtain theses and dissertations from universities throughout the world and how to cite them in your own research.

Nevertheless, the book does contain some rare useful ideas and bibliography which may in turn guide you to better resources. I have tried to cull from it what I adjudge to be the viable bits—the rest is chaff.

Chapters 1, 2, and 3 may be useful to you as a review of basic methodologies. These chapters are not summarized here. I suggest you avoid Chapter 4 entirely—there are far better aids available on its subject.

Chapter 5: "Sociolegal Approaches to the Conduct of Dissertation Research," pp. 119-81.

The first half of Chapter 5 is a theoretical analysis of "sociolegal research." The latter half contains numerous suggestions and examples of different kinds of empirical research, from which you may glean some ideas for your own work. Following Roscoe Pound[1], it distinguishes between "law in books" (black-letter law (黑體法律(金科玉律)) and "law in action" (sociolegal research). The footnotes list multiple resources which are collected in the chapter's bibliography starting at page 220. However, both footnotes and bibliography contain many, many errors. Use them with caution.

A thesis or dissertation that analyzes only legal rules (as produced by courts, legislatures) may be incomplete, one-sided and misleading. Empirical research can correct this and may actually challenge key tenets of black-letter law. (p. 126)

Black-letter rules (statutes, ordinances, rules, regulations) may not truly represent what occurs with the law in practice. (p. 128)

Students may need to develop a wide range of skills that are not traditionally "legal" in order to conduct socio-legal research. (p. 138)

Empirical research tends to undermine or contradict old certainties and draws previously excluded information into the scholarly adjudication process. (p. 145)

Even in fields where there may be a huge body of literature in black-letter law, there may be very little empirical research, thus making it easy for the student to

[1] Roscoe Pound, "Law in Books and Law in Action" (1910) 44 *American Law Review* 12.

identify significant research gaps to be filled. (pp. 152-53)

In addition to demonstrating the necessary skill set to conduct socio-legal research, students need to appreciate the interdependence of legal research methodology, and socio-legal theory. (p. 171)

Socio-legal research opens new areas of ethical problems that are usually unknown to black-letter research because, *inter alia*, virtually all documents and information used in black-letter research are in the public domain, whereas empirical research reaches into the private lives, information, and documents of individuals. (pp. 172-75, 181)

There are numerous strengths and weaknesses of the socio-legal approach which the student must understand before undertaking such research. (pp. 177-80)

Chapter 6: "Comparative and Historical Methods," pp. 182-212.

The comparative approach contains some pitfalls that can weaken a thesis or dissertation. One example is the presence of mere superficial narration of comparative differences in place of true legal analysis of those differences. (p. 190)

Historical reconstruction of legal topics may seem modern when in fact it merely re-enacts aspects of old and long-forgotten legal analysis. (p. 195)

In order to make sense of some kinds of research, a historical frame, model, and/or methodology must be used. (p. 196)

Many writers who are not necessarily interested or qualified in legal history *per se* often include historical contextualization within socio-legal research. (p. 197)

The value of historical studies suggests that such information can no longer be excluded or marginalized as being outside the scope of legal research—as witness the work of Pound, Weber, and Marx, for example. (p. 199)

There is a debate between external legal history and internal legal history, and whether and to what extent these are part of the law. (p. 207)

Black-letter rules emanating from high courts may not be the most important manifestation of law in society. (p. 209)

These different types of historical contextualization are not the same and are not fungible. (p. 211)

“**Conclusion,” pp. 213-14**

Students should think long and hard about the implications of their topics and research questions, and ensure that their questions are adequately answered by the adoption of the appropriate methodology. (p. 214)

It is not the choice of research field or area that determines the choice of methodologies. Instead, it is the choice of research questions. (p. 214)

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

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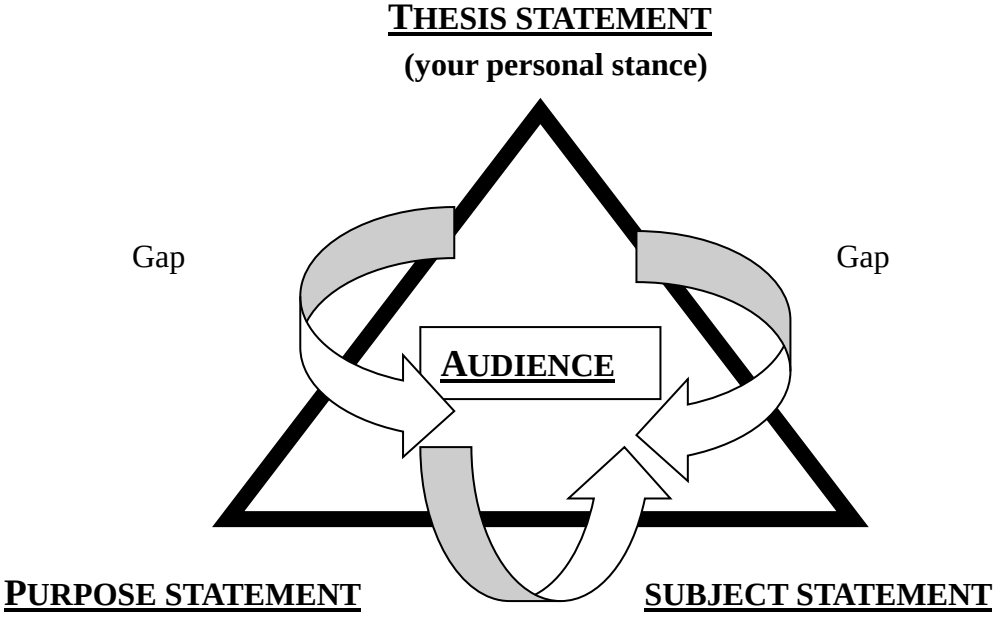
STAKING YOUR CLAIM: YOUR THESIS STATEMENT

"Staking a claim" is an image from the Old West of the United States. Maybe you have seen the idea in cowboy movies, or in the recent movie, "There Will Be Blood" (黑金企業 / 血色将至 / 黑金風雲). An old prospector (勘探者, 勘察者) is searching the wilderness for gold. Suddenly, he finds gold, and on that spot he "stakes his claim" to the gold. 他宣稱擁有那塊他發現了黃金的土地。 Once he does this, he can legally say, "This is mine. This is where I stand. This what I can and will defend to the death—against all comers." We also use "staking a claim" figurately. With the publication of her PhD dissertation, she has staked her claim to greatness as a scholar. 她聲稱她出版的博士論文已使她成為偉大的學者。

Creating a work of original scholarship that makes a new "contribution to knowledge" is the primary task of every RPG student. It is like creating a road map of the territory you wish to explore and roads by which you will explore it. In order to do this, you must early "stake your claim" to the scholarly territory (and its gold) which you intend to research and report. There are four (4) main parts of the task:



(reason & intent for this research) **(topic(s) of this research)**

Gap

Staking a claim for yourself and your research is like getting a patent (專利權) on a new invention. The task begins with choosing a claim, which you should be able to state in a single sentence.[1] This is the "thesis statement" of your thesis, dissertation, research project, or article. For example:

"This law is unconstitutional because….."

"My research shows that this law….."

"Viewing this law from a Marxist perspective leads us to conclude that….."

"I will argue that…."

As you can see above, there are <u>two different meanings</u> of the word "thesis."[2] The first refers to the research project that you write for your postgraduate degree. "My PhD thesis (博士論文) was over 300 pages long." This document is the entire record of a process of research to be read by examiners, teachers, and supervisors.[3] It may consist of several hundreds of pages. When finished, it will be deposited in the library.

The second meaning of the word "thesis" refers to the central idea of your project that reflects <u>your own</u> unique (or at least special) viewpoint, opinion, reasoned

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[1] The material on this page is taken from Eugene Volokh, "Writing a Student Article" (1998) 48 *Journal of Legal Education* 247. This excellent article is recommended reading for all RPG students. You will also find help in Geraldine Woods, *Research Papers for Dummies* (New York: Hungry Minds, 2002), and Anthony Weston, *A Rulebook for Arguments* (Indianopolis/Cambridge: Hackett Publishing, 3rd ed, 2000), and in Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Maidenhead: Open Univ. Press, rev. ed. 2010).

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

[3] Elizabeth Wager, Fiona Godlee, and Tom Jefferson, *How To Survive Peer Review* (London: BMJ Books, 2002).

argument, theoretical points, and contribution to your subject. "The main thesis (主要論點) of my paper is that this statute is unconstitutional." This thesis statement often shows the solution, answer, clarification, and way forward regarding a specific question or problem. It is usually only one or two sentences in length. *Thus, the thesis statement is different from your statement of purpose, intent, subject, or summary.* The development of this thesis statement is where you tease out the real light from your data, identify a research gap, and add something new, exciting, and special to your discipline. This carries your reader along and gives your reader something valuable to take away from reading your research. Without a proper thesis statement early in your research to guide your research, your efforts will not be properly focused but will be scattered (分散，散開) like the charge from a shotgun (獵槍，霰彈槍).

Stating a thesis during the initial stages of your research can be tricky because it requires you to suppose you already know the conclusion—as the Bible says, you "know" the end from the beginning (我從起初指明末後的事、從古時言明未成的事).[4] Of course, in your case, this may (and probably will) change as your research progresses and evolves, but you must nevertheless always have in mind a working (hypo)thesis which states your stance on your subject. The prospector who finds a few nuggets of gold on the surface of the land or in a stream bed at that point has no idea the extent of what may lie hidden beneath his feet. There may be (a) a vast deposit of gold that can be mined for years, or (b) only a few more nuggets. Still, he must stake his claim.

Volokh's test of patentability (可專利):

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

Everything about staking your claim is directed to satisfying your audience,

[4] *Old Testament*, Isaiah 以賽亞書 46:10.

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

INTELLIGENT
but
UNINFORMED.

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

> "Cheshire Puss," she began, rather timidly, as she did not at all know whether it would like the name: however, it only grinned a little wider. "Come, it's pleased so far," thought Alice, and she went on. "Would you tell me, please, which way I ought to go from here?"
>
> "That depends a good deal on where you want to get to," said the Cat.
>
> "I don't much care where—" said Alice.
>
> "Then it doesn't matter which way you go," said the Cat.
>
> **—Lewis Carroll, *Alice's Adventures in Wonderland***
> (卡羅爾著，*愛麗絲漫遊奇境記*)

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ASSIGNMENT: Read the short article entitled, "A View from the Coalface," by Morag McDermont at page 5 in the Winter 2002 edition of the *Socio-Legal Newsletter* (<www.slsa.ac.uk/images/slsadownloads/newsletters/38%20winter%202002.pdf>) about classes like this one. Determine what are McDermont's (1) thesis statement, (2) purpose statement, and (3) subject statement. Label them using the numbers (1), (2), and (3). Explain what McDermont means by the "coalface." Write a bibliography entry for this article using HKLJ style. Bring a copy of the article to

class for discussion.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

THE PILTDOWN PLAGIARISM: FALSEHOOD #2

The “Piltdown Man” is one of the most notorious episodes in the history of science.

PILTDOWN NOTES

Frank, Anne. 1989. *The Diary of Anne Frank: The Critical Edition*, eds. David Barnouw and Gerrold Van Der Stroom; trans. Arnold J. Pomerans and B. M. Mooyaart-Doubleday. New York: Doubleday. **HKU Library 940.53492 F8 a**

Hemingway, Ernest. *A Moveable Feast*. New York: Scribner's, 1964.

HKU Library 815.1 H48 D m

Navrozov, Andrei. 1990. Review of Fyodor Dostoevsky, *The Brothers Karamazov: A Novel in Four Parts With Epilogue*. Richard Pevear and Larissa Volokhonsky, trans. San Francisco: North Point Press, in *New York Times Book Review* (Nov. 11, 1990): 62. **HKU Library 891.731 D72 C3 b42p (book)**

HKU Library S 028.1 B72 (NY Time br)

Spencer, Frank. 1990. *Piltdown: A Scientific Forgery*. New York: Oxford University Press (for National History Museum Publications).

_____. 1990. *The Piltdown Papers 1908-1955: The Correspondence and Other Documents Relating to the Piltdown Forgery*. New York: Oxford University Press (for National History Museum Publications).

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

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MURPHY'S LAW (摩菲定理或莫非定律)

Murphy's Law states that "If anything can go wrong, it will."[1] (凡有可能出差邋的，它就會出差邋 or 如果事情有可能會出錯，那麼它終將會出錯.) It has many corollaries and sub-laws. It is often intended as a joke or humorous comment on life in general, but the truth is that it often applies to many situations. It certainly applies to legal research. You should study Murphy's Law. As you plan your time and career as an RPG student, you need to allow for such problems and give yourself time to correct them. For example, consider this corollary:

Everything takes longer than you think.

凡事耗費的時間都比原先料想的長.

You will find that all your research and writing work, including all the things you must do in working with your supervisor and satisfying the requirements of the Graduate School, the Law Faculty, and the University, will occupy much more of your time, and the process will move much more slowly, than you at first estimate. The unexpected will arise. You might get sick. You might have a family emergency. Problems will occur; things will go wrong. Your supervisor may ask you to rewrite or re-research a major portion of your thesis *Allow for this*.

Do you have any good "war stories" about how Murphy's law has operated in your life?

---

[1] General information on the content and history of Murphy's Law may be read online at <http://zh.wikipedia.org/wiki/%E6%91%A9%E8%8F%B2%E5%AE%9A%E7%90%86>; seen February 2, 2011. The "Top Ten Murphy's Laws (some are actually corollaries) may be seen at <http://140.124.30.80/introduction/lab/%E5%89%B5%E6%80%9Dweb/data/Murphy's%20Laws.htm>; seen February 2, 2011. Thanks to Nigel Lee Nai Lap for providing these references.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

FOOTNOTER'S OATH

Please memorize the following Oath—

In all of my scholarly work, I will never give any information in any form to any other person unless—

(1) I first verify for myself that the information is correct, ***and***

(2) I provide a reliable means by which the other person can independently verify that the information I have provided is correct.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

QUIZ

Time: 10 minutes

_____

Name and Student Number

If you need more space for any answer, write on the back of the page.

1. State HKU's definition of plagiarism.

2. Explain briefly the differences between "quantitative" and "qualitative" empirical research.

3. Write the Footnoter's Oath.

4. State the three points of Bacon’s Triangle.

5. State Llewellyn’s Cure.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

QUIZ

Time: 10 minutes

_____

Name and Student Number

If you need more space for any answer, write on the back of the page.

1. State the name of your home university and state that university's definition of plagiarism.

2. State briefly the idea of Nibley's philosophy.

3. The best reason(s) for using original-language text rather than translated text is:

I. It is a primary source
II. It is the only accurate source
III. It is required by the University
IV. It can be adjudicated

A. I. and IV. only
B. II. and III. only
C. All of the abve
D. None of the above

4. Of the three points of the Gap/New Triangle, thesis is the most important.

TRUE FALSE

5. State briefly the idea of Chopin’s Pedal.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

QUIZ

Time: 10 minutes

_____

Name and Student Number

1. According to the Regulations of the Graduate School, the length of your thesis—

A. Cannot exceed a total of 60,000 words

B. Cannot exceed 60,000 words exclusive of footnotes

C. Cannot exceed 60,000 words exclusive of footnotes and bibliography

D. Is not regulated

2. Explain the importance of “informativity.”

3. What is the “given-new” methodology discussed in Cooley & Lewkowicz?

4. Which of the following is a primary source?

I. Westlaw
II. Google
III. Lexis/Nexis
IV. Wikipedia

A. All of the above
B. I and III only
C. II and IV only
D. None of the above

5. Why is hedging important?

I. Avoids plagiarism
II. Maintains scholarly decorum
III. Protects modesty and caution
IV. Is required in university regulations

A. All of the above
B. II and III only
C. I and IV only
D. None of the above

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

TIMETABLING AND MAPPING YOUR RESEARCH PROJECT—PART I

Today's Date:

Making a timetable-calendar for your entire research project is essential. Doing so establishes the essential milestones (里程碑，轉折點) that will mark the progress of your research for your entire tenure as an RPG student. It does not matter whether you have four years, one year, or any other amount of time—you must manage your full time well. Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Buckingham: Open University Press, 3rd ed, 2002), pp. 85-95 describe the importance of this process. They call it the **"progressive reduction of uncertainty."** They give you a sample timetable-calendar on page 88. Study these pages carefully. They show the necessity of defining and *re-defining* short-term and long-term goals, as well as setting firm and constant deadlines for yourself. They state as follows:

> New research students enter the system with a vague overall plan that will get them to their long-term goal of a PhD at the end of three years. Their short-term goals may be more clearly defined: starting work on the problem, discussing what they want to do with their supervisor and gaining access to equipment or samples. But beyond that, goals are very fuzzy indeed. *This is because there is a tendency to take an unstructured approach to the project regardless of the time constraints and interim tasks to be undertaken and*

completed.

> At first three years (or six years part-time equivalent) will appear to be an extraordinarily long time for completing a single piece of research. **Beware of this illusion. If you trust it and behave accordingly you will be in <u>very deep trouble</u> later on**.

Phillips and Pugh, p. 86 (emphasis added).

In order to avoid this, it will also help you to draw a map, outline, diagram, or flow-chart of your complete plan of work over the entire course of your study—from inception to graduation. This could be on a single sheet of paper, or it could comprise a small booklet with short chapters for each stage of your work. We will look at sample maps in class, and you will prepare one as a class assignment to be handed in.

THE ASSIGNMENT

In keeping with the information and examples given in Phillips and Pugh, create a detailed and structured research timetable and calendar for yourself, complete with important short-term and long-term goals, including firm and constant deadlines, time constraints, and interim tasks. It should contemplate your entire tenure as an RPG student. This will take you some considerable time and thought. Do this in close coordination with your supervisor, teacher, or program director. Meet with your supervisor to discuss your timetable-calendar and the necessities of your research project. You must work with your supervisor on this timetable-calendar because it must conform

to his/her own busy schedule and calendar, and s/he must approve it.

When you finish your timetable-calendar, attach it to the next page and bring both documents to class with you to hand in on **Wednesday, March 9, 2011**.

Sign below to indicate that you have completed this timetable satisfactorily according to the instructions above and to the highest RPG standards. Ask your supervisor to sign indicating his/her approval of this timetable. Attach this page to the timetable you hand in at class.

_____

Your Signature

_____

Signature of Your Supervisor, Teacher, or Program Director

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

TIMETABLING AND MAPPING YOUR RESEARCH PROJECT—PART II

Most of the timetables produced in the first part of this assignment are not yet suitable for RPG work because they are not analytical. They must now be revised, improved, and upgraded. They mark a good beginning, but most are not professional or sophisticated enough to serve all the purposes for which you create a timetable. They are merely descriptive and superficial. They contain many truisms, generalities, and abstractions, instead of concrete details, dates, and deadlines. They indicate that you do not yet have a real idea of what you're doing or where you're going. Many of them look like middle-school work with the middle-school mentality (中學精神). They seem to say that you somehow intend simply to forge ahead blindly and just hope for the best, that "everything will work out for the best," like evolution. In other words, you are still dangerously in Group A:

A.		B.
Research first to determine—		Determination first of—
Subject/Topic		Subject/Topic
Purpose		Purpose
(Hypo)thesis	OR	(Hypo)thesis
Argument		Argument
Gap		Gap
Strategy		Strategy
Research Question(s)		Research Question(s)

—to develop plan or map

—to guide / control research plan or map

This reality is diagnostic of severe conceptual deficiencies in planning your research program. If you continue on this path, you will, in the words of Phillips and Pugh (p. 86), definitely "be in great trouble later on." Your timetable must now be revised, improved, and upgraded so that it is analytical in terms of goals, research questions, theories and models, and desired outcomes. Your timetable is a tool to help you figure out when and how to get from Group A to Group B as quickly as possible. It is the heart and soul of the RPG Roadmap. It is a kind of covenant for those times when you are overloaded with work, have conflicting loyalties, or you want to quit or slack off (自由散漫). In doing RPG work, you are in deep waters. The timetable will remind you that you promised to accomplish certain things, in certain ways, by certain times. A good, crisp, detailed, analytical, and complex timetable will back you up and keep you honest throughout your RPG tenure. Without this, you will not have sufficient control of your time, map, and research plan. In order to accomplish these things, your timetable must be upgraded and refined. As you do this, consider the following three requirements of a good timetable.

I

Your timetable must be analytical. It must instantiate and actualize your hopes, vision, imagination, and pathways toward realizing your topic, purpose, thesis, philosophy, and analysis. It must show that you have begun to think of yourself as a member of the academic profession. Your timetable is your own vision of the "end from the beginning." It shows when, where, and how you intend to undertake your library work, empirical and archival research, writing, presentations, publications, work with your supervisor, and each and every other step along the way to your degree. It

demonstrates how these steps relate to each other over time—not simply as a sequence of events along a time line (a calendar). It allows for the operation of Murphy's Law ("If anything can go wrong, it will"). It demonstrates that you are aware that you are in competition with other RPG students around the world. It tells you how you will finish on time in order to beat that competition. For example, if one item on your timetable is "conduct empirical research in Shanghai," that item must explain your answers to the questions: who, what, where, when, why, and how in Shanghai. How will you get to Shanghai, how will you pay for the trip, whom will you contact, where will you stay? How will you design your research there?[1]

II

Your timetable must be prescriptive, not just descriptive or aspirational. It is not merely a calendar. It is not a copy of the timetable for this class, or of the timetables of the University, the Graduate School, or the Department of Law. Of course, it will and must include all these timetables, but it is much, much more. It must demonstrate how you intend to handle the complexities of your own specific research project over the time allowed for you to finish within the constraints of the timetables for this class, the University, the Graduate School, and the Department of Law, and it shows how you integrate these myriad requirements. In other words, it must show how you intend to *manage* your RPG time. It is something like a constitution: You create it, but in turn it creates and holds you to your program and ideals, something like the timetable of an airline or a railroad.

The timetable is not a mere calendar that shows the movement of a single train or a single airplane through time and space. It is a highly complex, organic map that must

[1] Lee Epstein and Gary King, "The Rules of Inference" (2002) 69(1) *University of Chicago Law Review* 1, demonstrates some of the problems you will experience if you fail to do this.

coordinate the numerous actions of thousands of moving parts—lest accidents occur resulting in the loss of life and property. It is benchmarked or signposted so that you can actually *measure* your progress at specific points in time. For example, here is the Web page for the Dragon Air Hong Kong "Manage Your Trip" site at which you can download a complete timetable from the airline to see how it appears and what it contains: <www.dragonair.com/da/en_INTL/manageyourtrip/timetable>. Think of all the facts, considerations, possibilities, contingencies, and ideas that must be managed, integrated, and analyzed for such a timetable to be effective. Your RPG project is like this. You would never consider showing up at the airport with your luggage without knowing exactly where you were going, when you wanted to get there, and how you intended to accomplish the journey. Consider the dilemma of Alice in the story, *Alice in Wonderland*. If you don't know your destination, it doesn't matter what airplane or train you get on. The more can look deeply and analytically into the future and plan your trip, with a specific destination in mind *from the beginning*, the more likely it is that you will succeed and get your degree on time. Doing this is an essential part of the "progressive reduction of uncertainty." Phillips & Pugh, p. 86

III

Your timetable must conform to the rules and regulations of the University governing RPG documents. It must demonstrate your awareness and understanding of these. It must have the appearance of a sophisticated RPG document of the same order and dignity as your thesis, dissertation, or research paper. That means, among other things, that it must be on regulation paper, with regulation margins and typeface, with proper page numbers, and it must be bound. For documents of several pages, this means *stapled* in the upper left-hand corner.

* * *

Remember the warning:

> At first three years (or six years part-time equivalent) will appear to be an extraordinarily long time for completing a single piece of research. **Beware of this illusion. If you trust it and behave accordingly you will be in <u>very deep trouble</u> later on**.

Phillips and Pugh, p. 86 (emphasis added).

「如臨深淵、如履薄冰」　　《詩經》

The deadline for submitting your revised timetable is **<u>Wednesday, March 23, 2011</u>**. As you re-work your timetable, be sure to consult your supervisor, teacher, or program director and obtain his/her signature of approval on your revised timetable.

_____
Your Signature

_____
Supervisor's Signature

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

DR. SUN'S FIRST LECTURE

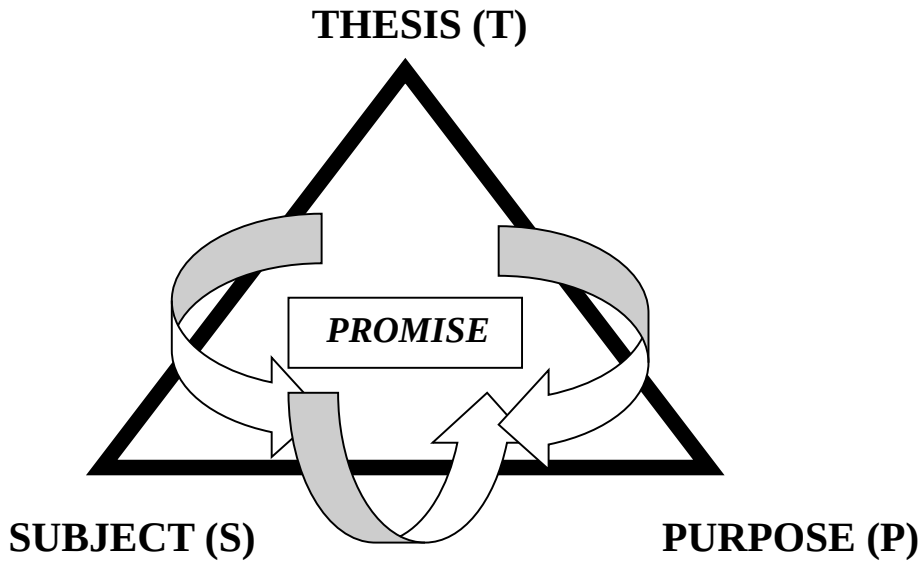
Dr. Sun Yat-sen (孫中山 (孫文)) (1866-1925) is this University's (香港大學) most famous graduate. In the latter part of the 19th Century, he was a student at the University of Hong Kong's Medical College, from which he graduated in 1892. This is why we refer to him as Dr. Sun (醫生). Today we honor him with a statue and several memorials on our campus. He practiced medicine for a short time in his home village of Cui Heng (翠亨邨)[1], but he was always involved in the political revolution that was then taking shape in China—a cause for which he traveled the world. Today he is called 國父, the Father of the Nation.

He spoke often and wrote much about his political philosophy. Probably his most famous book is the *Three Principles of the People*, or 《三民主義全文》. It is a compilation of lectures which he gave on a series of political and social subjects over an extended period of time.[2]

[1] The village is about half-way between Zhu Hai (珠海市) and Zhong Shang (中山市) on the Pearl River. From Hong Kong, it can usually be accessed by going to either of those cities and taking a bus or taxi to 翠亨邨. The village has a new and excellent museum devoted to Dr. Sun's life and work, plus a reconstruction of his birthplace (house and village).

[2] There are several differing versions (called "variora") of the Chinese text. Which version you see may usually depend on where the text was published: the PRC or Taiwan, or whether it was published before or after Dr. Sun's death in 1925. I prefer the Taiwan version and its translations in all cases because they are closest to the text published during Dr. Sun's lifetime. 孫中山 (孫文), <三民主義> (台北市: 三民書局, 1997), 頁 1. Sun Yat-sen, *San Min Chu I: The Three Principles of the People*. Trans. Frank W. Price. Ed. L.

We can learn a lot from him about statements of purpose, thesis, and topic. Here is the opening paragraph of Lecture 1. Dr. Sun is very clear about his statements of thesis, purpose, and subject.



As you read this keynote paragraph, identify the statements of purpose (P), subject/topic (S), and thesis (T) that form the promise to his hearers and readers.

T. Chen (Shanghai: Commercial Press, 1929), pp. 3-4.

I have come here to-day to speak to you about the *San Min* Principles. What are the *San Min* Principles? They are, by the simplest definition, the principles for our nation's salvation. What is a principle? It is an idea, a faith, and power. When men begin to study into the heart of a problem, an idea generally develops first; as the idea becomes clearer, a faith arises; and out of the faith a power is born. So a principles must begin with an idea, the idea must produce a faith, and the faith in turn must give birth to power, before the principles can be perfectly established. Why do we say that the *San Min* Principles will save our nation? Because they will elevate China to an equal position among the nations, in international affairs, in government, and in economic life. So that she can permanently exist in the world. The *San Min* Principles are the principles for our nation's salvation; is not our China to-day, I ask you, in need of salvation? If so, then let us have faith that the *San Min* Principles and our faith will engender a mighty force that will save China.[3]

* * *

今天來同大家講三民主義。什麼是三民主義呢？用最簡單的定義說，三民主義就是救國主義。什麼是主義呢？主義就是一種思想、一種信仰和一種力量。大凡人類對於一件事，研究當中的道理，最先發生思想；思想貫通以後，便起信仰，有了信仰，就生出力量。所以主義是先由思想再到信仰，次由信仰生出力量，然後完全成立，何以說三民主義就是救國主義呢？因為三民主義係促進中國之國際地位平等、政治地位平等、經濟地位平等，使中國永久適存於世界。所以說三民主義就是救國主義。三民主義即是救國主義，試問我們今日中國是

[3] Sun Yat-sen, *San Min Chu I: The Three Principles of the People*. Trans Frank W. Price. Ed. L. T. Chen (Shanghai: Commercial Press, 1929), pp. 3-4.

不是應該要救呢？如果是認定應該要救，那麼便信仰三民主義。信仰三民主義便能發生出極大勢力，這種極大勢力便可以救中國。[4]

[4] 孫中山 (孫文), 《三民主義》 (台北市: 三民書局, 1997), 頁 1.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

ARCHIVES (檔案)

You must understand the tremendous importance of **ARCHIVAL MATERIALS**. Your awareness and use of them might mean a great difference in the success or failure of your postgraduate research and writing. They are a necessary component of your empirical research.[1] Archived materials are those holdings of the library that are not published books and journals. They are usually one-of-a-kind documents which this library alone possesses. These include such things as government documents, photos, court filings and papers, diaries, recordings, personal memoirs, and many others. There may be no other copies, or only a few copies, anywhere else in the world. Please do not overlook these materials as a valuable contribution to your work.[2]

a.

In my own postgraduate research, I have been able to use the archives to great advantage. I will show you an example of my experience searching for a Hawaiian newspaper article. That is an example of finding and using archival materials. We will mention others in class.

My PhD research at HKU was on several important constitutional cases

[1] Robert J. Morris, Book Review Essay, (2011) 41(3) *Hong Kong Law Journal* 883, reviewing Peter Kane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford & New York: Oxford Univ. Press).

[2] Louis Craven, *What Are Archives? Cultural and Theoretical Perspectives* (Aldershot, England and Burlington, VT: Ashgate Publishing, 2008).

decided by the Hong Kong Court of Appeal (CA) and Court of Final Appeal (CFA). Fortunately for me, our Law Library houses the court bundles for each of these cases, which were provided to the Law Library by the barristers who handled these cases in court. The court bundles contain all of the pleadings and documents filed with the court by all of the parties during the litigation and appeals. Do you see why these archives provided an advantage to me? **Everyone can (and does) read the final published decisions of the CA and CFA—that is common practice. Your research will not be special or unique if you merely do the same. But not everyone reads the court bundles.** They contain a lot of information that is not generally made public to anyone outside the litigation. They provide valuable insights into the thinking of the parties, the evidence submitted, and the arguments made. They provide excellent background data to help supplement, explain, and analyse the final published decision of the court.[3] They might show you a gap and a possible new

[3] See, for example, the materials in the Hong Kong "flag-desecration" cases, the published CFA decision for which is as follows: *HKSAR v. Ng Kung Siu & Another* (1999) 2 HKCFAR 442, which in turn contains the citations to the trial court and CA decisions. Legal counsel for defendants/respondents were Audrey Eu, P. Y. Lo, Paul Harris, and Lawrence Lau. For this and all other references to court materials such as briefs, memoranda, transcripts, judgments, etc., not published in the official case reports, there are two sets of volumes entitled, "The Flag Case: Court Bundles / HKSAR v. Ng Kung Siu & Lee Kin Yun (1999)", housed at call numbers KT4369 F57 and KT4369 F57 C, respectively, in the Law Library. The first referenced set, which is "Authorities and Statutory Materials for Appellant," contains ten volumes; the second, which is "Respondents Materials and Correspondence," contains seven volumes. These materials were donated by the legal counsel in the flag cases via Professor Andrew Byrnes of the law school. The citation in each volume, dated November 2001, reads as follows (emphasis added):

> "The present collection was kindly donated to the Law Library by Mr. Andrew Byrnes on his departure from the University. The bundles contain *all the submissions, authorities and other materials placed before the courts* in the case of HKSAR v. Ng Kung Siu & Anor (1999)." (emphasis added)

These materials contain exhaustive research and references in the "Brandeis Briefs" filed by the parties in the CFA appeal, which presumably also contain their fundamental arguments and findings before the CA prior to that.. The records before the Magistrate's Court (trial court) appear in the single volume labeled "Appeal Bundle" and are indexed at the beginning of that volume. Most significant in those materials is a transcript of the oral proceedings ("Minutes of proceedings") before that court beginning on May 13, 1998, at pages 7-128. The pages of the Transcript in the bound volume bear two sets of page numbers, one at the top, which locates it in the consecutive numbering for all documents throughout the bound volume, and one at the bottom, which is the original number of the document's pages as submitted to the courts. These numbers are not the same.

In addition to the flag materials, the Law Library now has court bundles for the recent "Long Hair" and Falun Gong "freedom of expression" cases, all courtesy of barrister Paul Harris.

contribution to knowledge where none existed before.

b.

Why are archived materials so important? Because you can use them to identify a true and significant research gap and to make a new contribution to knowledge in your research that is truly new, fresh, special, and even unique. Why is this so? Because many other researchers often overlook or ignore archival materials. They focus exclusively on published sources such as books and articles—and they try to find their research gap there. Therefore, if you consult only the same books and articles, you will be competing with everyone else in the field for the same research space. It will be difficult for you to stake a special or unique claim.

Remember this motto by a teacher to her students: "Once again, as in life, you are not in competition with me, yourself, or this exam, but with each other." Archival materials can help you gain a distinct advantage in that competition. Indeed, if you make good use of archival materials, you may be alone in using them. Therefore, you can more easily identify research gaps and find unique ways to fill those gaps. As a postgraduate student, you are preparing to add to the body of knowledge by creating new knowledge. Archival materials will help you do that. Both the provenance and the history of the archived documents, including the jurisdiction in which they were produced, are very important. Remember that the country of publication or the provenance of a document may or may not be the same as the subject matter or jurisdiction of the contents of the document, and they may be housed in a library in yet a different place.

In sum, you must never assume that simply because material is not published, it is not important. Indeed, it may be more important. In this regard you might want to read Simon Hing Yan Wong's PhD thesis (2000) in the Faculty of Law, which was a study of unpublished CCP internal documents, laws and decrees, newspapers, and propaganda materials, and diaries—almost all of which were archived materials. It is

an excellent example of how to use archival materials for a PhD thesis. If you wish to see how I used the archived court bundles in my own research, see pages 157-58 of my PhD Thesis, including the footnotes.

Please complete the following two assignments.

TWO ASSIGNMENTS:

1

Talk to your supervisor about the possible existence and use of archived materials in your research subject. Ask about your supervisor's network as a possible help in locating archives.

2

In the law library, locate the court bundles for the recent "Long Hair" and Falun Gong "freedom of expression" cases, note the call numbers and locations for each, and copy the indices for the bundles showing what documents are there in the files. Bring this information to class.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

CRITICAL *LEGAL* THINKING & ADJUDICATING: HOW DO YOU ACTUALLY *DO* IT?

We all know that we are expected to **ADJUDICATE** the goodness and quality of the materials we study—not merely "repeat and report" as we learned in middle school:

> "It is not sufficient for you to say 'who said what' and expect your readers to make the judgements as to the value of works you are citing. You generally need to indicate the *relative importance* of works you cite and where conflicts are reported, you need *to adjudicate on whose findings you consider the most plausible*."[1]

We know that we are *supposed* to do it. The question is: *How?* *How* do you get to the point of sufficient scholarly sophistication that you *can* adjudicate? And then what is *the process* (the steps, the method, the approach) by which you adjudicate? What if you find yourself swayed by everything you read where you say, "This is good; I like this; I'm convinced; I agree"? Then you read something else and you are swayed by that? And so on—where everything in turn seems persuasive? How do you step outside the gravitational pull of a book or article in order to look at it objectively and adjudicate it? How do you know where to stand, and how to resist? How do you finally draw those lines and make those categories where you can say, "This I can definitely use"; "This I can perhaps use"; and "This is junk"?—where you can articulate precisely the rationales behind each of your adjudications?

After you have done the necessary thinking, how do you put it down on paper so that your reader(s) (audience) can see it clearly? Shakespeare (莎士比亞) wrote about this problem of the difference between knowing and doing in his play, *The Merchant*

[1] Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003), p. 26 (emphasis added).

of Venice:

> "If to do were as easy as to know what were good to do, chapels had been churches, and poor men's cottages princes' palaces. It is a good divine that follows his own instructions: I can easier teach twenty what were good to be done, than be one of the twenty to follow mine own teaching."[2]

We all know what is "good to do"—that's easy. And it's easy to tell someone else, to "teach" them, what is "good to do." The hard part is actually "to do" it—to put it into practice. But as lawyers, we not only *know* the law; we actually *practice* it, too. As RPG students, we must not only know what the good research tools and methods are, but also how to use them.

Part of the answer lies in critical thinking—but not the kind of abstract, analogical "critical thinking" that you might study in a general philosophy class.[3] It is not 2+2+2=6. The logic and reasoning of the law are not coextensive with the logical and reasoning of philosophy or any other branch of learning. And legal reasoning and analysis are *not* rote memorisation (填鴨)—in fact, they are just the opposite. What Sir Edward Coke said to the King of England in 1608 is still true today:

> "[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not

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[2] Act I, scene 2; Portia speaking; emphasis added. Here is a Chinese translation:

> 鲍西娅:
>
> "倘使做一件事情就跟知道应该做什么事情一样容易，那么小教堂都要变成大礼拜堂，穷人的草屋都要变成王侯的宫殿了。一个好的说教师才会遵从他自己的训诲；我可以教训二十个人，吩咐他们应该做些什么事，可是要我做这二十个人中间的一个，履行我自己的教训，我就要敬谢不敏了。"
>
> —*威尼斯商人*，第一幕 第二场

This may be read online at <www.dglib.cn/libonline/wnss/001.htm>; seen February 2, 2009.

[3] As, for example, that set forth in a general "critical thinking" class; see, e.g., the University of Hong Kong, <http://philosophy.hku.hk/think>; seen March 5, 2009.

> learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the *artificial reason and judgment of law*, which law is an act which requires *long study and experience*, before that a man can attain to the cognizance of it: and that the law was the…measure to try the causes of the subjects; and which protected his Majesty in safety and peace…."[4]

In this regard, we can say that the law is a discipline by itself. It is different from any other discipline. This is illustrated in the play and the movie, *A Man for All Seasons*,[5] in which there is the following dramatic exchange between Sir Thomas More, a lawyer, and the court that is trying him for treason. More has remained silent regarding the divorce and remarriage of the king, Henry VIII, and has refused to take an oath declaring that the king's "title" or right to the new marriage is good.

> CROMWELL: Now, Sir Thomas, you stand upon your silence.
>
> MORE: I do.
>
> CROMWELL: But, Gentlemen of the jury, there are many kinds of silence. Consider first the silence of a man when he is dead. Let us say we go into the room where he is lying; and let us say it is in the dead of night—there's nothing like darkness for sharpening the ear; and we listen. What do we hear? Silence. What does it betoken, this silence? Nothing. This is silence, pure and simple. But consider another case. Suppose I were to draw a dagger from my sleeve and make to kill the prisoner with it, and suppose their lordships there, instead of crying out for me to stop or crying out for help to stop me, maintained their silence. That *would* betoken! It would betoken a willingness that 1 should do it, and under the law they would be guilty with me. So silence can, according to circumstances, speak. Consider, now, the circumstances of the prisoner's silence. The oath was put to good and faithful subjects up and down the country and they had declared His Grace's Title to be just and good. And when it came to the prisoner he refused. He

[4] Sir Edward Coke, "Prohibitions Del Roy" 6 Coke Rep. 280, 282 (1608); emphasis added.

[5] The Chinese title for this movie in Hong Kong is 日月精忠.

calls this silence. Yet is there a man in this court, is there a man in this country, who does not know Sir Thomas More's opinion of the King's title? Of course not! But how can that be? Because this silence betokened—nay, this silence *was*—not silence at all but most eloquent denial.

MORE: (*with some of the academic's impatience for a shoddy line of reasoning*) Not so, Master Secretary, the maxim is “qui tacet consentire”. The maxim of the law is: (*very carefully*) “Silence gives consent.” If therefore, you wish to construe what my silence "betokened", you must construe that I consented, not that I denied.

CROMWELL: Is that what the world in fact construes from it? Do you pretend that is what you *wish* the world to construe from it?

MORE: The world must construe according to its wits. This Court must construe according to the law.[6]

The point is that the world’s and philosophy’s wits (才能，才智) are one thing; the law’s are quite another.

Eight Steps for Good Adjudication & Critical Legal Thinking

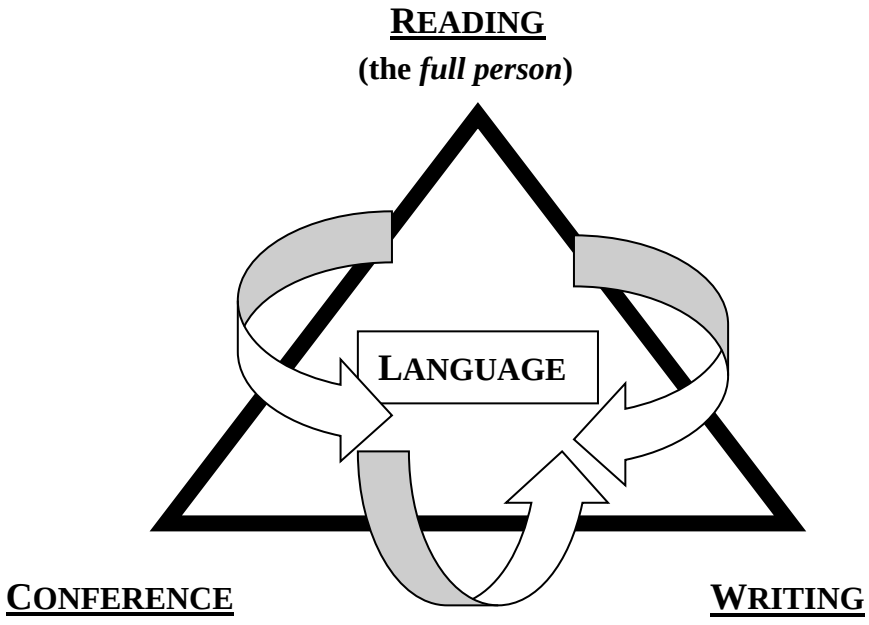
1.

The first step in adjudicating something you read is to decide whether and how well it fits this peculiar method of “legal critical thinking.” You might think of it like the X^2 test of “goodness of fit.” The “artificial reason and judgment of law” are what we call “thinking like a lawyer.” It is something you achieve after “long study and experience” of the “laws of the realm.” This is the magnetic field of the law. You must enter into this world, this mind-set, completely. You must stop thinking like a “civilian” non-lawyer and always think like a lawyer. *In doing this, you are placing yourself in the position of a judge sitting in court*. You are sitting in judgment on the quality of witnesses and evidence, as well as the arguments and submissions of counsel, in the same ways that a judge adjudicates them.

2.

[6] Robert Bolt, *A Man for All Seasons: A Play of Sir Thomas More* (London: Methuen Drama/Random House, 1995), pp. 96-97; final bold-face emphasis added.

The second step is to ask, How well is this written? This is a question about the basics of good composition: Good writing is good writing is good writing. Is the writing of this article or book clear, well organized, logical, etc.? Are the sentences and paragraphs well written? Is the diction good? Poor writing usually means poor thinking. And you can always tell when someone who is a non-lawyer is trying to write about the law, even if the writing is done in absolute good faith. It doesn't ring true because it's written by an outsider. Don't let the "print mystique" beguile you. There is a lot of junk in print. In order to develop your skills of discernment and discrimination, be skeptical about everything until you have tested it for excellence. Excellent writing means quality thinking.[7] "Reading maketh a Full Man; Conference a Ready Man; And Writing an Exact man."[8] Are you, the audience, persuaded? Do you understand to your satisfaction? Remember Bacon's paradigm[9]:



[7] One of the best discussions of the meaning of "quality" occurs in Robert M. Pirsig, *Zen and the Art of Motorcycle Maintenance: An Inquiry into Values* (London: Corgi Books, 1989). For help on "How To Evaluate Journal Articles" and "How To Do Library Research," I recommend an excellent Web page at <http://lib.colostate.edu/howto/evalclues.html> published by Colorado State University Libraries; seen March 15, 2009.

[8] Sir Francis Bacon, *Of Studies*, in *The Essayes or Counsels, Civill and Morall* 152-53 (Michael Kiernan ed., Clarendon Press 1985).

[9] See my fuller discussion of Bacon's idea and this diagram in Robert J. Morris, "Globalizing and De-Hermeticizing Legal Education" 2005(1) *Brigham Young University Education and Law Journal* 53, 71.

(the *ready person*) **(the *exact person*)**

3.

Third, in order to adjudicate the "goodness of fit" for your *particular* purpose and research, which we call *relevance*, you need constantly to measure everything you read against your own chosen SUBJECT, PURPOSE, and THESIS, as well as the GAP you are attempting to fill or the ISSUE you are attempting to resolve. If you do not have these clearly and constantly in mind at all times as you read, you will have no criteria by which to measure, adjudicate, include, or exclude what you read. The things you read may cause you to amend your SUBJECT, PURPOSE, and THESIS, as well as the GAP or ISSUE, and then they will in turn become the measure of what you read. It is a constant, ongoing, circular process. But the SUBJECT, PURPOSE, THESIS, GAP and ISSUE are *the foundation* and starting point which you must have in place *before* you can adjudicate the things you read. You must do the initial work of getting them in place before you can do the work of adjudicating the writing of others. *They are your anchor*. Don't confuse the chicken and egg. Otherwise, you will be like "children, tossed to and fro, and carried about with every wind of doctrine"[10]—tugged here and there, back and forth, by everything you read.

4.

Fourth, before you start reading the text, take a look at the footnotes and bibliography. Does the writer cite a good variety of solid scholarly sources, and are they cited in the proper format so that you can easily find and read those sources if you wish? Test-out a few of them. If you have found a reliable author, try to read more by that author. Let that author teach you how to read, research, write, and adjudicate. Also check the Table of Contents and the Index. They will give you help in deciding whether to read the entire book.

5.

Fifth, if you are conducting research in a foreign language, be sure you have within your scholarly network some native speakers of that language who understand your research and are willing to help you when you have questions. Get them to be your readers, examiners, and editors. Improve your skills in that language constantly,

[10] Bible, Ephesians 4:14. 聖經, 以弗所書 4:14— "使我們不再做孩童、像波浪漂來漂去，被各樣教義的風帶前帶后…."

particularly in the specialty of the law.

6.

Sixth, regardless of whether you are writing a thesis or dissertation, a scholarly article, or a memorandum of law for the court, you bear both the burden (or onus) of proof (舉證責任 / 證明的責任) and the burden (or onus) of persuasion (說服責任). This means that your audience will evaluate (a) the quality of your research and sources as evidence, (b) the quality of your narrative and exposition for the way you present that evidence, and (c) the quality of your legal reasoning and argument. To the extent your work fails to prove and to persuade, it fails to have the necessary quality for excellent RPG legal work. It helps to think of yourself not only as a scholar and a researcher, but also as a good journalist with the responsibility to find the truth and then explain it clearly to others.

7.

Seventh, apply the same standards and criteria to other authors as the University requires of you. The University has many standards, rules, and requirements that it imposes upon you as a research postgraduate student, particularly with regard to your thesis and other written work. Use these same standards to evaluate the articles and books you read. *Read as if you were a thesis examiner*. Remember that a doctorate is a license to teach as a member of a university faculty—to be an authority in full command of the subject matter right up to the limits of current knowledge and the astuteness to discover where you can make a meaningful contribution. Your professional peer group is worldwide. It is the learning of both knowledge and skills—knowing *that*, and knowing *how*. *It is the status to examine other people's PhD theses [as well as their articles and books] with authority*.[11] Each piece of published research that you read and adjudicate is more practice in learning how to achieve this status and to do the same thing yourself.

8.

[11] Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Buckingham: Open University Press, 3rd ed, 2002), pp. 20-23. See also Kjell Erik Rudestam and Rae R. Newton, *Surviving Your Dissertation: A Comprehensive Guide to Content and Process* (London: Sage Publications, 1992); Beth Luey, *Handbook for Academic Authors* (Cambridge: Cambridge University Press, 4th ed, 2002); Robin M. Derricourt, *An Author's Guide to Scholarly Publishing* (Princeton: Princeton University Press, 1996); William P. Germano, *Getting It Published: A Guide for Scholars and Anyone Else Serious About Serious Books* (Chicago: University of Chicago Press, 2001).

Finally, it helps to understand what adjudication is not. It is not merely stating a personal opinion about something. You may like chocolate ice cream better than strawberry ice cream, but that is not an "adjudication" but simply a matter of personal taste or preference. When you adjudicate something, you must state the principles and the reasons upon which you base your judgment. Courts do this when they explain the reasons for their decisions. Adjudication is a *principled* judgment.

* * *

Finally here are some questions to help you think further about critical legal thinking and analysis:

> As postgraduate legal researchers carry out their research, what do they actually do, if anything, besides finding, reading, summarizing, and writing about legal documents and source materials ("repeat and report")? In other words, are postgraduate legal researchers engaged in any distinctive intellectual activity?
>
> Do legal research methods exist apart from simple library skills?
>
> Are the research methods used by postgraduate legal researchers the same as, or different from, those used by legal practitioners?
>
> How are those research methods the same as, or different from, the methods used by researchers in the sciences, social sciences, and humanities—if at all?[12]

* * *

Take a look at the following exercise to help you practice critical legal thinking and adjuciation. The United States Constitution, Article IV, Section 2, Clause 1,

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[12] See John O. Mudd, "Thinking Critically About 'Thinking Like a Lawyer'" (1983) 33 *Journal of Legal Education* 704, and my counterarguments in Robert J. Morris, "Not Thinking Like a Nonlawyer: Implications of 'Recogonization' for Legal Education" (2003) 53(2) *Journal of Legal Education* 267, 268 n. 6 and accompanying text, which discusses these kinds of questions.

contains an important Privileges and Immunities Clause which states:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

This clause is repeated in the Constitution's 14th Amendment and was first interpreted by the US Supreme Court in the famous *Slaughterhouse Cases*, 83 U.S. 36 (1873). The case was decided only by a 5-4 majority (five justices in the majority, four justices dissenting).

Issue: Whether the 13th and 14th amendments guarantee federal protection of individual rights of all citizens of the United States against discrimination by their own state governments.

Holding: No. The Constitution only meant to guarantee federal privileges, not state privileges, whatever they may be. The Privileges & Immunities Clause did not create additional rights but merely required states to apply their own laws equally to non-state residents as well as state residents within each state. In other words, there was no federal or national standard of privileges and immunities.

Many people, myself included, think the Supreme Court was wrong in this decision and that it misconstrued the Constitution. In that opinion at page 75, the Supreme Court stated:

> "In the Constitution of the United States, the…[privileges and immunities] provision is found in section two of the fourth article, in the following words: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'"

At page 117, the Supreme Court, referring to an earlier state case, *Corfield v. Coryell* as precedent, made the following statement:

> "Being called upon to expound that clause in the fourth article of the Constitution which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States,' he [the state court judge] says:
>
> "'The inquiry is what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges

and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign.'"

You, of course, see the interpretative problem immediately, don't you? What is it? Do you see why some people argue that the Supreme Court misread the Constitution? Seeing this, do you agree with them or with the Supreme Court? What is your own adjudication?

* * *

Take a look at Andrew J. Nathan and Perry Link (eds), *The Tiananmen Papers* (London: Abacus, pb ed, 2002). 張良編著, *中國「六四」眞相* (香港：明鏡出版社, 2001).

Read the author's introduction where they discuss their adjudication of the provenance and authenticity of the archives which they are publishing. Do you agree with their assessment? Why or why not?

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

THE U.S. CONSTITUTION AND *DECLARATION OF INDEPENDENCE*

We can study the structure and composition of writing (Subject, Purpose, Thesis) by observing some famous portions of the United States Constitution and *Declaration of Independence*. The Preamble to the Constitution states as follows:

> PREAMBLE
> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.
>
> 序言
>
> 我们美利坚合众国的人民，为了组织一个更完善的联邦，树立正义，保障国内的安宁，建立共同的国防，增进全民福利和确保我们自己及我们後代能安享自由带来的幸福，乃为美利坚合众国制定和确立这一部宪法。

At first glance, this appears to be only a statement of purpose and subject. However, it also contains a thesis statement, but that thesis statement and its promise are implied. Can you tell what the thesis statement is?

Here are the first and last paragraphs of the *Declaration of Independence*. Can you identify the Purpose statement(s), Thesis statement(s), and Subject(s) here?

When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. **That whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.**

在人类事务发展的过程中，当一个民族必须解除同另一个民族的联系，并按照自然法则和上帝的旨意，以独立平等的身份立于世界列国之林时，出于对人类舆论的尊重，必须把驱使他们独立的原因予以宣布。

我们认为下述真理是不言而喻的：人人生而平等，造物主赋予他们若干不可让与的权利，其中包括生存权、自由权和追求幸福的权利。为了保障这些权利，人们才在他们中间建立政府，而政府的正当权利，则是经被统治者同意授予的。**任何形式的政府一旦对这些目标的实现起破坏作用时，人民便有权予以更换或废除，以建立一个新的政府。新政府所依据的原则和组织其权利的方式，务使人民认为唯有这样才最有可能使他们获得安全和幸福。**

* * *

We, therefore, the representatives of the United States of America, in General Congress, assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be free and independent states; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great Britain, is and ought to be totally dissolved; and that as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes and our sacred honor.

因此我们这些在大陆会议上集会的美利坚合众国的代表们，以各殖民地善良人民的名义，并经他们授权，向世界最高裁判者申诉，说明我们的严重意向，同时郑重宣布：

我们这些联合起来的殖民地现在是，而且按公理也应该是，独立自由的国家；我们对英国王室效忠的全部义务，我们与大不列颠王国之间大不列颠一切政治联系全部断绝，而且必须断绝。

作为一个独立自由的国家，我们完全有权宣战、缔和、结盟、通商和采取独立国家有权采取的一切行动。

我们坚定地信赖神明上帝的保佑，同时以我们的生命、财产和神圣的名誉彼此宣誓来支持这一宣言。

This is an example of a proper introduction, body, and conclusion with clear statements of Subject, Purpose, and Thesis—which together are the authors' Promise to their audience. Go back through the above two texts and identify each of these parts with a S, P, and T at the proper location. It may help you to understand these things if you remember that both the Constitution and the Declaration proceed from the assumption that human rights are "unalienable," meaning that they are inherent or inborn in each person, not granted, given, dispensed, or allowed by the government. The government's only role is to protect such pre-existing rights. The best exposition of these ideas is *The Federalist Papers*《联邦论》.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

TRANSLATIONS, COPIES, MICROFILMS, NEWSPAPERS AND PRIMARY SOURCES: A TRUE RESEARCH DETECTIVE STORY FROM HAWAII (WAR STORY #1)

A few years ago, when I was still living and practicing law in Hawaii, I was conducting some research on Hawaiian legends and stories as part of my preparation of a scholarly article for a peer-reviewed journal. In the library of the Bishop Museum in Honolulu, I had found an English translation of an ancient Hawaiian story that contained some elements which were perfect for the subject of my research. However, I first wanted to read the story in the original Hawaiian language—that, not the translation, would be the primary source. I do not trust translators. Through much sad experience, I have learned that many translators are liars. They leave things out; they change things; they add things. They have their own agendas; they often interpret instead of translate. And I don't like being lied to. Furthermore, *translations are secondary sources. The original language is the primary source*.[1] Hence, I prefer to read things in the original language.[2] In any case, for scholarly research I was obligated to read the original source. And since I read Hawaiian, going to the primary source of the story in the original language would, I thought, be easy.

According to the translator's notes, the original publication of the story had occurred in a Hawaiian-language newspaper in the 1860s. There were many such newspapers published in those days. However, the original copies of these

[1] Unless, of course, the subject of your study in the translation itself or the translation process itself. In that case, it would be the primary source.

[2] Robert J. Morris, "Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation" (2006) 51(3) *Journal of Homosexuality* 225.

newspapers are old and in very fragile condition. Many have been destroyed through neglect. The paper on which they were printed is rapidly disintegrating. They cannot be replaced. The newspapers that have survived are therefore stored in a special vault in the Bishop Museum[3] in Honolulu where the atmosphere and temperature are carefully controlled. They are not available to the general public. If they were brought out of their special vault into the open air and touched by many hands, they would quickly disintegrate and be lost forever. Only the Hawaiian translator who made the English translations had ever been permitted to work from those originals, and that was 50 years ago. She has long since died.

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

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

Microfilms are nearly indestructible and can be used by many people with little or no damage. If one does become damaged, it is easy to replace it from the film's original negative. So readings of the newspapers for all research are made using only the microfilms on microfilm-reading machines. This is what I did. My intent was to make paper copies from the microfilm so that I could have my own permanent records for my files. Printing paper copies from the film is easy on modern microfilm reader-printers.

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[3] Information about the Museum may be read online at <www.bishopmuseum.org>. The English translations mentioned are housed in a collection entitled Hawaiian Ethnological Notes (HEN), information about which may be read at <http://www2.bishopmuseum.org/HEN/index.asp>.

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

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

I felt sick at heart (and sick to my stomach). The situation was serious because I had included a reference to this story in the manuscript of my article that an editor had accepted for publication in a scholarly journal, but the acceptance was conditional upon my confirmation of the accuracy of the translation. The editor was not satisfied with a footnote referring to the secondary (English-language) source. He wanted me to verify the original *primary* text and footnote that. The story was central to my article. The deadline was fast approaching, and if I could not confirm the story's accuracy, the editor said I would have to delete it entirely from my manuscript. This would create a serious deficiency in my article. So time was of the essence, and I

was starting to panic. I had to find a way to confirm the story—the whole story in the original Hawaiian text. The substance of my article absolutely depended on it.

WHAT WOULD YOU, AS AN RPG WITH THE TRUE WARRIOR SPIRIT (奮鬥精神) AND AN RPG TRACKER (追蹤者) DO AT THIS POINT TO TRACK DOWN (追查) THIS PRIMARY SOURCE?

IF YOU WANTED TO FIND MY PUBLISHED ARTICLE TO SEE HOW I EVENTUALLY SOLVED THIS PROBLEM, HOW WOULD YOU DO IT?[4]

HOW COULD YOU FIND OUT IF THE PROBLEM IN THE MICROFILM HAD BEEN FIXED, OR WHAT OTHER STEPS MIGHT HAVE BEEN TAKEN, TO ASSIST FUTURE SCHOLARS WHO MIGHT ENCOUNTER THE SAME PROBLEM?[5]

[4] Robert J. Morris, "Same-Sex Friendships in Hawaiian Lore: Constructing the Canon" in Stephen O. Murray (ed), *Oceanic Homosexualities* (New York & London: Garland Publishing, 1992), pp. 71-102.

[5] Hint: see *ibid*. p. 82 n. 5.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

ANNOTATED SUMMARY OF DEAN MIKE McCONVILLE'S LECTURE ON EMPIRICAL RESEARCH

Mike McConville[1], dean of the Chinese University law school, gave us war stories and fundamental principles to help us understand some important aspects of empirical research in the law.[2] Many of the ideas he discussed are developed extensively in Mike McConville and Wing Hong Chui [崔永康] (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007), a copy of which he kindly donated to us.[3] It was good to hear the voice of such experience in advanced empirical research.[4]

As a basic paradigm, he cited the American "legal realists" and the experience of Warwick University in the UK[5] for the "law in context" movement and the movement to "democratize education." The basic paradigm means that the research project begins not

[1] His professional Web page is here: <www.cuhk.edu.hk/law/faculty/profMMcconville.html>.

[2] "Empirical research" is an umbrella term that includes many different approaches: qualitative, quantitative, sociolegal, ethnological, sociological, historical, philosophical—to name but a few.

[3] Law Library call no. KL 155 R42. One of the great values of this book is the bibliography and notes that accompany each chapter. They provide further reading and research materials for those interested in the respective subjects. Please look at them carefully.

[4] See especially his chapter, Mike McConville, "Development of Empirical Techniques and Theory" in McConville and Chui, *Research Methods for Law*, pp. 207-29. The chapter contains several interesting "war stories" and is, as McConville states, a "cautionary tale" (p. 207), much of which he repeated and reified in his lecture. Both contain many caveats for the would-be empirical researcher. Comparing this chapter with Michael Pendleton's chapter in the same volume (pp. 159-80) should provide a clear picture of the choices involved as between the two approaches to research.

[5] Warwick University Web page: <www2.warwick.ac.uk/study/>; seen April 29, 2009.

with the identification of a legal issues, but with the identification of social problems and issues, including the social setting in which the law operates. The researcher must look at the actual world rather than merely the law texts (legislation, case decisions, library materials, etc.). This recognizes that the law is not the focus of attention or necessarily the solution to a problem, but indeed may be a contributor to the problem. Often this kind of research is the perspective of the "law *and* _____" as, for example, the family and law, the consumer and law, crime and law, law and prisons, literature and law.

However, empirical research may not be for everybody.[6] Dean McConville noted that empirical research involves a whole panoply of problems and situations that are not usually present in traditional black-letter doctrinal research.[7] These include, *inter alia*, political and ethical concerns. The potential empirical researcher needs, in close collaboration with his/her supervisor, to weigh and balance these concerns carefully and "count the cost" before undertaking serious empirical research.[8] Do you have the skills, aptitude, and personality for empirical research?

He cautioned that historically, much empirical research has been wrong and misleading because the research problems and methods were defined and funded by rich,

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[6] Whether or not to conduct empirical research is a question for you to consider most carefully with your supervisor.

[7] Black-letter research and publishing, of course, are not without their own sets of problems and caveats. See, e.g., one kind of difficulty as dramatized in the television program, THE WEST WING, Season 1, Episode #9, entitled "The Short List." You can read the episode guide here: <www.westwingepguide.com/S1/Episodes/9_TSL.html>; seen April 30, 2009. The DVDs are in the law library.

[8] For example, McConville, "Development of Empirical Techniques and Theory," p. 224, asserts the following (emphases added):

> "I found that it is idle to talk about the politics of research as if there was a choice. *There is no choice: empirical research of any quality is necessarily political*, and the *only question*, ethical and political, is whether to make explicit for the benefit of readers and future researchers what is deeply embedded in the undertaking."

If this is true, and if you dislike politics, you may wish to stick with black-letter doctrinal research and avoid being enmeshed in the politics altogether—assuming that black-letter research is itself apolitical or nonpolitical.

influential, privileged, and powerful people or institutions, often the state itself. This meant that researchers were told what to research and were paid to do so, often using unchallenged and unchallengeable methods. So they often (intentionally) overlooked the real problems, and this skewed their results—or dictated their results in advance.[9] One motive for this kind of control was to ensure that researchers would not question the politics, practices, and ethos of the established order as already legitimated by law. So the question for the researcher is: Who pays for you?[10]

Hence, the first problem for the empirical researcher may be that s/he encounters a body of research that tells but one story, and this may seem unchallengeable. The researcher becomes a prisoner of the received framework and is afraid or unable to challenge it because it comes with great "authority" from the established "experts" in the field.[11] In other words, the researcher simply continues the received framework in the "repeat and report" mode and therefore makes no new contribution to knowledge. Breaking out of this powerful constraint requires true courage to be not only counterintuitive but also counterauthoritarian. This is why the skills of adjudication are so important because in adjudicating evidence and sources you must ask yourself: "Does this make sense to me?" The research gap occurs where the reality of the actual situation does not fit thus accepted framework or paradigm. This creates a parallax view (視差) which gives rise to the research questions: "How do I really explain this? How do I account for this discrepancy?" You keep asking why, why, why? What can explain this? What is the Occam's Razor here? The answers you develop to these questions become

[9] We call this GIGO.

[10] Bible, *New Testament*, Matthew 6:21, Luke 12:34: "Where your treasure is, there will your heart be also." (你的財寶在那裡 、 你的心也在那裡)

[11] We have seen this in the problems relating to Professor Bloom. The result of research that fails to raise such challenges will likely be the mere repetition of a mere truism (自明之理；老套的；众所周知)—or what McConville, "Development of Empirical Techniques and Theory," calls "merely a tenet [教條]…uninformed by any systematic analysis and founded in romanticism…[which consists of] 'top-down' explanations, reliant upon macro-theories unanchored in empirical data…." (p. 223). In other words, no new contribution to knowledge.

your model and your framework for the research. Then the results of your research can actually change the paradigm of the field, and this becomes your new contribution to knowledge.

Professor McConville used the examples of his investigations of plea bargaining and jury trials as set forth in Mike McConville and Chester A. Mirsky, *Jury Trials and Plea Bargaining: A True History* (Oxford: Hart Publishing, 2005)[12], to illustrate these points, methods, and questions. He noted that the received explanation with which he began his project turned out to be entirely false.

During the course of his remarks, he referred to a number of the skills and ideas that we have already developed in this class: serendipity (luck, chance)[13], the importance of consulting librarians, and of course the intimate relation between empirical research and the use of archives. He stressed that archives are necessary in understanding the history of a research problem. **The EMPIRICAL-ARCHIVAL nexus is crucial**.[14]

The ethical dimension of empirical research is vitally important. Empirical research is done *with* people, not *on* people. People and their personal information have rights and deserve respect. Hence, it is important to consider how you present yourself to your research subjects. How much about yourself, your motives, and your project do you disclose? How much do you conceal? There may be a temptation to conduct research on easy targets—persons with little power or defenses who can be manipulated. The researcher must resist this. Establishing and earning the trust of the research subjects is crucial, and this takes time. The researcher must be open and honest.

There is no such thing as a perfect empirical methodology. Don't start out to be a

[12] A copy of which he also donated to us. Law Library call no. KM 582.007 M12. Anyone interested in conducting empirical research, including comparative research, in the criminal justice system should consult this book. It would also be beneficial to study the body of work and methodologies of Professor Michael DeGolyer of the Hong Kong Baptist University. HKU Library holdings of his works can be found by entering "DeGolyer, Michael E" in the Dragon search engine.

[13] Louis Pasteur (1822–1895): "Chance favors the prepared mind."

[14] This is demonstrated especially clearly in *Jury Trials and Plea Bargaining*.

social reformer. Don't assume there is any solution to a social problem. Your goal as a researcher is simply to explain, with no effort to be sensational.[15] Ask no leading questions of your subjects, but only, "Tell me your story." The questions you are trying to answer for yourself are Who, What, Where, When, Why, and How. This is what news reporters, especially investigative reporters, do.[16]

Remember that your presence in the situation alters the situation itself.[17] At first, you are a stranger, which means that the information you receive will largely be presentational data, the "official" information the subjects want you to have. But as you get accepted, you get more normal accounts and research data. You become the proverbial "fly on the wall." You become invisible. Become an anthropologist—living among and like the "natives"—one of them.[18] Read Howard S. Becker, "Whose Side Are

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[15] Remember Spinoza's dictum: "non ridere, non lugere, neque detestari, sed intelligere."

[16] For an excellent dramatization of this, see the 1976 movie, *All the President's Men*, or read the book by Bob Woodward and Carl Bernstein.

[17] One of the seminal articles on this subject is Felix S. Cohen, "Field Theory and Judicial Logic" (1950) 59 *Yale Law Journal* 238.

[18] I agree with this notion if by "become" McConville means the formal study of anthropology leading to a recognized credential in that discipline—thus the equality of law *and* anthropology. I disagree if he means self-training where a lawyer or law student merely assumes that s/he can enter the discipline and practice of anthropology (or anything else) without such formal training. A law degree alone does not qualify anyone to practice law *and* anthropology or "law *and* anything else." You cannot "make yourself into" any kind of specialist in, for example, history, sociology, anthropology, or philosophy, any more than you can turn *yourself* into a brain surgeon.

By way of illustration, I would expect that any article published in, for example, the journal *Law and History Review* would be written only by author(s) expert and credentialed in both law and history—not just one or the other. One possible solution: form a complementary "natural alliance" with another researcher who has the skills and credentials that you lack, and vice versa. McConville, "Development of Empirical Techniques and Theory," p. 215.

As Professor Michael Pendleton puts it: "There are many areas *in or touching law* worthy of further examination by *those trained in it*." Michael Pendleton, "Non-Empirical Discovery in Legal Scholarship—Choosing, Researching and Writing a Traditional Scholarly Article" in McConville and Chui, *Research Methods for Law*, p. 159; emphases added. Perhaps surprisingly, Pendleton's chapter in McConville's book is an argument *against* the "contemporary dominance of empirical legal research" where it tends to overshadow "traditional legal doctrinal criticism," which is the heart of the common law. See esp. pp. 159-161, 177. Comparing this chapter with Mike McConville's chapter in the same volume should provide a clear picture of the choices involved as between the two approaches to legal research.

We On?" (1967) 14 *Social Problems* 239.[19] This examines the question of the politics of research and how you negotiate the various inevitable political pressures which you encounter in the field.

"Keep a diary, and one day it will keep you." Record all information carefully, and later when it comes time to write up your research, your diary will help you remember accurately and fully—and it will protect you against charges of bias and dishonesty.[20] The diary might be handwritten, tape recorded, stored in the computer—or a combination of these methods.

Be careful with theory. As stated earlier, the first step is to actually look at the situation first; look at what you see THERE and then describe THAT. Theory comes AFTER that, often by induction from information gleaned in the field. Do not reverse the process. Don't let theory prescribe the research process and dictate what you perceive in the field by making you blind to certain information. Research is not about proving anything. Instead, you develop a researchable question or hypothesis, and then you test it, examine it, and demonstrate it. You go wherever the research leads you—not the other way round.[21]

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[19] This article is also cited, along with other writings of Becker, at several points in McConville and Chui, *Research Methods for Law*.

[20] Keeping a research diary of your project is, of course, a standard "good practice" recommended in Phillips & Pugh.

[21] See, e.g., this issue in the story of researching the Human Papillomavirus in female sex workers, despite official pressures that it is not politically correct, as dramatized in the television program, THE WEST WING, Season 5, Episode #16, entitled "Eppur Si Muove." You can read the episode guide here: <www.westwingepguide.com/S5/Episodes/106_ESM.html>; seen April 30, 2009.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

EMPIRICAL RESEARCH EXERCISE (VOLUNTARY): THE SAD, SAD TALE OF PROFESSOR BLOOM

The following exercises are voluntary for anyone who wants more practice in empirical research prolems.

Read the article, "What If Chinese Had Linguistic Markers for Counterfactual Conditionals? Language and Thought Revisited," by Feng and Li, download here: <www.cogsci.rpi.edu/csjarchive/Proceedings/2006/docs/p1281.pdf>. Write a correct HKLJ footnote with a short adjudication for the article here:

This is one of many articles that criticize the writings of Professor Alfred Bloom, whose hypothesis argued that the Chinese language has no way of expressing counterfactual ideas (事實相反的假設), and therefore Chinese people cannot think or speak counterfactually or use the subjunctive (虛擬語氣, 假設語氣) as English speakers do.[1] He was, of course, wrong.

The reason so many scholars have criticized Bloom's findings is that his empirical methodology was seriously flawed.[2] As the Feng and Li article states:

[1] If I had not….; If it were not for...; But for….; If I were you…; If only….; Would that it were…." An example in the common law is the "but for" test「要不是」驗證.

[2] See, e.g., Robert J. Morris, Book Review (2001) 8(2) *China Review International* 396, reviewing

"Empirical support for Bloom's claim is weak at the best." The major problems were that (1) Bloom himself did not speak, read, or understand Chinese, and (2) the questionnaires and "experiments" he used in Hong Kong and Taiwan were translated poorly from English. He had to work through the translations and explanations of interpreters, as did his research subjects, and this created a design flaw in his research methodology, his research questions, his framework and theory, and ultimately his thesis statement. He committed the common and fatal error of many researchers:

GIGO

***G*ARBAGE *I*N, *G*ARBAGE *O*UT**

垃圾進、垃圾出

錯進、錯出

This is a concept that began with the first invention of computers many years ago. If you put programming "junk" into the computer, the computer can only give you processed "junk" out. The end product is only as good as the starting information. That was Dr. Bloom's error. Another way of saying this is that he failed to follow Nibley's Philosophy in several particulars—he did not acquire and use the necessary tools for his research. Poor Professor Bloom! If he had studied with us in this class, he NEVER would have made these mistakes!

For this assignment please do the following:

Look at the references in the Feng and Li article. The second column on page 1281 of the article both mentions and quotes two other articles: Bloom (1984) and Hsu et al. (2004). Find and read both of these articles in order to get a better picture of the ways Bloom went wrong. Write correct footnotes with short adjudications for both Bloom (1984) and Hsu et al. (2004) here:

Berry F. C. Hsu, *Laws of Banking and Finance in the Hong Kong SAR,* for a discussion, with citations to the major sources, of the Bloom controversy.

You may voluntarily read any other articles referred to in the References section of the Feng and Li article or Bloom and Hsu, and if you do, make footnotes for them as well. With all of the footnotes and sources above, adjudicate each one and state your short adjudication with the footnote.

These problems have serious implications for the law and legal research, particularly qualitative and quantitative research.[3] They have profound implications for the cause of justice. Consider, as but one example, the simple "but for" rule or test (要不是驗證) in the common-law area of negligence in tort. The central point of analysis in that doctrine is causation and what is the "proximate cause" (近因) of a tort. When we ask, Are there any intervening causes or acts (干預行為/因)?, we are using the "but for" rule—and therefore the subjunctive and the counterfactual.

The Bloom problems also have important implications for legal education and legal thinking, where our minds are subject to common errors and misconceptions (called "heuristics") that can seriously impede legal thinking.[4]

Good empirical research can and must deal with these problems. As Roscoe Pound wrote: "For the lawyer…Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient…. Let us not

[3] A knowledgeable resource in the Faculty of Law on studies and methods of qualitative research is Professor Felix W. H. Chan.

[4] Robert J. Morris, "Not Thinking Like a Nonlawyer: Implications of 'Recogonization' for Legal Education" (2003) 53(2) *Journal of Legal Education* 267.

become legal monks."[5] This idea echoes the famous words of Oliver Wendell Holmes, Jr.:

> '*The life of the law has not been logic; it has been experience.* 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. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. *In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage*."[6]

This is how and why we conduct empirical research. In order to help you further in these endeavors, you might want to consult the following two empirical research **PATHFINDERS**:

United States: <www.ll.georgetown.edu/guides/EmpiricalLegalStudies.cfm>

and

Research ethics: <www.ukcle.ac.uk/research/ethics/index.html>; be sure to compare this with the HKU ethical rules for empirical research.

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[5] Roscoe Pound, "Law in Books and Law in Action" (1910) 44 *American Law Review* 12, 35-36.

[6] Oliver Wendell Holmes, Jr., *The Common Law*, Lecture 1; emphasis added. The cited quotation is from the first of twelve Lowell Lectures delivered by Oliver Wendell Holmes, Jr. on November 23, 1880, which were the basis for *The Common Law*. The quotation is reproduced and discussed in Max Lerner (ed), *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions* (Boston: Little, Brown & Co., 1946), pp. 51-52.

ADVANCED (LEGAL) RESEARCH METHODOLOGY

(LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

January 8, 2012

Dear Friends:

1. Daniel Kahneman and Cognitive Psychology

Several years ago, I published an article that included discussion of much of the work of Professor Daniel Kahneman. He is the winner of the Nobel Prize in Economics for his work regarding cognitive psychology. Here is the reference to my article:

Robert J. Morris, (2003) "Not Thinking Like a Nonlawyer: Implications of 'Recogonization' for Legal Education" 53(2) *Journal of Legal Education* 267-83 (on the application of cognitive psychology and the study of "heuristics" to legal education).

There is an excellent new interview of Professor Kahneman on the BBC Radio programme HEALTH CHECK here:

www.bbc.co.uk/programmes/p00mmnj2

If you are doing any work related to cognitive psychology, or if you are doing empirical research *of any kind*, you probably should be award of Dr. Kahneman's work. It has relevant application to what you are doing and the possibility for cognitive errors in your work.

2. Empirical Research

The just-published edition of the *Hong Kong Law Journal* contains my book review of *The Oxford Handbook of Empirical Legal Research*., starting on page 883. In that article you will find many helps and references that will aid you in your empirical work. I hope all of you are doing some kind of empirical research.

3. The Right To Demonstrate

The past year has been an amazing year. We have seen mass demonstrations in almost every part of the world—including Hong Kong and HKU. It started about a year ago with the "Arab Spring" in North Africa. You should understand these forces and how they apply to legal studies. Here's my article that may help you:

Robert J. Morris (2007) Book Review Essay, 37(3) *Hong Kong Law Journal* 1013, reviewing Paul Harris, *The Right To Demonstrate: A History of Popular Demonstrations from the Earliest Times to Tian An Men Square and Beyond*.

In any case, be sure to consult Paul Harris's excellent book as your basic source on the subject. The "right to procession and demonstration" is supposedly guaranteed in Article 27 of the Hong Kong *Basic Law*, but as we saw last summer, it was denied to students at HKU. We will continue to see many demonstrations during 2012.

4. The Taiwan General Election

I urge everyone to watch the daily news reports about the upcoming general election in Taiwan in two weeks' time. The most important part of the election, of course, is the office of the president. This is an important empirical study in the operation of democracy and the rule of law.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

ATTENDING ACADEMIC CONFERENCES: A SOLDIER'S FIELD MANUAL

Every RPG student is encouraged and expected to attend academic conferences as part of the total RPG experience.[i] There are at least three (3) main purposes for attending academic conferences:

1

First, the conference is a chance for you to prepare and read a paper that arises directly out of your RPG research and to have others of your academic peers and colleagues offer insights, criticisms, and suggestions on your work—all of which will make it better. Preparing for the conference will help you think through your research more clearly with a real audience in mind.[ii]

2

Second, the conference is an opportunity for you to interact socially with peers and colleagues from around the world and thus become socialized in the academic world which you are now in the process of entering. It is a chance for you to market yourself and observe how other scholars market themselves. The experience helps you to become more cosmopolitan. You go to the conference in order to study your peers and colleagues within the larger context of the global "academic community." Remember that one or more of these colleagues and peers may become your thesis examiner, or maybe your boss.

3

Third, the conference is a powerful research tool. If you use it properly, it can place you personally and strategically in the very heart of your research venue and give you visibility and *gravitas* as a mainline scholar among scholars. It is your entre into their world and their networks. Peers and colleagues who observe you read your paper will congregate with you and offer help in many ways. They will give you leads, hints, connections, ideas, and other helps that you would not get otherwise. They will accept that your university believes in you and supports you. Depending on the topic of your research, you may be able to conduct some empirical research at the conference itself or its wider venue.

When you attend a conference, you have many different but related jobs to do and many different but related roles to play at the same time.[iii] Remember Bacon's Triangle. The following are some suggestions for participating in the conference process from beginning to middle to end. If you have yet to attend your *debut* conference, these suggestions are especially important.[iv] These are listed in no particular order of importance or sequence.

HKU Research Services conference grants may be seen at <www.hku.hk/rss/enquiries.htm>.

BEFORE THE CONFERENCE

Always attend conferences with the knowledge, help, and permission of your supervisor. See Phillips and Pugh pp. 108-09, 152, 171-72, 184-86.[v]

Make sure you know and follow all rules and regulations of the University regarding attendance at conferences. If you must complete forms or applications, do so properly and promptly.

Give yourself plenty of "lead time" to get ready for the conference. You cannot properly get ready at the last minute or in a rush. Remember that "all good writing is rewriting."

Your first source of help in selecting and preparing for a conference is your supervisor for two reasons. First, your supervisor has been through this process before and can show you the ropes. Second, your supervisor has probably helped to

sponsor, organize, and conduct a conference or two before this and so has read and evaluated many proposals and abstracts as well as final conference papers. Tap into this resource.

Your second source of help is your fellow RPG students, some of whom have already attended conferences. Consult them about their experiences.

Follow the advice, lessons, and principles you have learned in this class—especially about audience (intelligent but uninformed). If necessary, hire a coach, a tutor, and an editor to help you get ready for the conference.

Make sure your attendance at the conference will be a meaningful and central part of your overall strategic research and professional plan as analyzed and instantiated in your research Timetable and Thesis Map. It cannot be merely a side-trip or an excursion primarily for fun or curiosity. It must affirmatively move your agenda forward. Remember Chicken & Egg, and Llewellyn's Cure.

Like Janus, your conference experience looks back and builds on what you have already done, and forward to help prepare you for what is to come in the future.

Janus

Study the conference's Web page and announcements carefully and thoroughly in advance to make sure you understand the exact theme off the conference, the details of the call for papers, and the requirements of format and participation. Read these materials again and again during the process of preparing your abstract, proposal, and

paper. Make sure your presentation will conform exactly to the requirements of the conference—nothing more and nothing less.

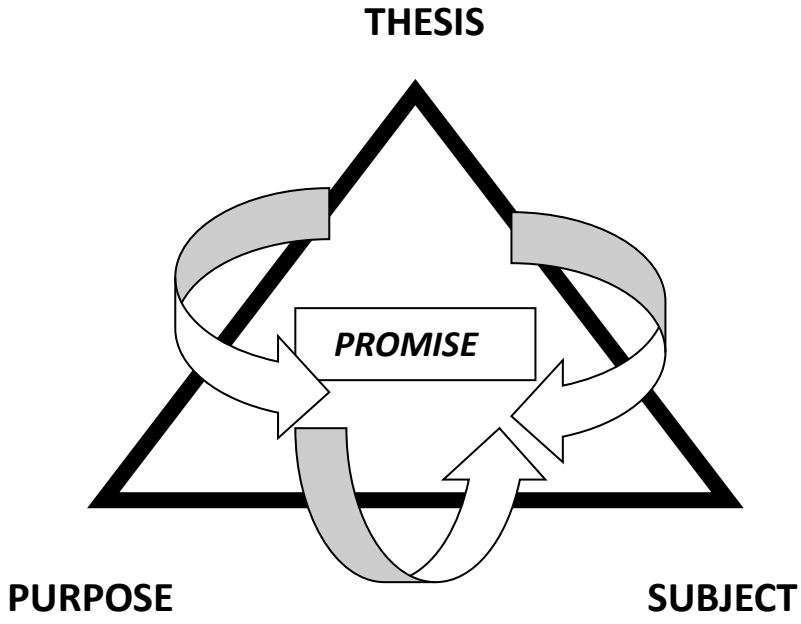
Your goal in applying to present at the conference should be to demonstrate how you can benefit the conference, not how the conference can benefit you. Think of it as a job interview.

Especially study the Web pages and CVs of all the named conference organizers, participants, and invited and keynote speakers so that when you meet them, you can talk intelligently with them about their work. If possible, "project" your arrival at the conference by contacting some of these people to introduce yourself and perhaps ask for "advice" by email. Your supervisor can assist with introductions. Prepare a personal "facebook" so that you can instantly recognize the important participants when you see them at the conference.

Study the venue of the conference. If you are going to a conference in London, make sure you study the city of London and its environs before you go. If the conference plans to offer tours of interesting places at the venue, take the tours. Remember, the primary purpose of the tour—like conference lunches, dinners, and cocktail parties—is to socialize, not to sightsee, eat, or drink. If you are skillful, you can do both.

When you prepare your abstract and/or proposal, write it with two purposes in mind: delivery of your paper at the conference AND ultimate publication of your paper in either a peer-reviewed journal or the official proceedings of the conference—or BOTH.

Make sure your proposal contains (1) a clear statement of subject, (2) a clear statement of purpose, and (3) a clear thesis statement—and that it demonstrates how you intend to make a new contribution to knowledge by filling a gap. In other words, make sure your proposal instantiates and replicates these cardinal rules and principles which we have studied in this class. All of these together add up to and constitute the PROMISE you make to your audience(s).[vi]



Choose carefully which conference(s) you wish to attend. The venue of the conference is as important as the subject of the conference. Choose conferences that will directly help you with your research project—especially with key libraries, archival materials, and empirical opportunities. You may want very much to go to Paris (to shop and tour), but if a conference in Paris is only marginally related to your RPG work, don't waste your time and money. Think strategically, like a warrior.

Try to pick conference venues where you can "kill two birds with one stone" (一舉兩得, 一舉兩得, 一石二鳥), i.e., read your paper PLUS conduct empirical research, interviews, library work, visits to universities and important colleagues, etc.

Try to pick conferences sponsored and conducted by individuals, institutions, and organizations directly related to your RPG work, and then use the conference experience to interact and network with your colleagues there. Let them see you as part of their "in-group" (自己人團體).

Before you go to the conference, make sure you know how to eat and dress properly. Are your clothes correct? Are you properly groomed? Are your table manners correct? Do you know the rules of etiquette and behavior for the place of

the conference? Do you speak properly? Do you know how to be polite? Are you fit and in good health? Do you have good *guanxi* (關係) skills of the kind needed for this particular conference and this particular venue? If you answer is no to any of these questions, begin now to correct the situation.

If you have never done so, get a good book on modern etiquette (禮節) and study it carefully. Remember the purpose of etiquette: to make *others* comfortable about *you*. It is not your private concept of what is polite or proper.

Will you be a lawyer among lawyers, or a lawyer among anthropologists? It makes a difference. Know your audience!

Get yourself into the proper mind-set and *Weltanschauun*g for the conference.

Print and take with you a large number of official professional name cards to distribute to other conference members, and be sure to collect their cards in return. Your cards should be a marketing tool—your full contact information, Web page address, university logo, etc.

Also take a few copies of your professional CV. You never know who may ask for one. If someone does ask you for one, be sure to say, "You can also get a lot more information about me and my interests on my personal Web page."

Make sure your personal Web page is completely functional (interactive) and up-to-date before you go to the conference, so that if someone asks you a question about your work, you can give a short answer and then refer them to your Web page for particulars. Include your Web address on your name card and CV as part of your contact information and your presentation.

Know who you are and what you are—a peer and a colleague. Be ready to represent yourself, your professors, and your university with dignity.

One of the best ways to learn about conferences relevant to your special field is to become a member, or at least get your name on the mailing list, of relevant academic groups, societies, and professional organizations. Follow their Web pages and network with their members to learn about conferences now being planned for the

future. Also, check the Web pages of major universities that have programs in your field. Usually, they will have a section that announces “upcoming conferences” and “calls for papers.”

If you plan to use a PowerPoint presentation, prepare and take along to the conference a paper copy and overhead transparency slides of your presentation as well. You do not know the condition of the AV facilities at the venue, and you cannot control their viability either before or during your presentation. Remember Murphy’s Law.

As you get ready to attend the conference—

Prepare!
Prepare!
Prepare!

Practice!
Practice!
Practice!

Rehearse!
Rehearse!
Rehearse!

Try to give at least one mock presentation (rehearsal) to some other RPG students and/or your supervisor as your audience. Ask them to be critical. Take their suggestions and criticisms on board and make improvements.

How good is your spoken *presentational* English? If it’s not very good, you might want to take a speech class to improve it.

Hone your “platforming” skills. Learn how to stand and perform with confidence and poise in front of a live audience. Study the methods of good platformers. One excellent example is the movie, *An Inconvenient Truth*, by Al Gore. Other helpful books are *Public Speaking for Dummies* and *Presentations for Dummies*, both by Malcolm Kushner.[vii]

If possible, rehearse your platforming in front of a video camera. Watch yourself, study your performance. It will make your actual presentation better.

Remember Liberace's concert, Chopin's pedal, and Nibley's philosophy.

AT THE CONFERENCE

Make a good first impression. Think of your participation in the conference as a job interview.

Observe your peers and colleagues carefully. How are they dressed and groomed? How do they behave at the conference? What is their professional demeanor, stance, body language, and countenance? What do they talk about? How do they relate to each other? How do they relate to you? How do they eat? How do they speak? What do they do during leisure time?

Remember that "your peers and colleagues" include not only academics but editors and publishers, media people, business people, etc.

Attend and support the presentations of other colleagues and peers. Ask them supportive questions. Ask for copies of their papers. Show a strong interest in their work. Be unselfish. Be polite. Hedge.

In the conference session when you present your paper, listen carefully to the entire discussion regarding all the papers. Take on board all the comments made about your paper. Write them down. Record them if you can. Bring them all back with you and incorporate them into your next draft.

In addition to reading your individual paper, consider other ways to make your name known at the conference, such as participating in panel and group discussions, serving on conference committees, helping with conference organization, and the like. Be a volunteer; make yourself available and useful. Always wear your name tag with your name written LARGELY (you may have to rewrite it yourself).

Remember Liberace's concert.

Take lots of photos at the conference, and make sure that these include photos of you with the important conference organizers and attendees. Make sure you know their names accurately. Post the best one or two "official" photos of you at the conference on your personal Web page along with the official Web address of the conference.

AFTER THE CONFERENCE

Bring all conference materials back with you to share with your supervisor and fellow RPG students. Make sure to include a write-up of your conference experience for your diary and your supervisor's diary and your personal Web page.

Debrief yourself. Ask yourself, What did I learn? How can I benefit from this experience? How can I do better next time?

Immediately follow-up with email and telephone contacts to those important individuals with whom you want to have an ongoing professional relationship and with whom you exchanged name cards at the conference.

If conference participants suggested changes and improvements to your paper, make them immediately. Include a reference to your conference paper, as well as to the publication if it is published, in your professional CV, and post that on your personal Web page. Post a PDF copy of your revised paper also.

Your report of the conference should be positive. If you have any criticisms, make them politely and constructively by hedging. But always speak affirmatively of the conference, its organizers and participants.

If the University or other entity has supported your trip financially, be sure to complete all the necessary forms and reports properly and on time. Keep copies for your diary and your supervisor's diary—and give credit it your paper and your Web page.

Always keep in mind the possibility of publishing your writing in peer-reviewed journals and books.[viii]

Imagine that you are asked to help organize an academic conference. What would you do? What would be your ideal conference? Whom would you invite? How would you advertise? What topics would you cover? What would be the theme of your ideal conference?[ix]

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[i] I attended six (6) conferences during my four-year tenure as an RPG student. The University paid for one trip, and I paid for the other five. Not all of them were law conferences. One of the most important conferences I ever attended as a lawyer was the annual meeting of the American Anthropological Association in San Francisco. I have also attended conferences of professional Political Science and Anthropological societies.

[ii] If you later publish your paper, be sure to give all such contributors, as well as the conference itself and its organizers and sponsors, credit in a proper footnote. This both avoids plagiarism and ingratiates you with your peers and colleagues. They will surely reciprocate! When the paper is published with such a footnote, be sure to send an offprint to each person mentioned therein along with a thank-you note and your name card.

[iii] To help you get ready, and to instill the "warrior spirit" generally, I suggest you read any book by Robert J. Ringer. My favorite is *Looking Out for Number One*. My second favorite is *Winning Through Intimidation*. This is his Web page: <www.robertjringer.com>. Take some time to explore it and assimilate his ideas. Get the free downloads. Ringer is a real warrior.

[iv] These suggestions, if you follow them, will also help you write a better thesis, dissertation, and/or research paper, and help you get ready for your final and oral exams.

[v] If you have not yet read both Cooley & Lewkowicz and Phillips and Pugh in their entirety, you are shortchanging yourself. Do it now.

[vi] If it helps you, you can think of this as an equation: (1) Thesis + (2) Subject + (3) Purpose = Your Promise to Your Audience. The equation illustrates that your statements of thesis, subject, and purpose are three separate and distinct statements, because they are three separate and distinct concepts.

[vii] HKU library has paper and e-book copies of both books. Don't be insulted by the word "dummies" in the titles of these books. It's for fun. I love all the Dummies books and own many of them. I'm a dummy—I admit it.

[viii] See, e.g., Beth Luey, *Handbook for Academic Authors* (Cambridge: Cambridge University Press, 4th ed, 2002); Robin M. Derricourt, *An Author's Guide to Scholarly Publishing* (Princeton: Princeton University Press, 1996); William P. Germano, *Getting It Published: A Guide for Scholars and Anyone Else Serious About Serious*

Books (Chicago: University of Chicago Press, 2001).

[ix] Try looking at *Meeting & Event Planning for Dummies* by Susan Friedmann. It's an excellent primer.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

ATTENDING ACADEMIC CONFERENCES

Every RPG student is encouraged and expected to attend academic conferences as part of the total RPG experience.[1] There are at least three (3) main purposes for attending academic conferences:

1

First, the conference is a chance for you to prepare and read a paper that arises directly out of your RPG research and to have others of your academic peers and colleagues offer insights, criticisms, and suggestions on your work—all of which will make it better. Preparing for the conference will help you think through your research more clearly with a real audience in mind.[2]

2

Second, the conference is an opportunity for you to interact socially with peers and colleagues from around the world and thus become socialized in the academic world which you are now in the process of entering. It is a chance for you to market yourself and observe how other scholars market themselves. The experience helps

[1] I attended six (6) conferences during my four-year tenure as an RPG student. The University paid for one trip, and I paid for the other five. Not all of them were law conferences. One of the most important conferences I ever attended as a lawyer was the annual meeting of the American Anthropological Association in San Francisco. I have also attended conferences of professional Political Science and Anthropological societies.

[2] If you later publish your paper, be sure to give all such contributors, as well as the conference itself and its organizers and sponsors, credit in a proper footnote. This both avoids plagiarism and ingratiates you with your peers and colleagues. They will surely reciprocate! When the paper is published with such a footnote, be sure to send an offprint to each person mentioned therein along with a thank-you note and your name card.

you to become more cosmopolitan. You go to the conference in order to study your peers and colleagues within the larger context of the global "academic community." Remember that one or more of these colleagues and peers may become your thesis examiner, or maybe your boss.

3

Third, the conference is a powerful research tool. If you use it properly, it can place you personally and strategically in the very heart of your research venue and give you visibility and *gravitas* as a mainline scholar among scholars. It is your entre into their world and their networks. Peers and colleagues who observe you read your paper will congregate with you and offer help in many ways. They will give you leads, hints, connections, ideas, and other helps that you would not get otherwise. They will accept that your university believes in you and supports you. Depending on the topic of your research, you may be able to conduct some empirical research at the conference itself or its wider venue.

When you attend a conference, you have many different but related jobs to do and many different but related roles to play at the same time.[3] Remember Bacon's Triangle. The following are some suggestions for participating in the conference process from beginning to middle to end. If you have yet to attend your *debut* conference, these suggestions are especially important.[4] These are listed in no particular order of importance or sequence.

HKU Research Services conference grants may be seen at <www.hku.hk/rss/enquiries.htm>.

BEFORE THE CONFERENCE

Always attend conferences with the knowledge, help, and permission of your

[3] To help you get ready, and to instill the "warrior spirit" generally, I suggest you read any book by Robert J. Ringer. My favorite is *Looking Out for Number One*. My second favorite is *Winning Through Intimidation*. This is his Web page: <www.robertjringer.com>. Take some time to explore it and assimilate his ideas. Get the free downloads. Ringer is a real warrior.

[4] These suggestions, if you follow them, will also help you write a better thesis, dissertation, and/or research paper, and help you get ready for your final and oral exams.

supervisor. See Phillips and Pugh pp. 108-09, 152, 171-72, 184-86.[5]

Make sure you know and follow all rules and regulations of the University regarding attendance at conferences. If you must complete forms or applications, do so properly and promptly.

Give yourself plenty of "lead time" to get ready for the conference. You cannot properly get ready at the last minute or in a rush. Remember that "all good writing is rewriting."

Your first source of help in selecting and preparing for a conference is your supervisor for two reasons. First, your supervisor has been through this process before and can show you the ropes. Second, your supervisor has probably helped to sponsor, organize, and conduct a conference or two before this and so has read and evaluated many proposals and abstracts as well as final conference papers. Tap into this resource.

Your second source of help is your fellow RPG students, some of whom have already attended conferences. Consult them about their experiences.

Follow the advice, lessons, and principles you have learned in this class—especially about audience (intelligent but uninformed). If necessary, hire a coach, a tutor, and an editor to help you get ready for the conference.

Make sure your attendance at the conference will be a meaningful and central part of your overall strategic research and professional plan as analyzed and instantiated in your research Timetable and Thesis Map. It cannot be merely a side-trip or an excursion primarily for fun or curiosity. It must affirmatively move your agenda forward. Remember Chicken & Egg, and Llewellyn's Cure.

Like Janus, your conference experience looks back and builds on what you have already done, and forward to help prepare you for what is to come in the future.

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[5] If you have not yet read both Cooley & Lewkowicz and Phillips and Pugh in their entirety, you are shortchanging yourself. Do it now.

Janus

Study the conference's Web page and announcements carefully and thoroughly in advance to make sure you understand the exact theme off the conference, the details of the call for papers, and the requirements of format and participation. Read these materials again and again during the process of preparing your abstract, proposal, and paper. Make sure your presentation will conform exactly to the requirements of the conference—nothing more and nothing less.

Your goal in applying to present at the conference should be to demonstrate how you can benefit the conference, <u>not</u> how the conference can benefit you. Think of it as a job interview.

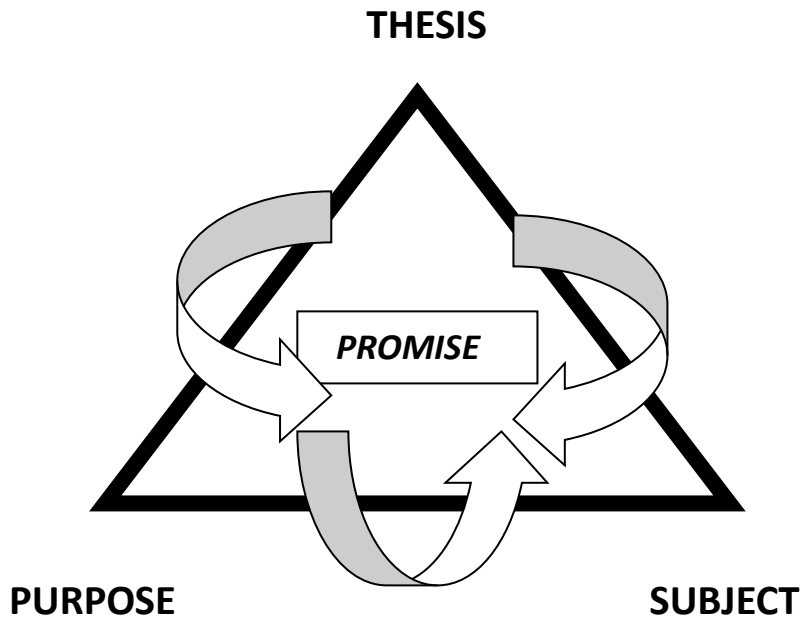
Especially study the Web pages and CVs of all the named conference organizers, participants, and invited and keynote speakers so that when you meet them, you can talk intelligently with them about their work. If possible, "project" your arrival at the conference by contacting some of these people to introduce yourself and perhaps ask for "advice" by email. Your supervisor can assist with introductions. Prepare a personal "facebook" so that you can instantly recognize the important participants when you see them at the conference.

Study the venue of the conference. If you are going to a conference in London, make sure you study the city of London and its environs before you go. If the conference plans to offer tours of interesting places at the venue, take the tours. Remember, the primary purpose of the tour—like conference lunches, dinners, and cocktail parties—is to socialize, not to sightsee, eat, or drink. If you are skillful, you

can do both.

When you prepare your abstract and/or proposal, write it with two purposes in mind: delivery of your paper at the conference AND ultimate publication of your paper in either a peer-reviewed journal or the official proceedings of the conference—or BOTH.

Make sure your proposal contains (1) a clear statement of subject, (2) a clear statement of purpose, and (3) a clear thesis statement—and that it demonstrates how you intend to make a new contribution to knowledge by filling a gap. In other words, make sure your proposal instantiates and replicates these cardinal rules and principles which we have studied in this class. All of these together add up to and constitute the PROMISE you make to your audience(s).[6]



[6] If it helps you, you can think of this as an equation: (1) Thesis + (2) Subject + (3) Purpose = Your Promise to Your Audience. The equation illustrates that your statements of thesis, subject, and purpose are three separate and distinct statements, because they are three separate and distinct concepts.

Choose carefully which conference(s) you wish to attend. The venue of the conference is as important as the subject of the conference. Choose conferences that will directly help you with your research project—especially with key libraries, archival materials, and empirical opportunities. You may want very much to go to Paris (to shop and tour), but if a conference in Paris is only marginally related to your RPG work, don't waste your time and money. Think strategically, like a warrior.

Try to pick conference venues where you can "kill two birds with one stone" (一舉兩得, 一舉兩得, 一石二鳥), i.e., read your paper PLUS conduct empirical research, interviews, library work, visits to universities and important colleagues, etc.

Try to pick conferences sponsored and conducted by individuals, institutions, and organizations directly related to your RPG work, and then use the conference experience to interact and network with your colleagues there. Let them see you as part of their "in-group" (自己人團體).

Before you go to the conference, make sure you know how to eat and dress properly. Are your clothes correct? Are you properly groomed? Are your table manners correct? Do you know the rules of etiquette and behavior for the place of the conference? Do you speak properly? Do you know how to be polite? Are you fit and in good health? Do you have good *guanxi* (關係) skills of the kind needed for this particular conference and this particular venue? If you answer is no to any of these questions, begin now to correct the situation.

If you have never done so, get a good book on modern etiquette (禮節) and study it carefully. Remember the purpose of etiquette: to make *others* comfortable about *you*. It is not your private concept of what is polite or proper.

Will you be a lawyer among lawyers, or a lawyer among anthropologists? It makes a difference. Know your audience!

Get yourself into the proper mind-set and *Weltanschauun*g for the conference.

Print and take with you a large number of official professional name cards to distribute to other conference members, and be sure to collect their cards in return.

Your cards should be a marketing tool—your full contact information, Web page address, university logo, etc.

Also take a few copies of your professional CV. You never know who may ask for one. If someone does ask you for one, be sure to say, “You can also get a lot more information about me and my interests on my personal Web page.”

Make sure your personal Web page is completely functional (interactive) and up-to-date before you go to the conference, so that if someone asks you a question about your work, you can give a short answer and then refer them to your Web page for particulars. Include your Web address on your name card and CV as part of your contact information and your presentation.

Know who you are and what you are—a peer and a colleague. Be ready to represent yourself, your professors, and your university with dignity.

One of the best ways to learn about conferences relevant to your special field is to become a member, or at least get your name on the mailing list, of relevant academic groups, societies, and professional organizations. Follow their Web pages and network with their members to learn about conferences now being planned for the future. Also, check the Web pages of major universities that have programs in your field. Usually, they will have a section that announces “upcoming conferences” and “calls for papers.”

If you plan to use a PowerPoint presentation, prepare and take along to the conference a paper copy and overhead transparency slides of your presentation as well. You do not know the condition of the AV facilities at the venue, and you cannot control their viability either before or during your presentation. Remember Murphy’s Law.

As you get ready to attend the conference—

Prepare!
Prepare!
Prepare!

Practice!
Practice!
Practice!

Rehearse!
Rehearse!
Rehearse!

Try to give at least one mock presentation (rehearsal) to some other RPG students and/or your supervisor as your audience. Ask them to be critical. Take their suggestions and criticisms on board and make improvements.

How good is your spoken *presentational* English? If it's not very good, you might want to take a speech class to improve it.

Hone your "platforming" skills. Learn how to stand and perform with confidence and poise in front of a live audience. Study the methods of good platformers. One excellent example is the movie, *An Inconvenient Truth*, by Al Gore. Other helpful books are *Public Speaking for Dummies* and *Presentations for Dummies,* both by Malcolm Kushner.[7]

If possible, rehearse your platforming in front of a video camera. Watch yourself, study your performance. It will make your actual presentation better.

Remember Liberace's concert, Chopin's pedal, and Nibley's philosophy.

AT THE CONFERENCE

Make a good first impression. Think of your participation in the conference as a job interview.

Most conference give you a name badge or card that you wear around your neck

[7] HKU library has paper and e-book copies of both books. Don't be insulted by the word "dummies" in the titles of these books. It's for fun. I love all the Dummies books and own many of them. I'm a dummy—I admit it.

or on your clothing. Usually, you name is too small to read. If that is the case, REWRITE your name in LARGE LETTERS so that everyone can read it from far away.

Observe your peers and colleagues carefully. How are they dressed and groomed? How do they behave at the conference? What is their professional demeanor, stance, body language, and countenance? What do they talk about? How do they relate to each other? How do they relate to you? How do they eat? How do they speak? What do they do during leisure time?

Remember that "your peers and colleagues" include not only academics but editors and publishers, media people, business people, etc.

If this is your fist time in the city of the conference venue, let everyone know you are a "stranger," a "newcomer," a "tourist," and accept any guidance and suggestions they might have about "what to see and do" outside the conference. If they offer to become your "guides" to the local sights, that will be a good opportunity for you to network with them professionally but casually.

Attend and support the presentations of other colleagues and peers. Ask them supportive questions. Ask for copies of their papers. Show a strong interest in their work. Be unselfish. Be polite. Hedge.

In the conference session when you present your paper, listen carefully to the entire discussion regarding all the papers. Take on board all the comments made about your paper. Write them down. Record them if you can. Bring them all back with you and incorporate them into your next draft.

In addition to reading your individual paper, consider other ways to make your name known at the conference, such as participating in panel and group discussions, serving on conference committees, helping with conference organization, and the like. Be a volunteer; make yourself available and useful. Always wear your name tag with your name written LARGELY (you may have to rewrite it yourself).

Socialize. Go to lunch and dinner with the other conferees. If the conference has arranged tours and other "extracurricular" leisure activities for the conferees,

attend them. Share a drink, a walk on the beach, a movie. Takes lots of photos and exchange lots of business cards at these activities.

Remember Liberace's concert. Stand out. Be in plain view and easy to access.

Take lots of photos at the conference, and make sure that these include photos of you with the important conference organizers and attendees. Make sure you know their names accurately. Post the best one or two "official" photos of you at the conference on your personal Web page along with the official Web address of the conference. Share your photos with other conferees after you return home. Help them remember you.

AFTER THE CONFERENCE

Bring all conference materials back with you to share with your supervisor and fellow RPG students. Make sure to include a write-up of your conference experience for your diary and your supervisor's diary and your personal Web page.

Debrief yourself. Ask yourself, What did I learn? How can I benefit from this experience? How can I do better next time?

Immediately follow-up with email and telephone contacts to those important individuals with whom you want to have an ongoing professional relationship and with whom you exchanged name cards at the conference. Send your photos of them to them. Refer them to your Web page.

If conference participants suggested changes and improvements to your paper, make them immediately. Include a reference to your conference paper, as well as to the publication if it is published, in your professional CV, and post that on your personal Web page. Post a PDF copy of your revised paper also.

Your report of the conference should be positive. If you have any criticisms, make them politely and constructively by hedging. But always speak affirmatively of the conference, its organizers and participants.

If the University or other entity has supported your trip financially, be sure to complete all the necessary forms and reports properly and on time. Keep copies for your diary and your supervisor's diary—and give credit it your paper and your Web page.

Always keep in mind the possibility of publishing your writing in peer-reviewed journals and books.[8]

Imagine that you are asked to help organize an academic conference. What would you do? What would be your ideal conference? Whom would you invite? How would you advertise? What topics would you cover? What would be the theme of your ideal conference?[9]

[8] See, e.g., Beth Luey, *Handbook for Academic Authors* (Cambridge: Cambridge University Press, 4th ed, 2002); Robin M. Derricourt, *An Author's Guide to Scholarly Publishing* (Princeton: Princeton University Press, 1996); William P. Germano, *Getting It Published: A Guide for Scholars and Anyone Else Serious About Serious Books* (Chicago: University of Chicago Press, 2001).

[9] Try looking at *Meeting & Event Planning for Dummies* by Susan Friedmann. It's an excellent primer.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

ANNOTATIONS, NOTES, AND REFLECTIONS ON DR. LIU NANPING'S LECTURE ON ARGUMENTATION

Dr. Liu Nanping (刘南平博士)[1] stressed the crucial importance of the thesis statement (your argument) in all academic writing. "Without a thesis," he said, "your work is not academic no matter how analytical it is."[2] This is the only way to create and add value in academic work. Such superficial works as "brief comments" (间评) or notes "on" (论) a subject are not theses. Merely writing narration or history or description or analysis or any other kind of "text"—without argument—is not enough.[3] Without a proper argument, the result is fake scholarship or pseudo-scholarship—and this is boring and useless. Dr. Liu's linguistic formula for stating a thesis is the words, "This article argues that…." Non-argument formulas such as—

This article reviews

[1] Dr. Liu is a former professor in the HKU Department of Law. He now practices law in Shenzhen: <www.liuandwang.com>. He received his SJD in law at Yale University. His dissertation became the seminal book, Nanping Liu, *Judicial Interpretation in China: Opinions of the Supreme People's Court* (Hong Kong & Singapore: Sweet & Maxwell Asia, 1997), many references to which you can see in my own PhD thesis. His work was one of my major primary sources, and I consider him to be one of my academic mentors.

[2] This is a point repeatedly made also by Hart; see esp. his pages .

[3] A point made repeatedly by Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003); and Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Buckingham: Open University Press, 2000), and other similar materials dealing with the nature and process of RPG scholarship.

This article surveys

This article summarizes

This article provides

This article considers

This article attempts

—are not thesis statements, although they may be statements of subject or purpose. ***THIS ARTICLE <u>ARGUES</u>*** is the key. You must explain why the conditions you observe are so. In order to do this, a scholar (you) must be independent and critical—you cannot be governed by ideology or doctrine. This is the way to make a "new contribution to knowledge" that is fresh and original. Dr. Liu marked this as the crucial difference between the opinions of judges in Hong Kong and the mainland, as well as the difference between true academic scholarship and fake scholarship. A common-law judge not only states his judgment (the decision of the case), but also his reasons for reaching that judgment—the *ratio decidendi*. Without the *ratio*, the decision alone is not considered to be legitimate. The presence of the *ratio* in the decision assists all persons affected by the decision—including the parties in the case, students, scholars, and other readers—to make their own adjudications about the validity of the decision and the quality of the judge himself. In common-law thinking, the judge owes this to his audience. Dr. Liu used two of his own articles to illustrate his points,[4] one of which was submitted as expert evidence to the Hong Kong courts.[5]

It is not sufficient simply to state your argument in words. You must make your argument apparent to your audience. You must make it manifest and obvious. You do this through structure. Even more than the words you use, the structure of your analysis,

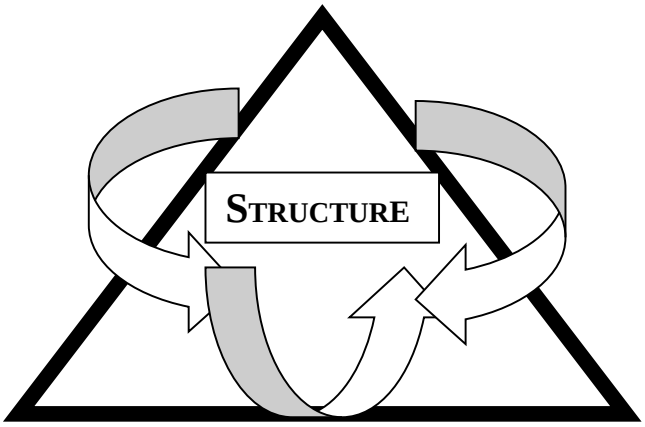
[4] See, e.g., Nanping Liu, "Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic of China" (2008) 34(1) *North Carolina Journal of International Law and Commercial Regulation* 179.

[5] Nanping Liu, "A Vulnerable Justice: Finality of Civil Judgements in China" (1999) 13(1) *Columbia Journal of Asian Law* 35. On similar uses of extrajudicial research in court, see Johannes Chan, "Amicus Curiae and Non-Party Intervention" (1997) 27(3) *Hong Kong Law Journal* 391.

as well as the structure of your writing and of the document itself, make your argument clear and visible to your audience.

Our word for this structure *architectonics*. The importance of this is why the regulations of the University and the Graduate School contain very specific requirements as to the structure of all RPG work.[6] They require that the layout of your work be divided into discrete and identifiable sections, chapters, parts, and that these always appear in the same place and order in your work.[7] Book publishers and journal editors always have the same kinds of requirements for the structures of the materials they publish. That is why, for example, all books have a title page, a page with the book's publication data, a table of contents, numbered chapters, and an index—*in that order*. The order of these parts never varies, and no part is ever omitted. This idea can be described this way:

THESIS/ARGUMENT



THESIS/ARGUMENT **THESIS/ARGUMENT**

[6] See, e.g., the current HKU *Graduate School Handbook*.

[7] See, e.g., the HKU Graduate School booklet, *Preparing and Submitting Your Thesis: A Guide for MPhil and PhD Students* (2009).

Dr. Liu showed us the thesis statements in his articles. They occurred close to the beginning of each and were composed of only one or two sentences in a paragraph. His thesis statements were short, clean, simple, and easy to identify.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

LIBERACE'S CONCERT

We have all seen a philharmonic orchestra (交響樂團) perform a classical concert (交響曲), either on television or in person. We have many such classical concerts at the Concert Hall here in Hong Kong. These are very formal occasions. All members of the orchestra, including the conductor, are uniformly dressed in black--the men in black "tails" (燕尾服) (black tailcoat or cutaway with white shirt and bow tie), and the women in black full-length gowns in order to present a uniform and stately appearance consistent with the dignity of classical music. A single unified appearance equals a single unified sound and purpose—the orchestra working together as one—the *sym*phony. Because of this appearance, however, some people jokingly refer to the orchestra members as "penguins" (企鵝).

Often the orchestra will invite a guest artist, such as a pianist or a violinist, to perform a special musical selection with the orchestra. These are important occasions because the guest artists are world-renowned musicians. They are not members of the orchestra but appear only on this special occasion. The guests are also dressed in black like the members of the orchestra.

One of the most famous pianists in the United States was Liberace (1919-1987). He was both a popular and a classical artist. He achieved great fame and wealth during his lifetime. It is therefore useful for us to study him and his technique for what he can teach us as RPG students. Please watch this entire 10:22-minute video of Liberace performing a medley (集成曲、組合曲) of classical music with the London Symphony Orchestra (LSO), including portions of works by Tchaikovsky, Beethoven, Chopin (remember Chopin's Pedal!) and others.

www.youtube.com/watch?v=odyz0xWAWEU&feature=PlayList&p=69E561B441706

5E3&playnext=1&playnext_from=PL&index=22

After you have studied the video, answer the following questions:

What is unusual or even unique about the visual images in the video?

How did Liberace distinguish himself from all other members of the orchestra?

When you watch it, what do you watch the most? Why?

Can you relate everything you see and hear in the video to your work as an RPG student?

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

HEMINGWAY'S FEAST: FALSEHOOD #1

When I was very young, perhaps in high school or early university, I read Ernest Hemingway's book, *A Moveable Feast* (流動的饗宴 : 海明威巴黎回憶錄). Published in 1964, it is the autobiography of his years as a young writer in 1920s Paris. In idealistic those days, Hemingway (海明威) was one of my favorite authors. I wanted to be a great writer like Hemingway. I thought I had the talent for writing great stories like him (I didn't). Hemingway came under the influence of the great Russian writers like Dostoyevsky (杜思妥也夫斯基). He read many of his important books, including *The Brothers Karamazov* (卡拉馬助夫兄弟們), as translated into English by Constance Garnett (康斯坦斯加內特) (1861-1946). She was the first English translator to render Dostoyevsky into English, and her translations were the only ones available to Hemingway. I was especially taken by this statement in *A Moveable Feast*:

> In Dostoyevsky there were things believable and not to be believed, but some so true they changed you as you read them….[1]
>
> 陀思妥耶夫斯基的作品裡有些東西可信也有些不可信, 但是有些作品寫得那麼真實, 你讀著讀著會改變你.
>
> 陀思妥耶夫斯基的作品里有些东西可信也有些不可信, 但是有些作品写得那么真实, 你读着渎着会改变你.[2]

[1] Ernest Hemingway, *A Moveable Feast* (New York: Charles Scribner's Sons, 1964), p. 133.

[2] 海明威着, *不固定的圣节*. 汤永宽译 (上海 : 上海译文出版社, 1999), 102 頁.

That idea in that sentence changed my life—even as I read it. *Ideas and writing so great they changed you even as you read them!* I hope all of us have had that kind of experience one way or another—with a book, a movie, a poem, music—to pass though an experience and come out at the end a different person from the person we were at the beginning.

Over a period of more than 20 years, I taught that idea to my students. I told them, "Always try to associate yourself with the greatest minds, the greatest writings, the greatest music—things that change you as you experience them. Never settle for anything that is petty, paltry, and pedestrian." I also began to try to live that idea in my own life. I thought, What if *I* could write something that would change someone else even as s/he read it? Being the best is, of course, "high as a mountain and harder to climb," but it is worth the effort. Follow your bliss, and find your excellence! Like Liberace, do everything you can to distinguish[3] yourself from all the others. Keep climbing! Keep moving toward excellence! I had my students read Hemingway, and together we read that sentence in *A Moveable Feast* together.

Then one day late in 1990, I read a review of a new translation of Dostoyevsky's book. You can read the review here: <www.nytimes.com/1990/11/11/books/dostoyevsky-with-all-the-music.html>. The book review, written by Andrei Navrozov, praised the new translation and was highly critical of Constance Garnett and her translations of Dostoyevsky—the translations Hemingway had read and said they "changed you as you read them." Garnett's translations, Navrozov said, were lies, emendations, rewritings, camouflage, without music. This new information devastated me: Hemingway had based his great statement—the one that changed my life—on a falsehood. Therefore, what I

[3] Set apart from, differentiate from, be different from.

had believed and taught my students was based on a falsehood, or a series of falsehoods—both Garnett's and Hemingway's—Garnett's intentional, Hemingway's perhaps unknowing.[4] A whole chain of communication, thought, and analysis in my life and profession over a period of several decades, was suddenly without a basis in truth.[5]

Constance Garnett died in 1946. Ernest Hemingway died in 1961.[6] I eventually lost contact with most of my students.

What should I do, if anything? What could I do, if anything? What would you do, if anything? What does this story say about adjudication?

How does this story apply to your work?

Would an experience like this make you a sceptic? A cynic?

[4] See generally Jacqueline Tavernier-Courbin, *Ernest Hemingway's A Moveable Feast: The Making of Myth* (Boston: Northeastern University Press, 1991).

[5] Perhaps like that generated by Professor Bloom. This situation no longer surprises me as I have learned that nearly all translators are liars. Robert J. Morris, "Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation" (2006) 51(3) *Journal of Homosexuality* 225.

[6] *A Moveable Feast* was published posthumously.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

THE WARRIOR SPIRIT 奮鬥精神 (PART I):

BASIC WARFARE FOR RPG STUDENTS

TOTAL WAR

RESEARCH (LIKE LIFE) IS TOTAL WAR (完全大戰)

You don't have the right be to a conscientious objector (拒服兵役者).[1]

This is an exercise in psychology, specifically the psychology of law, research, and war—and how these subjects are related. As explained here, two Professors Chen argue that law changes the psychology of the people, and related forces work fundamental changes in the political culture. It is important to understand this psychology if we are to understand the true nature of RPG work and how to practice it well.

In many ways, getting a research postgraduate degree is a test of endurance. It requires a dedication and single-mindedness (目的專一的，專心致志，一心一意) that is intense and enduring. Many RPG students make a vigorous, energetic start only to languish when the time and effort involved begin to feel onerous, or when they get tired or distracted by other projects that are not directly related to the RPG work. Many who make the start later fail to "endure to the end" (忍受到底, 持久到底). Often this is

[1] In the 1963 movie, *Irma La Douce*, the Bartender (Moustache) says, 'Life is total war, my friend. Nobody has a right to be a conscientious objector." (朋友, 生命是一場戰爭. 沒人有權基於良心[道德]拒服兵役) The same rule applies to all dedicated RPG students.

because they do not plan properly, or they fail to understand how difficult the process is—mentally, physically, and emotionally. Then they quit and "fall by the wayside" (半途而廢). Therefore, an important part of the psychology of RPG work is to develop a strong mental attitude that will carry you through to completion of your project and obtaining your degree. True RPG research is bloodsport.

In his 1976 movie, *The Outlaw Josey Wales*, Clint Eastwood (奇連伊士活) says these important words:

> "Now remember, when things look bad and it looks like you're not gonna make it, then you got to get mean. I mean plumb[2], mad-dog mean![3] 'Cause if you lose your head[4] and you give up, then you neither live nor win. That's just the way it is."

This is a good mind-set for RPG research. In fact, it is the only mindset that will get you through the rigors of a long RPG project. According to Professors Albert Chen (陳弘毅) and Chen Duanhong (陳端洪) among others, the *law itself* changes the very psychology (心理)—the mental identity or mind-set—of the people.[5] This belief or faith

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[2] Exactly, totally, absolutely, completely, downright, 正好, 精確, 地地道道, 完全.

[3] 象瘋狗一樣的刻薄

[4] 要努力保持一個清醒的頭腦

[5] Albert H. Y. Chen, "Confucian Legal Culture and Its Modern Fate" in Raymond Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, 1999), pp. 527-28; Albert H. Y. Chen, "Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law" (1999/2000) 17(2-3) *UCLA Pacific Basin Law Journal* 125, 150, citing 陳端洪, "對峙——從行政訴訟看中國的憲政出路 [Confrontation: The Future of Chinese Constitutionalism from the Perspective of Administrative Litigation]" (1995) 4(40) *中外法學*[*Chinese and Foreign Legal Studies*] (*Peking University Law Journal*)] 1, 7-9; reprinted in 陳端洪, "對峙:從行政訴訟看中國的憲政出路," 羅豪才主編, *現代行政法的平衡理論* (北京: 北京大學出版社,1997), p. 252. I understand both authors Chen to mean "why, how, and under what circumstances people obey the law," as discussed in Ronald Roesch, Stephen D. Hart, and James R. P. Ogloff, *Psychology and Law: The State of the Discipline* (New York: Kluwer Academic/Plenum Publishers, 1999), p. 11, citing Craig Haney, "Psychology and Legal Change: On the Limits of Factual Jurisprudence" (1980) 4 *Law and Human Behavior* 147, 156.

in the power of the law to rule and overrule culture, history, tradition, and learning may be the core meaning of both the “rule of law” and “thinking like a lawyer.”

If that is so, then a successful legal researcher must possess the correct psychology as gained from the study of law itself. In addition to psychology, conducting proper RPG research is a matter of possessing the proper skills and of having maturity and good character. Are you a person of maturity and good character?

In order to be an advanced, competent legal researcher, you must possess not only superb research skills. You must also possess the correct mental force and attitude. The purpose of the following collection of materials is to provide you with some help developing that *Weltanschauung*. You must possess the heart, soul, and mind of a true warrior (奮鬥精神) with the Right Stuff, the "fire in the belly." This will help you get through those difficult emotional times of boredom, discouragement, ennui, illness, and personal problems. Remember Llewellyn’s Cure.

Let us therefore look at collection of basic ideas about the psychology of law, research, and war.

* * *

"The more sweat on the training field, the less blood on the battlefield."

* * *

In order to understand what this means, you might want to read Peter B. Kyne's short story, "The Go-Getter: A Story That Tells You How To Be One," which you can find online at <www.gutenberg.org/files/12257/12257-h/12257-h.htm>. Or you can find it in our Library. You can read and report on this book for extra credit.

* * *

Jesus said, "Behold, I send you forth as sheep in the midst of wolves; be ye therefore wise as serpents, and harmless as doves."

--*Bible*, Matthew 10:16

耶穌說：”**看哪！** 我差你们去， 如同羊进入狼群。 所以你们要灵巧像蛇，驯良像鸽子。”

—<u>聖經</u> 馬太福音 10:16

* * *

BLITZ THE LIBRARY
對圖書館進行猛然空襲

and

RESEARCH DEFENSIVELY
(just as you drive a car or walk <u>DEFENSIVELY</u>)

What does this mean?

* * *

USE YOUR TOTAL RESOURCES

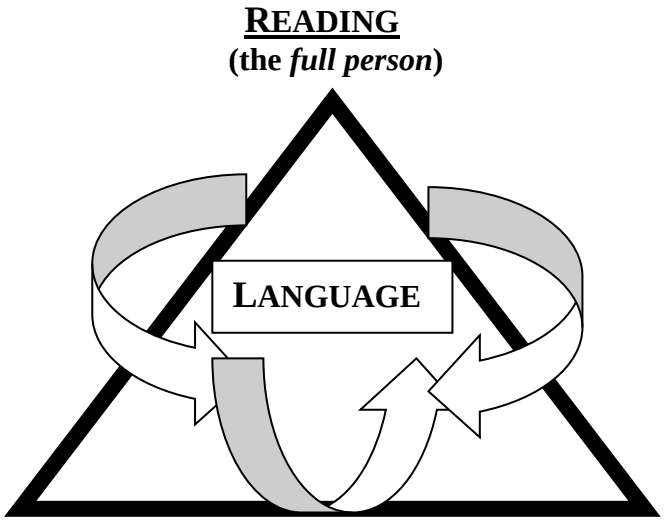
"One of the commonest misconceptions about research is that it is an 'ivory tower' activity, far removed from reality and from social contact with others. If you say you are doing research, people will often talk to you as though you had decided to spend a number of years in solitary confinement from which, in due course, you will emerge with your new discoveries.

"It is not like that at all. Although there are considerable periods when you will be working on your own (thinking and writing, for example) this is not the whole story. There is also a considerable academic *network* of people with whom, as an active researcher, you <u>must</u> interact. These include your supervisor, <u>other academics in your department</u>, the general library staff, the specialist librarian who deals with computer-based

literature searches, visiting academics giving seminars, colleagues giving papers at conferences--the list is very considerable. *To be an effective [postgraduate] research student, you MUST make use of ALL the opportunities offered*. Research is an interactive process and requires the development of social, as well as academic, skills."

--Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Buckingham: Open Univesity Press, 3rd ed, 2002), p. 14; emphasis added.

Furthermore, just as you consider "other academics in your department" to be potential resources, you have the right to consider any other teacher who has ever taught you at the university to be a resource. This is because they are, and are supposed to be, part of your worldwide professional peer group. *They owe this to you*. It is part of the process of Bacon's triangle.



Whatever you do, the responsibility to solve the research problem is finally, ultimately, irrevocably, and totally yours--and no one else's. Being an “exact” person means, inter alia, that you DO NOT GUESS. RPG work is about exact knowledge and information—not GUESSWORK (猜測、推測). Approximation, “close enough,” and “good enough” are *not good enough*!

* * *

"Today's exam will be scaled...three A's, five B's, ten C's, and the rest Ds and Fs.... Once again, as in life, you are not in competition with me, yourself, or this exam, but each other."

“今天的考試已訂評分標準: 三名甲等, 五名乙等, 十名丙等餘下四名則取丁及己等成績. 再次, 同生活一樣, 你們非為我, 自己或考試競爭而是互相競爭.”

--Medical school professor to students in 1990 film, "FLATLINERS"

* * *

"When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal."

--Oliver Wendell Holmes, Jr., "The Path of the Law" (1897) 10(8) *Harvard Law Review* 457, 469.

What is the “dragon”?

* * *

"Our doubts are traitors,
And make us lose the good we oft might win
By fearing to attempt."

--William Shakespeare, *Measure for Measure*, Act I, scene 4

“疑惑足以敗事，一個人往往因為遇事畏縮的緣故，
失去了成功的机會。”

--莎士比亞: 一報還一報 第一幕 第四場

Do you have doubts or fears that betray you?

* * *

WESTMORELAND

O that we now had here
But one ten thousand of those men in England
That do no work to-day!

KING HENRY V

What's he that wishes so?
My cousin Westmoreland? No, my fair cousin:
If we are mark'd to die, we are enow
To do our country loss; and if to live,
The fewer men, the greater share of honour.
God's will! I pray thee, wish not one man more.
By Jove, I am not covetous for gold,
Nor care I who doth feed upon my cost;
It yearns me not if men my garments wear;
Such outward things dwell not in my desires:
But if it be a sin to covet honour,
I am the most offending soul alive.
No, faith, my coz, wish not a man from England:
God's peace! I would not lose so great an honour
As one man more, methinks, would share from me
For the best hope I have. O, do not wish one more!
Rather proclaim it, Westmoreland, through my host,
That he which hath no stomach to this fight,
Let him depart; his passport shall be made
And crowns for convoy put into his purse:
We would not die in that man's company
That fears his fellowship to die with us.
This day is called the feast of Crispian:
He that outlives this day, and comes safe home,
Will stand a tip-toe when the day is named,
And rouse him at the name of Crispian.
He that shall live this day, and see old age,
Will yearly on the vigil feast his neighbours,
And say 'To-morrow is Saint Crispian:'

Then will he strip his sleeve and show his scars.
And say 'These wounds I had on Crispin's day.'
Old men forget: yet all shall be forgot,
But he'll remember with advantages
What feats he did that day: then shall our names.
Familiar in his mouth as household words
Harry the king, Bedford and Exeter,
Warwick and Talbot, Salisbury and Gloucester,
Be in their flowing cups freshly remember'd.
This story shall the good man teach his son;
And Crispin Crispian shall ne'er go by,
From this day to the ending of the world,
But we in it shall be remember'd;
We few, we happy few, we band of brothers;
For he to-day that sheds his blood with me
Shall be my brother; be he ne'er so vile,
This day shall gentle his condition:
And gentlemen in England now a-bed
Shall think themselves accursed they were not here,
And hold their manhoods cheap whiles any speaks
That fought with us upon Saint Crispin's day.

--William Shakespeare, *Henry V*, Act 4, Scene 3; emphasis added

威斯摩兰　啊，只要我们这儿能添上一万个今天在英格兰闲着的人们！

亨利王　是哪一位在发出这样的愿望？我那威斯摩兰姑丈吗？不，好姑丈。要是我们注定该战死在疆场上，那我们替祖国招来的损失也够大了；要是我们能够生还，那么人越少，光荣就越大。上帝的意旨！我求你别希望再添一个人。我并不贪图金银；也不理会是谁花了我的钱；说实话，人家穿了我的衣服，我并不烦恼——这一切身外之物全不在我心上。可要是渴求荣誉也算是一种罪恶，那我就是人们中最罪大恶极的一个了。下，说真话，姑丈，别希望从英格兰多来一个人。天哪，我不愿错过这么大的荣誉，因为我认为，多一个人，就要从我那儿多分去一份最美妙的希望。啊，威斯摩兰，别希望再多一个人吧！你还不如把这样的话晓谕全军：如果有谁没勇气打这一仗，就随他掉队，我们发给他通行证，并且把沿途所需的旅费放进他的钱袋。我们不愿跟这样一个人死在一块儿——他竟然害怕跟咱们大伙儿一起死。今天这一天叫做“克里斯宾节”，凡是度过了今天这一关、能安然无恙回到家乡的人，每当提起了这一天，将会肃然起立；每当他听到了“克里斯宾”这名字，精神将会为之一振。谁只要度过今天这一天，将来到了老年，每年过克里斯宾节的前夜，将会摆酒请他的乡邻，说

是：“明天是圣克里斯宾节啦！”然后，他就翻卷起衣袖，露出伤疤给人看，说：“这些伤疤，都是在克里斯宾节得来的。”老年人记性不好，可是他即使忘去了一切，也会分外清楚地记得在那一天里他干下的英雄事迹。我们的名字在他的嘴里本来就像家常话一样熟悉：什么英王亨利啊，培福、爱克塞特啊，华列克、泰保啊，萨立斯伯雷、葛罗斯特啊，到那时他们在饮酒谈笑间，就会亲切地重新把这些名字记起。那个故事，那位好老人家会细细讲给他儿子听；而克里斯宾节，从今天直到世界末日，永远不会随便过去，而行动在这个节日里的我们也永不会被人们忘记。我们，是少数几个人，幸运的少数几个人，我们，是一支兄弟的队伍——因为，今天他跟我一起流着血，他就是我的好兄弟；不论他怎样低微卑贱，今天这个日子将会带给他绅士的身分。而这会儿正躺在床上的英格兰的绅士以后将会埋怨自己的命运，悔恨怎么轮不到他上这儿来；而且以后只要听到哪个在圣克里斯宾节跟我们一起打过仗的人说话，就会面带愧色，觉得自己够不上当个大丈夫。

--莎士比亞: 亨利五世　第四幕 第三场

Who are your “band of brothers”?

* * *

“**革命尚未成功,同志尚須努力**!” (Until the revolution achieves success, comrades must still press on.)

孙中山 **遺囑** --Sun Yat-sen, *Last Will and Testament*, February 24, 1925

* * *

A FINAL THOUGHT FROM CHAPTER 3 OF《**孫子兵法**》SUNZI *MILITARY METHODS*:

“**知彼知己，百戰不殆**” (Know the enemy and know yourself, and you can fight endless battles with no danger of defeat).

* * *

CAVEAT

The attitudes and mind-sets discussed here are for your use WHEN YOU ARE CONDUCTING RESEARCH. In that work, you must be a warrior.

However, they are NOT for use when you give a presentation or sit an examination on your thesis, dissertation, or research paper. In that situation, you must become totally submissive to the suggestions, recommendations, and directives of the examiners. There, you are NOT a warrior but a humble servant!!! You must not get defensive, cantankerous, or rude. You may politely discuss your ideas with the examiners and defend what you have written, but in the end, if the examiners are not convinced by your arguments, you must "take on board" everything they tell you in all humility and then *do it* with completeness and exactness. Phillips and Pugh, pp. 150-58.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

THE WARRIOR SPIRIT 奮鬥精神 (PART II):

《孫子兵法》SUNZI *MILITARY METHODS* FOR RPG STUDENTS

Sunzi lived about 490 BC. The book he wrote is world-famous.[1] It is a book in thirteen chapters of military (**兵**) mindsets, worldviews, advice, tactics, methods, rules, and principles (**法**) addressed to generals, commanders, and officers of the military. It is a manual of "how to soldier" and, more importantly, *how to win*. Sunzi teaches us that true soldiers never snivel or whine or cry or make excuses or explanations for failure. They either win or die. Not all of it is relevant to RPG students and the "warfare" of advanced legal research, but many of its principles have direct bearing on that task. As we have already discussed in Part I:

[1] Most English translations call the title of the book *The Art of War*. You will always see this title in English. I do not like this translation as I think it is inaccurate. First of all, **兵** means military, soldier, and the like. The common word for war is 戰. Second, the word 法 means law, rule, edict, principle, method, and the like. It is not generally translated as "art." War might be considered a science, perhaps even a philosophy, but not an art. Therefore, my view is that 兵法 is better translated as Military Methods/Methodology, Soldiering, Military Rules, Methods of Soldiering, etc. In addition, I have the following comment from Mr. Niu Yue, one of my RPG students in 2007:

> I think the Art of War is a very picturesque translation of 孫子兵法. In traditional Chinese, 兵 not only refers to soldier, but also means war. For example, there is a description in the research on Chinese legal history—大刑用甲兵 （《國語·魯語》）, which means that the most serious criminal punishment is war. In this phrase, 甲 means armor, and 兵 means soldier. However, neither of them implies the concrete armor or soldier, but describes the state of war. I think 孫子兵法 is a book which taught the military leader how to fight, but not a manual to train soldiers. In the record of Chinese history, many military leaders utilized 孫子兵法 to gain successes, so this book by 孫子 was regarded as a masterpiece.

Perhaps the best English translation of Sunzi is D. C. Lau and Roger T. Ames, *Sun Bin: The Art of Warfare* (Albany : State University of New York Press, 2003). If you want to watch a movie about an "American Sunzi," watch the George C. Scott movie, *Patton*.

RPG Research = Total War (完全大戰).

Research Postgraduate (RPG) Students who have the 奮鬥精神 (warrior spirit) understand that "thinking like a lawyer" and "warring like a lawyer" mean the same thing in terms of their research task. They can learn a lot about both by reading stories and watching movies about soldiers. One of my favorite warrior movies is "Hero"《英雄》by Zhang Yimou. It contains many important lessons for RPG students. If you haven't watched it recently, please watch it through your RPG eyes. I also recommend the movies "Braveheart" and "Stand and Deliver."

The following are some principles excerpted directly from Sunzi's text with my translations, combinations, paraphrases, summaries, and in some cases modernizations and colloquializations, in English. Where our received texts of Sunzi exhibit slight *variora*, I have tried to choose the one that is clearest or most applicable to our study. In a few cases I have juxtaposed or combined sentences. If you read Chinese, you may want to make your own translation, or use another authoritative source. If you disagree with my translation or interpretation of any word or sentence, please make a note of that, too. Translation is *both* an art and a science.[2]

Read all of the following 34 items. Choose any five (5) that appeal to you the most, and in the space provided for "Application," write your notes about how you think that particular principle applies to the task of advanced postgraduate research. Try to limit each Application to one sentence. I have given you an example of how to do this by supplying a possible Application for the first item (#1). I suggest you work in groups for this assignment.

Before you begin, take some time to complete the following equations by adapting Sunzi's language to your own situation. In other words, WHO and WHAT are the following personnel and activities in advanced postgraduate research?

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[2] Robert J. Morris, "Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation" (2006) 51(3) *Journal of Homosexuality* 225.

The General/Commander = Myself

The State =

The Enemy =

War, Warfare, the Combat, the Battle =

Army =

Soldiers/Troops =

Soldiering =

Sovereign =

Orders =

Spies =

Spying =

I.

1

Now here is my example of an Application. Sunzi said: Soldiering is of vital importance to the state. It is a realm of life and death, the road to safety or danger. Therefore, it is a subject of study which must not be neglected.

孫子曰：兵者，國之大事，死生之地，存亡之道，不可不察也。

<u>Application:</u> Soldiering in this example is the process of RPG researching, and learning it well is of vital importance to me, my university, my research project, my discipline, and my country and people because through it I will make a new contribution to knowledge, without which knowledge becomes stagnant and dies. I will also demonstrate that I love the law, and that my research will serve the cause of justice because neglect of research is dangerous.

2

Those who know these things prevail; those who do not are defeated.

知之者勝，不知之者不勝。

Application:

3

The winning general makes many plans in his mind before the battle is fought. A losing general makes few plans beforehand. Thus, many calculations lead to victory, few lead to defeat! By this we can foresee who is likely to win or lose.

夫未戰而廟算勝者，得算多也；未戰而廟算不勝者，得算少也。多算勝少算，而況於無算乎！吾以此觀之，勝負見矣。

Application:

II

4

Speedy victory is the main object of war. If victory is long in coming, it will wear down the army and exhaust the resources of the state. Although stupid haste in war should be avoided, the state never benefits from a prolonged war.

故兵聞拙速，未睹巧之久也。夫兵久而國利者，未之有也。故不盡知用兵之害者，則不能盡知用兵之利也。

Application:

5

In order to kill the enemy, there must be anger; and in order to enjoy the benefits of victory, there must be booty.

故殺敵者，怒也；取敵之利者，貨也。

Application:

III

6

If you know the enemy and know yourself, in a hundred battles you will not be defeated. If you are ignorant of the enemy yet know yourself, your chances of winning or losing are the same. If you know neither the enemy nor yourself, you will lose every battle.

知己知彼，百戰不貽；不知彼而知己，一勝一負；不知彼不知己，每戰必敗。

Application:

IV

7

The good warriors in ancient times made themselves invincible, then waited for the enemy to become vulnerable. To place yourself beyond defeat is within your own ability, but you cannot cause the enemy to invincible. Thus it is said, You may know how to win without being able to do it.

昔之善戰者，先為不可勝，以待敵之可勝。不可勝在己，可勝在敵。故善戰者，能為不可勝，不能使敵之必可勝。故曰：勝可知，而不可為。

Application:

8

Those in attack flash forth as if from the heaven above. To perceive a victory which only the ordinary person can perceive is not the height of excellence. Therefore, the skillful general takes up a position where he cannot be defeated and misses no opportunity to overcome the enemy. Thus it is that the victorious strategist only seeks battle after the victory has been won, whereas losers first fight and then look for the victory.

善守者藏於九地之下，善攻者動於九天之上，故能自保而全勝也。見勝不過眾人之所知，非善之善者也；…故善戰者，立於不敗之地，而不失敵之敗也。是故勝兵先勝而後求戰，敗兵先戰而後求勝。

Application:

9

Successful warriors cultivate the Dao (the Way) and preserve the laws and regulations, thus controlling victory itself.

善用兵者，修道而保法，故能為勝敗之政。

Application:

V

10

Fighting with a large army is the same as controlling a few soldiers. It is a matter of organization and of using formations, signs, and signals.

凡治眾如治寡，分數是也；鬥眾如鬥寡，形名是也；三軍之眾，可使必受敵而無敗者，奇正是也；兵之所加，如以瑕投卵者，虛實是也。

Application:

11

There may be seeming disorder in the battle itself, but in fact there is none at all among the soldiers. While the battlefield may be in chaos, the troops and the army themselves are in good order. A skilled warrior keeps the enemy on the move by making the best use of the situation as it is and uses resources in the way you roll logs or stones.

紛紛紜紜，鬥亂而不可亂；渾渾沌沌，形圓而不可敗。亂生於治，怯生於勇，弱生於強。治亂，數也；勇怯，勢也；強弱，形也。故善動敵者，形之，敵必從之；予之，敵必取之。以利動之，以卒待之。故善戰者，求之於勢，不責於人故能擇人而任勢。任勢者，其戰人也，如轉木石。

Application:

12

Whoever first occupies the field of battle and awaits the enemy is rested and at ease; whoever comes later is exhausted. The skillful warrior brings the enemy and is not brought by him.

凡先處戰地而待敵者佚，後處戰地而趨戰者勞。故善戰者，致人而不致於人。

Application:

13

Victory comes from studying the enemy's own plans and the evolving situation itself. After one victory, do not repeat the same tactics verbatim. Circumstances change in an infinite variety of ways, and the army, like flowing water that accommodates itself to the shape of the ground, adapts to changing conditions and circumstances.

故策之而知得失之計，候之而知動靜之理，形之而知死生之地，角之而知有餘不足之處。… 人皆知我所以勝之形，而莫知吾所以制勝之形。故其戰勝不復，而應形於無窮。夫兵形象水，水之行避高而趨下，兵之形避實而擊虛；水因地而制流，兵因敵而制勝。故兵無常勢，水無常形。能因敵變化而取勝者，謂之神。

Application:

VII

14

The general receives his orders from the sovereign.

將受命於君。

Application:

15

Those who do not know the situation of their neighbors cannot ally with them. Those who do not know the conditions of mountains and forests, pitfalls, marshes, swamps, defiles, etc. cannot conduct the progress of the army, and they are unable to use local guides to make use of natural advantages on the ground.

故不知諸侯之謀者，不能豫交；不知山林、險阻、沮澤之形者，不能行軍；不用鄉導者，不能得地利。

Application:

16

Ponder and deliberate the situation before you make a move…. An army can be robbed of its spirit and a general can be robbed of his confidence. At the start of a campaign the spirit of the soldiers is keen, but after a period of time they begin to flag and falter, and in the final stage they want to return to camp…. Control the mental factor.

懸權而動。…三軍可奪氣，將軍可奪心。是故朝氣銳，晝氣惰，暮氣歸。…此治心者也。

Application:

VIII

17

There are some roads which must not be followed, armies that must not be attacked, towns that must not be taken, positions that must not be contested, and orders of the sovereign that must not be obeyed.

途有所不由，軍有所不擊，城有所不攻，地有所不爭，君命有所不受。

Application:

18

The student of war knows a variation of tactics and is well-versed in the art of varying his plans.

是故智者之慮，必雜於利害，雜於利而務可信也，雜於害而患可解也。

Application:

19

As a rule of war, we do not assume that the enemy will not come, but we are ready to meet him. We do not presume that he will not attack, but make our own position impregnable.

故用兵之法，無恃其不來，恃吾有以待之；無恃其不攻，恃吾有所不可攻也。

Application:

IX

20

Whoever lacks foresight and underestimates the enemy will surely be captured by the enemy.

夫惟無慮而易敵者，必擒於人。

Application:

X

21

When one is weak and not strict, when his orders and words are not clear, when the rules and duties that guide the officers and men are not fixed and consistent...the result is called chaos.

將弱不嚴，教道不明，吏卒無常...曰亂。

22

Whenever the troops flee, are insubordinate, are in disorder, distress, disorganization, or rout, these six conditions are not the calamities of Heaven and Earth but of the general.

凡兵有走者、有馳者、有陷者、有崩者、有亂者、有北者。凡此六者，非天地之災，將之過也。

Application:

23

When those who are knowledgeable about warfare move forward, they are never bewildered. When they act, their resources are limitless. Therefore it is said: Know the

enemy, and know yourself, and your victory will never be in danger. Know Heaven and Earth, and your victory will be complete.

故知兵者，動而不迷，舉而不窮。故曰：知彼知己，勝乃不殆；知天知地，勝乃可全。

Application:

XI

24

Different kinds of terrain are connected.

地形有通者。

Application:

25

On ground of intersecting highways, join hands with your allies.

… 衢地則合交…。

Application:

26

A skillful tactician is like the Shuai-ran snake of the Chang Mountains. If you strike at its head, the tail will attack you. If you strike at the tail, the head will attack you. Strike at the middle, and both the head and the tail will attack you. Can soldiers be made like the Shuai-ran? I say, Yes.

故善用兵者，譬如率然。率然者，常山之蛇也。擊其首則尾至，擊其尾則首至，擊其中則首尾俱至。敢問兵可使如率然乎？曰可。

Application:

27

Success in warfare is gained by carefully accommodating ourselves to the enemy's purpose.

故為兵之事，在順詳敵之意…。

Application:

XII

28

The means and the equipment for setting fires (amid the enemy) must always be at hand.

行火必有因，因必素具。

Application:

29

To win battles and take objectives, but fail to consolidate these achievements, is ominous and may be called "a waste of time."

夫戰勝攻取而不惰其功者凶，命曰"費留"。

Application:

30

Anger may in time change to gladness, and vexation to content, but a state that has perished cannot be resurrected, nor can the dead be brought back to life. Therefore, the enlightened ruler is prudent, and the good general is warned against rash action.

怒可以複喜，慍可以複說，亡國不可以複存，死者不可以複生。故明主慎之，良將警之。

Application:

XIII

31

The reason an enlightened sovereign and a wise general conquer the enemy whenever they act, and their achievements surpass those of ordinary men, is their foreknowledge of the enemy situation. This foreknowledge cannot be gained from spirits or gods, or by analogy with past events, nor by astrology. It must be obtained from those who know the enemy's situation.

故明君賢將所以動而勝人，成功出於眾者，先知也。先知者，不可取於鬼神，不可象於事，不可驗於度，必取於人，知敵之情者也。

Application:

32

There are five kinds of spies. There is no place where spies cannot be used.

故用間有五。 無所不用間也。

Application:

33

He who does not have sagacity and justice, who is not humane and just, cannot use spies. He who is not delicate and subtle cannot get the truth out of them.

非聖賢不能用間，非仁義不能使間，非微妙不能得間之實。

Application:

34

With regard to whatever armies you wish to strike or cities you wish to attack and people you wish to assassinate, it is necessary to find out the first and last names of the garrison commanders, their aides-de-camp, the ushers, gatekeepers, and bodyguards. You must instruct your spies to ascertain these matters in minute detail.

凡軍之所欲擊，城之所欲攻，人之所欲殺，必先知其守將、左右、謁者、門者、舍人之姓名，令吾間必索知之。

Application:

ASSIGNMENT

a.

To understand the principle behind this assignment, first go back to item 7 above and review your thoughts about the differences between *knowing* something and *doing* it. Item 7 teaches: *"You may know how to win without being able to do it. 勝可知，而不可為。"*

It is important to *learn* theory and to *know about* the ideas for good research in the abstract (知), but then you must then be able to take that knowledge and *enact* it (為) in actual practice. "Doing" includes the idea of "becoming." Until you can DO, the principle or theory alone does you no good. It is knowing + doing/becoming that creates winners.

b.

Now that you have thought carefully about the five (5) items which you have chosen to write about, the assignment for the coming week is an assignment in *doing* (為). For this assignment, choose any ONE of the five items to put into practice in your own research. You and your supervisor need to work closely together on this assignment.

For example, suppose you choose item #4 above: "Speedy victory is the main object of war." You will meet with your supervisor to discuss this tenet. You and your supervisor will agree on a strategy to research something during the week in which you will demonstrate your ability to create a speedy timetable, work speedily in following it, and perhaps to "blitz the library" or the Internet to answer a specific research question.

You will time yourself to keep a record of how much time it takes you to obtain a research "victory." Then you will report your efforts to the class next time we meet.

This is just one example. You may combine two or more principles that are related. For example, several of the above items talk about spies, several talk about anger, and several talk about the conduct of the general. Together, in combination, these might suggest a research strategy for you that would be better than just one alone.

Schedule a meeting with your supervisor to discuss with him/her this assignment. Together, figure out a way to employ your chosen principle as you conduct your research so that (1) your research is new, (2) it demonstrates your love of the law, and (3) it serves the cause of justice. When you have finished the assignment, please sign below and ask your supervisor to sign also.

_____

_____

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

COMPARATIVE LAW: HOW & WHY

April 10, 2010

Many of you are doing comparative law, and you have many questions about method, theory, models, etc.

A good place to begin is this article: John C. Reitz, "How To Do Comparative Law" (Fall 1998) 46(4) *American Journal of Comparative Law* 617.

Reitz's article is one of many excellent articles in an entire issue of this journal devoted to a symposium on "how to do" and "why to do" comparative law. So I suggest you start by reading the Reitz article, then read others in the same issue that appeal to you and are relevant to your own project. You can get the AJCL in the Law Library and/or online.

Also, I suggest you review my personal materials which I have given you in the course materials --

My pre-admission proposal to the Graduate School;

My confirmation presentation notes;

The first chapter of my PhD Thesis.

These contain a lot of references and information about comparative law theiry, methods, techniques, models, and sources -- including, of course, a demonstration of how I did my comparative project. In my view, comparative research always begins

with the PURPOSE aspect of Bacon's Triangle: What is your PURPOSE?

WHY do you want to do comparative law?

WHY do you think the parts of your subject are comparable?

WHY do you think comparison is better in your case than other non-comparative methods of legal study?

If your only answer to these questions is, "Because I think it's interesting," or "Because I'm curious about it," that is not a strong enough reason to sustain your RPG project. Your purpose must be solidly embedded in your THESIS STATEMENT and your SUBJECT. It must truly and analytically answer your research questions and show why comparison can and will drive your project forward.

When we meet in class, I will ask each of you who are doing comparison these questions. Perhaps when I hear your answers, I can help you more with your projects and diagnose any problems you may be having.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

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LINCOLN'S AUDIENCE

When Abraham Lincoln (林肯) was president of the United States in 1863, the country was in the midst of the great Civil War—one of the most difficult times in American history.[1] It was essential for the President to communicate often and effectively with the people. In those days, of course, there was no radio or television, no movies or Internet. Lincoln communicated with the people primarily through the written word: speeches, articles, and letters. He had a great gift for writing and speaking. Many of his written and spoken words have become central documents in American history. His ability with language was so powerful that it actually shaped public opinion and helped to change the course of history.

The way he achieved this expertise, particularly in writing, is instructive for RPG students. *He rehearsed before an audience*. He had a profoundly aural sense of language. Even when he was writing, he could "hear" the words as if they were being spoken. He would often ask friends and colleagues to sit and listen while he read his written drafts to them out loud.[2] (He also read Shakespeare and other poets to them, sometimes for hours.) He would read to anybody: friends, neighbors, co-workers, children. If he could read aloud to some person as his immediate audience, it would help him weigh and examine

[1] Probably the best biography of Lincoln is Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* (New York: Simon & Schuster, 2005).

[2] Douglas L. Wilson, *Lincoln's Sword: The Presidency and the Power of Words* (New York: Random House/Vintage Books, 2007), pp. 180-82 *passim*.

his thoughts and so refine them into the final document.

One day, Lincoln had written out a draft of very important letter that would be read to the public on a crucial political issue. Lincoln looked around the White House for someone to be his audience. All his other principal aides were away, so he asked his secretary, William O . Stoddard, to come into his office (the Oval Office). Stoddard recalled the scene this way. Lincoln said to him:

"Sit down. I can always tell more about a thing after I've heard it read aloud, and know how it sounds. Just the reading of it to myself doesn't answer as well, either."

"Do you wish me to read it to you?" Stoddard asked.

"No, no; I'll read it myself. *What I want is an audience. Nothing sounds the same when there isn't anybody to hear it and find fault with it.*"

"I don't know, Mr. President, that I'd care to criticize anything you'd written."

"Yes, you will. Everybody else will. *It's just what I want you to do*. Sit still now, and you'll make as much of an audience as I call for."[3]

Lincoln invited criticism. He sought an audience to "find fault" with his draft. He practiced all three components of what we call Bacon's Triangle. This was his rehearsal for his actual "presentation" before the American people.

One of Lincoln's most famous speeches is The Gettysburg Address (蓋茲堡演說),

[3] *Ibid*. at pp. 181-81; emphasis added; citing William O. Stoddard, *Inside the White House in War Times: Memories and Reports of Lincoln's Secretary*. Michael Burlingame ed. (Lincoln, Nebraska, and London: University of Nebraska Press, 2000), p. 130.

which he delivered on November 19, 1863, at the Soldiers' National Cemetery in Gettysburg, Pennsylvania. Here is the text. See if you can identify Lincoln's statements of Subject, Purpose, and Thesis. But don't just read it silently to yourself. Find someone else to be your audience and do as Lincoln did—read it aloud to each other. Each of you test the other to identify the Subject, Purpose, and Thesis *aurally* and so practice and strengthen your skills at this aspect of Bacon's Triangle.

* * *

> Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.
>
> Now we are engaged in a great civil war, testing whether that nation, or any nation, so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.
>
> But, in a larger sense, we can not dedicate... we can not consecrate... we can not hallow this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.

在八十七年前，我們的國父們在這塊土地上創建一個新的國家，乃基於對自由的堅信，並致力於所有男人皆生而平等的信念。[4]

當下吾等被捲入一場偉大的內戰，以考驗是否此國度，或任何肇基於和奉獻於斯者，可永垂不朽。吾等現相逢於此戰中一處浩大戰場。而吾等將奉獻此戰場之部分，作為這群交付彼者生命讓那國度勉能生存的人們最後安息之處。此乃全然妥切且適當而為吾人應行之舉。

但，於更大意義之上，吾等無法致力、無法奉上、無法成就此土之聖。這群勇者，無論生死，曾於斯奮戰到底，早已使其神聖，而遠超過吾人卑微之力所能增減。這世間不曾絲毫留意，也不長久記得吾等於斯所言，但永不忘懷彼人於此所為。吾等生者，理應當然，獻身於此輩鞠躬盡瘁之未完大業。吾等在此責無旁貸獻身於眼前之偉大使命：自光榮的亡者之處吾人肩起其終極之奉獻—吾等在此答應亡者之死當非徒然—此國度，於神佑之下，當享有自由之新生—民有、民治、民享之政府當免於凋零。

[4] 註：father 在此應避免有血緣的聯想。在當時的人，尤其是在政治上，沒有男女平等的觀念，men 指的是男人，而且沒有說出來的還是白種男人而已。為求忠實，不應將其視為人類的通稱。

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

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THORNLEY'S FN

In 1963 I was 18 years old and a senior in high school (高中). At the end of that year, I would graduate and go on to university study. Because I was good at English, I was given a seat in the Advanced Placement English class taught by Mr. Wilson Thornley. It was called "advanced placement" because only the best students got in, and the credit you received for the class was counted as "college credit" at the university you would attend the following year.

A lot of the class was writing poetry and short stories. Mr. Thornley was a master at teaching "creative writing." But the big project, which was due at the end of the semester, was a research thesis. Until I took that class, I thought that only university students had to write theses, but Mr. Thornley required it of us. After all, we were getting "college credit."

Because I was also in my fourth year of studying Latin, I decided to be smart and combine research in Latin with my research in Mr. Thornley's class. I was particularly interested in the poet Virgil 味吉爾 (Publius Vergilius Maro (October 15, 70 BCE – September 21, 19 BCE)) and his famous book, *The Aeneid*. 伊尼亞斯逃亡記 By that time, I had read most of the *Aeneid* in Latin, so I thought I could produce a pretty good piece of scholarship. I worked very hard at the project all year. I read a lot of sources and enlisted the help of my Latin teacher. I wrote up my research and handed it in to Mr. Thornley on time.

I was shocked when I got it back. On every page—every page—were his penciled notes, "fn"—sometimes underlined, sometimes circled, sometimes just fn. I didn't know what "fn" meant, so I aske him. He told me it meant "footnote." He explained that in every place—every place where I made an allegation of fact, I needed to give a source for that allegation. What I had done instead was to give a single footnote at the end of each paragraph giving a general source for the information in that paragraph. He explained that that was not sufficient. He wanted a footnote after almost every sentence! This was my first induction into the world of true scholarship.

I did what he asked. It was a lot of work. But eventually I produced a true research thesis. He liked it enough to recommend that I submit it to the editors of *The Student Writer*, a magazine published in Florida, USA, and dedicated to publishing the writing of high-school students like me from anywhere in the US. He knew the editors there; many of his students had already published in *The Student Writer*. I felt elated when he made this suggestion, and even more elated when my article was accepted and eventually published.[1] It was my first publication. On the first page of the article, above the title and across from my name, the editors had written this note: "student writer Robert Morris ably studies the creative masterpiece, the AENEID."[2] *Ably* studies. I was thrilled with that compliment. Ably. I had done my job ably! I published other things that year, some poems and stories, in the high school's own literary magazine, but nothing was as exciting as that very first *national* publication in *The Student Writer*. I still remember the feeling nearly 50 years later.

[1] Robert Morris, "Why Creative Writers are in Love With Virgil" (March 1963) 2(6) *The Student Writer* 22.

[2] *Ibid*.

This process was to set a pattern for much of what I have published since then, namely, that the best and easiest way to publish is through your network—teachers, supervisors, colleagues, conferees, correspondents, and editors—all the people you meet within the global "community of scholars" who will make the necessary connections and introductions for you. They will *invite* you to publish. They know the "markets"—the journals and publishers that exactly match your writing interests. This is much better than simply sending your writing "cold" to an unknown editor who does not know you and with whom you chances of getting published are small.

I did graduate at the end of that school year, and I went on to many years of university study. During those years, I had many classes where I was assigned to write research papers, theses, book reports, and oral presentations. In each case, I always began the task with the idea that I would produce something that was *publishable*. So I've always been grateful to Mr. Thornley for setting my feet on the correct path of doing scholarly work.

Regardless of how or where you get published, that "fn" is all-important. Proper footnoting is the basis of establishing your *bona fides* as a scholar, giving proper credit to other scholars, avoiding plagiarism, and showing your readers how and where to find the same source for themselves.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

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ARCHIVAL RESEARCH: "THE HITLER DIARIES" & TREVOR-ROPER'S SHAME

April 10, 2010

These are some study questions and notes for viewing and discussing the 2003 BBC docu-drama episode entitled, "Fact or Fiction 虛構的真實" (part 2) in *Days That Shook the World*, about the faked "Diaries of Adolf Hitler 希特拉日記" in 1983. These questions and notes will help you understand the nature and pitfalls of doing archival research. They are a cautionary tale ().for RPG warriors You can find the DVD in the Main Library at http://library.hku.hk/record=b4186844; Call No. AV 909.82 D27 S3 DVD:

> **DAYS THAT SHOOK THE WORLD** 驚世一刻. 第三輯. The complete series Volume Three [videorecording]; a Lion TV production for BBC and the History Channel. Disc 4, Episode 8, part 2 (following "War of the Worlds").

As we have learned, archival research is important in RPG legal studies because it is a good way to discover unpublished materials that help to fill a gap in the existing research. They are a good way to provide a "new contribution to knowledge," and they often go hand-in-hand with empirical research. Indeed, archival research is a kind of empirical research. But archival research can present special difficulties in evidence and adjudication. Sometimes these difficulties require very careful forensic study. As you see in the video, they can fool even

experienced scholars. Hugh Trevor-Roper (1914-2003) was a distinguished scholar, and like many distinguished scholars, he was cocksure and arrogant. He mistook authority for research, and he allowed his personal agenda take control over his scholarly judgment. He made the mistake of thinking that because he *wanted* something to be true, and *wanted* himself to be the authority, it would be so. He was wrong, and the public scandal damaged his reputation and questioned his integrity.

What lessons do you learn from this story?

What cautions must you take when researching archival materials?

What do you learn about your own task of adjudication?

What do you learn about the position of authority (any authority) in research (i.e., Sir Anthony Mason, Yash Ghai, Johannes Chan, Albert Chen, your supervisor, Robert Morris, Hugh Trevor-Roper, the CFA, the NPCSC, *The Tiananmen Papers*), Harvard University Press, the London *Times*?

How do you know that a document is authentic? How do you account for a document's provenance (), context and sources, plus the chain-of-evidence () that accounts for the custody of it? Who are the players in that chain-of-custody, and what stakes do they hold in the process? What are their respective agendas? What are their conflicts of interest?

What if there is already a “mountain of research” by other experts on the subject that tells you everything is all right? Can you therefore assume that everything is all right?

What were Hugh Trevor-Roper's fatal mistakes? How did he go wrong? Which of his mistakes was the worst? List at least five (5) of them:

1.

2.

3.

4.

5.

What warning signs, facts, indications, and evidence should have put Trevor-Roper and his colleagues on notice that there was a problem?

Where did his colleagues go wrong?

What is the difference between 100% and 99.9% in research certainty?

How can you correct for pride, hubris, arrogance, and stupidity in your own research?

Is a forgery the same as plagiarism—or vice versa?

How do these lessons relate to the Piltdown Plagiarism and Hemingway's Feast?

How would Professor Bloom handle all of this?

Does GIGO apply here?

How does Nibley's Philosophy apply to archival research? Chopin's Pedal? Llewellyn's Cure? (Hint: All of them are *forensic* tests.)

Whom do you trust and why? How far? What if a person of good reputation and authority gives you "assurances" of his own accuracy and trustworthiness?

Should you be skeptical or cynical?

Can you assume that because something is a product of "science" that it is true?

What is your personal and academic reputation worth? What if Trevor-Roper's fate happened to you?

How do you know that anything in this TV programme is accurate? How could you check its accuracy?

Suggestions for Further Viewing and Reading:

1981 Paul Newman and Sally Field movie, *Absence of Malice*

Gavin Menzies' book, *1421: The Year China Discovered the World*

The Common-Law Rules of Evidence

Charles Mackay, *Extraordinary Popular Delusions and the Madness of Crowds*

Wong Hing-yan Simon, HKU PhD Thesis, "Reconstructing the Origins of Contemporary Chinese Law: the History of the Legal System of the Chinese Communists During the Revolutionary Period1921-1949"

The Tiananmen Papers, which you can find in both the original Chinese and in English translation in our library. For the English, please see this URL: http://library.hku.hk/record=b3071129

For the Chinese, please see this URL: http://library.hku.hk/record=b2250365

These are archives (collected papers) of the events from inside Zhongnanhai.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

ROLE-PLAYING: SUPERVISING YOUR RPG STUDENT

Attached is a document entitled, "External Examiner's Comments," which reviews an article or chapter written by an HKU postgraduate student in the Faculty of Law. You are that student's **Supervisor**. The student who wrote the article or chapter is your **Supervisee**. The author of the comments in the attached review is an anonymous **External Examiner**.

Read the external examiner's comments carefully. Then devise a plan of instruction and advice for your student-supervisee to help the student rewrite the paper and improve it. You will report your plan of advice to the class as if the class and the instructor were the student-author of the chapter or paper.

The external examiner's comments tell you WHAT is wrong with the student's writing. **Your task is to tell the student HOW to fix these problems. What should the student DO?** You can find additional relevant information in Chapter 11 ("How To Supervise and Examine") in the Phillips and Pugh book, pp. 161-91. Why is this relevant to you here and now? For the answer, read pages 19-24 of the Phillips and Pugh book. After you have done the necessary thinking, how do you put it down on paper so that your reader(s) can see it clearly? Remember that you must explain everything to the satisfaction of your audience, not yourself. *It it does not appear on the page, to the full understanding of your audience, it does not exist.*

Shakespeare (莎士比亞) wrote about this problem of the difference between knowing and doing in his play, *The Merchant of Venice*:

> "If <u>to do</u> were as easy as <u>to know what were good to do</u>, chapels had been churches, and poor men's cottages princes' palaces. It is a good divine that

follows his own instructions: I can easier teach twenty what were good to be done, than be one of the twenty to follow mine own teaching. The brain may devise laws for the blood, but a hot temper leaps o'er a cold decree…."[1]

We all know what is "good to do"—that's easy. And it's easy to tell someone else, to "teach" them, what is "good to do." The hard part is actually "to do" it—to put it into practice. But as lawyers, we not only *know* the law; we actually *practice* it, too. We must not only know what the good research tools and methods are, but also how to use them. We must know HOW to do the things we are supposed to do. We must know how to *operationalise* (使用化) them.

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[1] Act I, scene 2; Portia speaking; emphasis added. Here is a Chinese translation:

鲍西娅:

"倘使做一件事情就跟知道应该做什么事情一样容易，那么小教堂都要变成大礼拜堂，穷人的草屋都要变成王侯的宫殿了。一个好的说教师才会遵从他自己的训诲；我可以教训二十个人，吩咐他们应该做些什么事，可是要我做这二十个人中间的一个，履行我自己的教训，我就要敬谢不敏了。理智可以制定法律来约束感情，可是热情激动起来，就会把冷酷的法令蔑弃不顾…."

—*威尼斯商人*，第一幕 第二场

This may be read online at <www.dglib.cn/libonline/wnss/001.htm>; seen April 2, 2010.

EXTERNAL EXAMINER'S COMMENTS

The paper begins with what seems to be an interesting approach to the problem of "one country, two systems," (OCTS) an approach that is based on the Marxist, and Chinese, theory of dialectical materialism and one that is not commonly employed in the literature to understand the politics and prospect of "one country, two systems". The execution of this approach is thwarted however. First, while it is a learned essay, its analysis is unnecessarily complicated and convoluted—it draws on a wide range of abstract, and at time technical, ideas from Hegel and Marx to Mao and Deng, and from ancient Chinese texts to modern western legal scholars such as Hart and Kelsen. Readers would quite easily get lost in an analysis filled with a great variety of jargons and quotations.

Second, the main conclusion seems to be that Mao and Deng see OCTS in terms of dialectical materialism, and hence a strict adherence to dialectical materialism would imply that the terms, contents, and implementation of OCTS would necessarily change in response to the internal contradictions and changing conditions of the two systems. But to show that the Chinese government has in fact employed this perspective in implementing OCTS in the last decade or two, it is not enough to simply cite, as the paper does, texts that suggest that Deng did justify OCTS in the broad terms of dialectical materialism; rather, it is necessary to show whether, and why, the Chinese government's understanding and implementation of the terms of OCTS have changed over time in the way predicted by dialectical materialism (in the case of the HKSAR at least). The paper does very little analysis of this kind, if at all, and thus fails to integrate theory and politics or to illuminate the concrete problems of OCTS as experienced in the HKSAR.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

SUPERVISION OF RPG LAW STUDENTS—THE ISSUE OF QUALITY ASSURANCE

"Soldiers deserve soldiers, sir."

There is no presumption of quality assurance or control in the process of supervision of RPG students in the Department of Law. This is because we have no empirical data whatsoever on the quality, nature, or uniformity of the supervision that goes on, and this in turn is because we have no evaluation procedures in place such as we use for all other endeavors under the heading of Quality Assurance.[1] In sum, with regard to our RPG supervisors, we do not know the answer to the Juvenalian question, "Who guards the guards?"

Uniformly high standards of RPG supervision of theoretically required by the university-wide application of rules and regulations promulgated by the Graduate School as published in the *Graduate School Handbook* and on the Graduate School Web page. These include many notes for both supervisors and RPG degree candidates, including, for example, "Good Practices for Supervisors." Some of these are hortatory, but most are mandatory. They are designed to ensure that HKU higher-degree graduates meet not only the university's uniform high standards from department to department, but also that they come up to the *global* standards of such graduate around the world.

Does the supervision of RPG law students meet these criteria? We do not know. Anecdotal evidence indicates that it does not. This is because there are at present no

[1] See the HKU Quality Assurance Web page <http://web.edu.hku.hk/quality_assurance/index.html>.

processes of evaluation by which to measure such supervision. In all other activities of the university, Quality Assurance is effected through a complex system of evaluations. Teachers mark and grade students. Students evaluate teachers and course through SETL forms. Faculty members check on the progress of each other through the PRD process. But there is no such process of any kind to evaluate our RPG supervisors. Thus, for the present we must rely upon anecdotal evidence of the state of affairs. It indicates that not all is well.

Feedback from ARM Students

This

Experience in the Guided Research Course

This

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

ENDGAME 殘局 I: THE COMMENCEMENT (開始)

The single purpose of all that we have studied in this class is to get you successfully to the end of your studies so that you get your degree on time and become the scholar you have been preparing to be—without being delayed or "discontinued" for any reason. As Shakespeare writes in *The Tempest*, "What's past is prologue." If you know where you are going (your destination), if you know "the end from the beginning [从起初指明末后的事]," you will have a much more enjoyable and successful trip getting there. Remember this:

> "Cheshire Puss," she began, rather timidly…, "Would you tell me, please, which way I ought to go from here?"
>
> "That depends a good deal on where you want to get to," said the Cat.
>
> "I don't much care where—" said Alice.
>
> "Then it doesn't matter which way you go," said the Cat.
>
> **—Lewis Carroll, *Alice's Adventures in Wonderland***

Along the way, there are many checkpoints that you must successfully pass. Your research and write-up must be satisfactory to the postgraduate standard, so that they satisfy your supervisor(s), and faculty, the university, the Graduate School, your

examiners, and global standards of good scholarship. You must pass your confirmation of candidature as well as your oral exams and all other checkpoints along the way. All of the checkpoints are useful and necessary. They constitute a structure designed to help you, not to intimidate or block you. Use them wisely and take them on board gladly. The process is a good one. I have tailored this class to you; you must now tailor it to yourself. You must now integrate and internalize all these materials and experiences by *putting them all together* in your mind as one great whole. Again, the process is not linear. You must learn and use all these skills *together at the same time*. The whole thing is a combination of Chopin's Pedal and Llewellyn's Cure.

I have already given you the six (6) documents that will help you visualise the final goal for which you are reaching, and some important steps you must take in order to get there. They are documents relating to my own "endgame" in the PhD process. They are:

1. Thesis Writing;
2. Faculty letter regarding the oral examination (16 January 2007);
3. Faculty letter regarding results of examination and corrections (1 February 2007);
4. My cover sheet detailing actual "changes and corrections" made to the thesis;
5. Graduate School letter noticing award of PhD degree (4 May 2007); AND
6. Certificate of degree (diploma) (27 November 2007).

The page detailing my actual "changes and corrections" made to the thesis (item 4) was compiled in direct response to changes made in the Thesis pursuant to requirements of the External Examiner and the two Internal Examiners, as well as notes and

requirements of my Supervisor. I used the TRACK CHANGES function in WORD to make the changes to my thesis. Please observe the detail and thoroughness of the changes (see ENDGAME II).

You should read this page together with the handout entitled, "Thesis Writing," in which we read these words (emphasis added) of a recent HKU thesis examiner in another department wrote:

> **This is a *somewhat* improved version of a thesis I examined last year. In the original report, I made many recommendations for improving the dissertation, and *some, although by no means all of these have been taken into account*. Having re-examined the dissertation, I *still* feel that it is not of a sufficient standard to warrant the candidate being awarded a Ph.D. It is *still* superficial in many respects, contains numerous errors and omissions, and does not make an original contribution to knowledge.**

The examiner then goes on for more than a page to describe all the remaining (and *uncorrected*) problems of the student's work. The student failed because s/he did not respond in 100% detail to *every* recommendation and requirement of the examiner. **Partial, selective response is not enough.** You must comply exactly, fully, and willingly with everything the examiners require of you. Otherwise, you risk being delayed or discontinued. As already suggested in previous notes, you should study other successful theses and dissertations as well. Study what has been successful in the past.

As you look at all of these documents, visualise yourself going through the same process, taking each of the same steps. Visualise yourself and your name in place of me and my name. Also, please reconsider the following quotation from a famous movie:

"Today's exam will be scaled...three A's, five B's, ten C's, and the rest Ds and Fs.... Once again, as in life, you are not in competition with me, yourself, or this exam, but each other."

"今天的考試已訂評分標準: 三名甲等, 五名乙等, 十名丙等餘下四名則取丁及己等成績. 再次, 同生活一樣, 你們非為我, 自己或考試競爭而是互相競爭."

—Medical school professor to students in 1990 film, "FLATLINERS"

Among other things, this means that you are not given any credit whatsoever for how hard you try, how much effort you put into your work, finishing the assignments "on time,"[1] or for "doing your best." **These things are expected of you ROUTINELY**. You will be judged solely on the quality of your final work product. That quality must be evident on the page—in your research product—your assignments, your exams, your presentations, your theses and dissertations, and your papers. It is assumed that everyone in the law school, especially RGP students, works hard all the time. Nevertheless, all the standards by which you and your work are adjudicated are ***objective***. If the quality is not evident in your work product, *it does not exist*, no matter how much work and effort you may have expended in producing it. In RPG work, your "blood, sweat, and tears" (血、汗、淚) simply do not count!

Finally, remember that the "endgame" is also the Commencement. In both the American and the UK educational systems, graduation (畢業) is called Commencement (開端, 開始). Check this page on the University's Mission on RPG Education <www.hku.hk/gradsch/web/outcome/index.htm> to see if you truly are where you ought to be right now as you head toward that commencement.

[1] Unless, of course, the assignment is specifically timed or deadlined, where "time is of the essence," in which case meeting the deadline is a crucial part of the final mark.

All learning is a great circle of graduations and commencements. These lines from the poet T. S. Eliot express the idea well:

> We shall not cease from exploration
> And the end of all our exploring
> Will be to arrive where we started
> And know the place for the first time.[2]

These days are the beginning of your successful, lifelong academic career in the law. 活到老, 学到老. Good luck! And remember always—加油 AND 更上一層樓! Or as the poet Henry Wadsworth Longfellow (1807-1882) wrote:

> "The heights by great men reached and kept
> Were not attained by sudden flight,
> For they, while their companions slept,
> **Were toiling upward in the night**."[3]

[2] T. S. Eliot, *Four Quartets*, "Little Gidding" V.

[3] Henry Wadsworth Longfellow, *The Ladder of St. Augustine* (1858), stanza 10. The entire poem may be read online here: <http://poetry.poetryx.com/poems/6332>; (emphasis added); seen March 22, 2011.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

ENDGAME 殘局 II: MY ORAL DEFENSE NOTES

During the oral examination when I defended by PhD thesis before three examiners (two internal, one external), my supervisor and I took voluminous notes. The examiners asked many questions, made many comments, and required a number of revisions to the thesis.[1] They also shared with me portions of their written examination reports which contained their comments on my work for the official records of the Faculty of Law. So I had a total of five (5) sets of notes to work from. The examiners required some revisions to my thesis, and I was allowed three months to complete them.

Following the one-hour defense (too short a time, in my view), my supervisor and I immediately met in his office to compare our notes and make an outline of all the issues that I was expected to address in making the revisions. We made sure to include every detail of what the examiners said and wrote in order not to miss any required revisions. I was determined to do everything the examiners wanted fully and without question—to "take it all on board" without exception. In a couple of places, the requirements made by the examiners slightly redefined or delimited the original scope and thesis of my research. The meeting with my supervisor helped to ensure that all of us—the examiners, my supervisor, and I—were "on the same page" with regard to the final outcome of my thesis. All of us knew that such a consensus was crucial. All this became my new and final THESIS MAP. Such a map was essential because, "The only place you can get to without a map is lost."

[1] This is common, even typical, and expected—not a catastrophe. See Phillips and Pugh, p. 30, plus references under "oral examinations" in the book's Index.

I was given three (3) months to make revisions and submit them to one of the internal examiners (Professor Fu Hualing) for approval and acceptance by him on behalf of all the other examiners. All this was in accordance with the published rules and regulations of the University, the Graduate School, and the Law Faculty. These are those notes which I submitted to that one internal examiner along with my revisions.

You probably will not understand most of these notes because they are written in my shorthand for myself and the internal examiner. That does not matter. You can still see in them the method by which I approached the revision process. These notes constituted the outline or map of all the additional research, writing, and revision that I undertook to complete the thesis exactly as the examiners wished it. Some of the notes required clarification of existing text in the thesis, and some required all-new additional research and writing. I approached this task very aggressively. In all, I read a substantial number of additional books and articles, and I wrote almost an entire new chapter. In other words, my response to the examiners was to *increase substantially* the size and length of my thesis. Every change (addition, deletion, rewrite) was noted by using the **TRACK CHANGES** function in Word. I submitted all such changes along with these Notes to the internal examiner, Fu Hualing.

Although I had three months in which to make revisions, I actually made them in about four weeks. I did this task quickly so that the issues and problems raised in the oral exam were still very fresh in my mind, and also because I wanted to finish up and get my degree! Also, I found the oral exam process, like the confirmation process before it, to be immensely enjoyable, and I wanted to please the examiners and my supervisor. I wanted my finished thesis to be right up-to-date in all the scholarship relevant to my field and to make sure that nobody else "scooped" me.

All the revisions were accepted as I wrote them. I then used TRACK CHANGES to "Accept All Changes," resubmitted the completed thesis, had it bound

and submitted both the bound and electronic copies to the library—and I finished my PhD on time.

++

MY ORAL DEFENSE NOTES

My new pubs:

--Metzger
--Summoning Democracy

New TW cases:

--Interpretation No. 617 (Oct. 26, 2006) (Criminal Code: freedom of speech/pub—obscenity)

--Interpretation No. 618 (Nov. 3, 2006) ("equality" betw. TW and PRC people)

DÉTENTE

Thesis: See Abstract, first paragraph

--comparative law is valid in itself
--most useful in Greater China
--using cases that themselves use the comparative approach

Argument: Chose cases in each instance where the court itself or commentators engage in some form of comparative law:

--PRC (*Marbury*) -- commentators

--HK (flag/US cases; Long Hair; Falun Gong) – citing US minority opinions

--TW ("clear and present danger" & "due process of law") – US doctrine

--445 freedom of expression (Parade Law)
--499 gov't rules of conduct (amendments, National Assembly)
--582 due process/appeal (CGJ vs. Supreme Court)

Key Theories:

Ginsberg – equilibrium

Gewirtz – What is a constitution?

Metzger – comparison of corrigible versus incorrigible state

Potter – "selective adaptation"

Friedman – One China, globalization, flattening, detente

Anne Jordan – how a constitution "constitutes"

Morris – dialectic

Conclusions:

--no such thing in law as "Chinese characteristics" – a parallax view

Implications:

--There is no one single "field theory" or "unifying theory" in the law

--Judicial détente (convergence, institution-building (p. 108))

--Culture not necessarily prologue

--Psychology (Professors Chen)

--Future work: detailed study of all three HK cases from inception; further observation of CGJ and SPC.

Contributions:

--I have shown a comparative way of thinking about law in Greater China using cases that themselves use a comparative approach, AND I have taken Metzger a step further.

"Yes, but Taiwan…." Control in experiment. Steve Tsang

Concept of "human personhood" ok.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

PLATFORMING: THE ART AND CRAFT OF THE ORAL PRESENTATION ("THE MEDIUM IS THE MESSAGE" / 媒介即是讯息)

Revised 31 March 2011

Sooner or later, almost every law student, undergraduate or RPG, full-time or part-time, is required to give an oral presentation of some kind for some purpose. S/he has to stand before a live audience on a *platform*—stage, dais, podium, stand—and give a live presentation, usually using PowerPoint and other multimedia, of some subject of research in the law. Oral presentation is performance art (戏剧表演艺术). It is the ancient art of rhetoric (修辭學). Unlike any other presentation of your research, it is putting on a show. It is entertainment—serious entertainment for a serious purpose, but entertainment nevertheless. You might think of it as "the theatre of imagination." I call the entire process "platforming"—performing on a platform.

The reason for this is simple: lawyers are expected to be able to stand on their feet and speak. Much depends on this ability. Good speakers win. They persuade their audience to agree with them. Those who do it right, who master its techniques and learn how to perform, have a powerful tool for presenting their message and persuading their audience, for as Marshall McLuhan taught, "The medium is the message [媒介即是讯息]."[1]

[1] Marshall McLuhan, *Understanding Media: The Extensions of Man* (Cambridge, Mass: MIT Press,

"In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operational and practical fact, the medium is the message. This is merely to say that the personal and social consequences of any medium—that is, of any extension of ourselves—result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology."

"我们这样的文化，长期习惯于将一切事物分裂和切割，以此作为控制事物的手段。如果有人提醒我们说，在事物运转的实际过程中，媒介即是讯息，我们难免会感到有点吃惊。所谓媒介即是讯息只不过是说：任何媒介（即人的任何延伸）对各人和社会的任何影响，都是由于新的尺度产生的；我们的任何一种延伸（或曰任何一种新的技术），都是要在我们的事物中引进一种新的尺度。"

An effective, powerful medium (the visual presentation itself by you yourself) declares that its content (the message of the research) is also effective and powerful. Both the *form* and the *content* of your presentation are equally important. Your oral presentation is based on three assessments: your written materials, the delivery of your presentation, and your ability to answer questions (Q&A). These notes are a guide to help you with the last two qualifications—your oral presentation *qua* oral presentation. For specific ideas on how to make a good *legal* oral presentation, see chapter 37, "Quantitative Approaches to Empirical Legal Research," in *The Oxford*

1994), p. 7. 马歇尔。麦克卢汉 [何道宽[译]. *人的延伸—媒介通论* (成都: 四川人民出版社, 1992.) 1 頁.

Handbook of Empirical Legal Research.[2]

Knowing Is Showing

How do you know something, and how do you demonstrate to others that you know it? Many students make terrible errors in answering these questions. Whenever you conduct research and then write it up for others to read, they (your audience) are always asking these questions: What do you know? How do you know it? What does it mean to say that you KNOW something? How do you expect me to believe (or convince me to believe) that you know it? Consider the important ideas in the following proverb:

> He who knows not that he knows not is a fool. Shun him
>
> He who knows not and knows that he knows not is a simpleton. Teach him.
>
> He who knows and knows not that he knows is asleep. Wake him.
>
> He who knows and knows that he knows is wise. Follow him

Do you fit into one of these categories? For example, do you think you know something when in fact you don't? For purposes of academic scholarship, "private knowledge" does not count. Only *public* knowledge that you can externalize, express, communicate to others, document, and prove to an audience is worthwhile. The ways in which you do this must conform to the generally required and acceptable standards of academic scholarship—the "community of scholars." The only way

[2] Peter Cane and Herbert M. Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford and New York: Oxford University Press, 2010), pp. 901-925.

you can make a new or original “contribution to knowledge” is by first acquiring your own “knowledge” and then by externalizing it in your writing and speaking. There is no other way. Until you do this, your “knowledge” does not exist and does not count. *Knowing is showing*. One of the best ways of “showing” what you know is by making a good oral presentation. Remember that you have two different burdens to meet—the burden of proof (舉證責任), and the burden of persuasion (说服责任). Your audience demands both.

Stop Reading

An oral presentation is not a reading presentation. It is a speech with illustrations. It is not at all interesting to an audience for a person (you) to stand in front of them and read a lot of words at them—especially if the words are also on the screen. The audience gets lost in the thickets of words. Most people are bad oral readers. They read because they lack confidence in—

—themselves

—their subject

—their speaking ability

Words on screen are not a visual depiction of anything, and they alone do not constitute a presentation. The audience can read the words *silently* on the screen much faster than the speaker (you) can read them *aloud*, and this makes the audience feel bored and impatient. In mere reading aloud, there is no spectacle, no drama. This is basic human psychology.[3] If all you are doing is reading, there is no need for

[3] For a legal study along the same lines as McLuhan’s, see Laurence H. Tribe, “Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality” (1972-73) 46 *Southern California Law Review* 617.

PowerPoint. And since the art of the law, including RPG research, is persuasion, this is one reason why every student must learn how to make a good oral presentation.[4] You must learn the discipline of the craft—they are extensions of yourself. Here are some things to do to get away from reading:

a—Imagine that ever member of your audience is blind.

b—Now imagine that they are blind.

c—Now imagine that they just arrived from Mars and don't understand English.

Stop Hiding

Many oral presenters hide behind the table, the computer, the desk. They do this out of fear. They need something to lean on. Don't hide. Expose yourself. Come out from behind the furniture and let people see you in full. How do you appear. How is your face framed? Is the lighting on your face and body good? Are you appropriately dressed? Haircut? Shirt? Dress? Tie? Jewellery? How do you stand? Keep your hands out of your pockets. Don't dance around nervously. Stand still, and walk and walk only to point out something on the screen.

Respect your audience. Look at them, talk to them, project your voice to them. Talk to the last person in the back of the room. Keep within the promised time limits—they get annoyed if you talk too much. Use a professional voice. Remember that your audience is (a) intelligent but (b) uninformed about your specialty. Simplify your subject. All visuals must be CLEAR, READABLE, and IMMEDIATELY UNDERSTANDABLE.

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[4] If you have little experience with these skills, you might want to begin by reading both *Public Speaking and Presentations for Dummies* by Malcolm Kushner and Rob Yeung, and *Presentations for Dummies* by Malcolm Kushner. The famous author Dale Carnegie also wrote several excellent books on public speaking. I also recommend the books by Robert J. Ringer for confidence building.

Stand well away from your computer and other furniture, and face your audience at all times. If you cannot do this confidently, you are not ready.

The following are three voluntary assignments to help you learn what a good oral presentation looks, sounds, and feels like.

A.

In my view, the best oral presentations *qua* oral presentation in recent times is Al Gore's movie, *An Inconvenient Truth*.[5] I would give it a grade of A+. Your assignment for this module is to watch and study that movie. You may or may not agree with Gore's message about the environment—that is beside the point here. Watch the movie solely as *oral presentation art*. Study Gore's presentational style. Watch how he controls himself, his message, his media and technology, and his audience. You will note that it is a movie about what he calls his "slide show" (燈片演講). In other words, the "slide show" is incorporated into this movie, but the movie is more than just the "slide show." You actually get to see a small portion of the "slide show" itself when Gore is presenting it in Beijing. Can you compare the "slide show" and the movie? What are the differences? Which one do you think is better? Why?

Be sure to watch the final credits of the movie and notice how new information is interwoven into the names and titles of those who made the movie. Then, be sure also to watch the Special Feature entitled, "An Update with Former Vice-President Al Gore." What does this teach you about your own research project? Think of it as

[5] Al Gore, *An Inconvenient Truth* (Paramount/Paramount Classics, 2006); www.climatecrisis.net. The Law Library AV copy is available at Call No. KZ363.78374 I37 DVD.

an oral defense with revisions.

In the “slide show,” the movie, and the Update, Gore makes many statements and claims about scientific research. He gives much information as his “evidence” of global warming and its effects. Where are his footnotes? How can you adjudicate the veracity of his presentation?

B.

Another very different, oral presentation is entitled, “Arithmetic, Population, and Energy,” by Professor Albert A. Bartlett, and you can watch it in eight parts on Youtube at this Web address: <www.youtube.com/watch?v=F-QA2rkpBSY>. I would grade it a B- or a C+. It deals with global over-population, a subject related to Gore’s presentation. Like Gore’s presentation, it deals with some detailed and complicated topics for an audience of non-specialists, i.e., an audience that is (a) intelligent but (b) uninformed about the Professor’s own academic specialty. But again, if you watch this presentation *qua* presentation, you will see that Dr. Bartlett’s presentational style is very different from Gore’s. Do you think the differences have anything to do with the speaker’s audience?

C.

Go to YOUTUBE and search for “Bad Oral Presentations.” You will lots of examples (some of them very, very funny).

Do a GOOGLE search for "oral presentation checklist" and you will find any number of useful checklists that will help you. Then –

Try to imagine yourself as a member of your own audience.

Try to anticipate their questions and doubts about your presentation. Be ready for all challenges.

Try to answer those questions and doubts IN ADVANCE during the presentation itself. This will satisfy your audience that you truly know what you are talking about.

The more you can eliminate or reduce the Q&A challenges beforehand, the better. Remember – you don't have time to think through your answers in the middle of your presentation. You should already have rehearsed them well beforehand.

Remember that the Q&A is extemporaneous and impromptu (即興的,即席的). It you have memorized your entire presentation by rote (死記硬背地學習), and presented it by reading, you will do poorly in the Q&A. The oral presentation is designed to test your ability to think on your feet (思考和決斷均敏捷).

The Essential Characteristics of a Good Oral Presentation

Let us make a tentative list of some of the essential characteristics of a good oral presentation and a good oral presenter, based on *An Inconvenient Truth* and "Arithmetic, Population, and Energy," to which you will add as you watch the videos. These are characteristics to which you aspire as a good oral presenter. What are the key differences? How do you compare them? Do you think one is better than the

other?

BODY

Properly dressed—not too formal or informal with respect to audience

Properly groomed and clean

Poise, Bearing, Posture

BODY LANGUAGE

Eye contact with individual audience members

Completely relaxed – not nervous – but in control

Smiling, happy, confident

Correct posture in relation to furniture—stage, dais, podium, stand

No nervous tics or disgusting gestures or actions[6]

LANGUAGE/SPEECH

Trained presentational speaking voice and countenance

Clear enunciation (口齒 / 清晰地发音)

Simplify, simplify, simplify

Speaking slowly, especially if English is your second language

Absolutely fluent in your language and your subject

Practice Rehearse

Practice Rehearse

Practice Rehearse[7]

[6] Ian Whitelaw, *Habitus Disgustica: The Encyclopedia of Annoying, Rude, and Unpleasant Behavior* (New York: Penguin/Plume Books, 2006), is a concise paperback guide to avoiding these problems.

VOICE CULTURE

Personal, conversational, trustworthy—the voice of truth

Use of humour

Comforting

Calm

Quiet

Low

Authoritative & knowledgeable

No histrionics or demonstrative, strident, frantic antics

SPECTACLE (VISUALS) & TECHNOLOGY

Study the graphics on the cover of the *An Inconvenient Truth* DVD[8]

Study the opening credits and pictures of "Arithmetic, Population, and Energy"

PPT has very few words or text, mostly visuals

Visuals are simple and comprehensible at a glance

Facts and story speak for themselves—the data are clear[9]

Two screens (computer and projection) – both are behind Gore

Many different kinds (graphs, charts, cartoons, still photos, movies, PDFs,

---

[7] You might want to practice using the virtual English online resources of the HKU English Centre at <http://ec.hku.hk/vec/film/category.asp?crit=Pronunciation&start=1>.

[8] You can see it at <www.climatecrisis.net/an-inconvenient-truth.php>.

[9] Please note that the word data is the plural of the Latin word *datum*, and hence it takes a plural verb as in this sentence. Most people make the mistake of using a singular verb.

animations[10]) because different media appeal to different people

The presenter himself, his persona (人格面貌), is part of the visuals – he merges with them

Correct use of technology (microphone, pointer, remote control)

DRAMA/DRAMATIZATION

Acting – presenter assumes a proper character or persona

Conflict is revealed because the presenter has a clear thesis or stance

Storytelling

Place yourself in the presentation; see yourself in the midst of your subject

Entertaining

Key points are repeatedly demonstrated, exemplified, and dramatized

AUDIENCE

Intelligent but uninformed

Special terms of art (行話、專門名詞) are clearly defined and frequently repeated

Simplify, simplify, simplify

No reading of notes or of text on the screen – constant eye-to-eye contact

"I see you, you see me."

Humor

Subject, purpose, and thesis are clearly repeated again and again and again

Theoretical and abstract constantly compared to practical and concrete

Oral footnotes

[10] The animations must grow out of and be part of the subject itself. They are not the moving gimmicks of PowerPoint with sound effects.

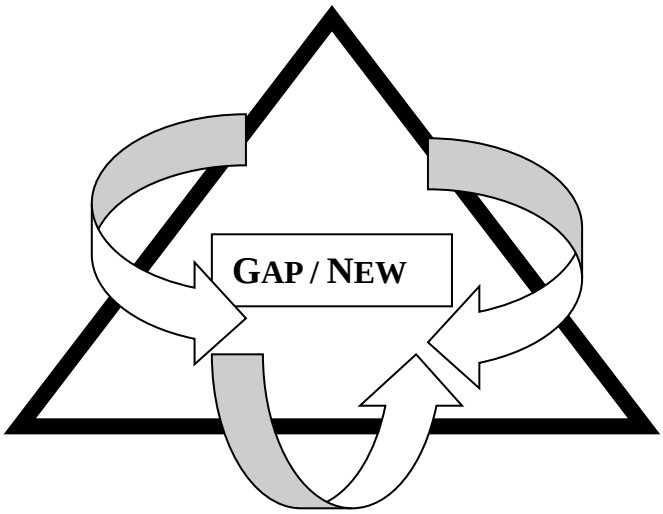
Constantly asking, “How can I illustrate this for my audience?”

Be prepared for questions by anticipating what the questions will be.

CONTENT

Your oral presentation has crystal-clear statements and presentations of all of these points:

THESIS



PURPOSE **SUBJECT**

They are stated at the very first of the presentation in three succinct sentences, as well as explained and elaborated at several other points throughout, and in the summary—so that your audience cannot miss or mistake them.

Your subject is properly “funneled.”

Your research questions, methodology, and analytical framework are all stated simply

and clearly.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

NOTES FOR VIEWING *THE WEST WING (白宮群英)* EPISODE ENTITLED "THE SHORT LIST" (短名單)

This is a ***voluntary*** exercise in "thinking like a lawyer" and in understanding the implications of legal research and publishing. It continues, in dramatic form, the themes and ideas we have already developed in our previous class sessions.

Watch an episode of the US television programme, *The West Wing*, which is about the US President and the White House staff who work for him (the Executive branch of government). The West Wing is that part of the White House where the President's support staff have their offices. You will also see the US Supreme Court Building in the early part of the story. The program is mostly serious, but each episode also contains a lot of humour as you will see. The "short list" is a final list of a few candidates after some names from an earlier, longer list have been eliminated.

The date of the episode is 2000. It contains several on-going stories, but for our purposes, this episode is about two primary stories that are intertwined: (a) the President's appointment of a nominee to be a Justice on the US Supreme Court to fill the vacancy left by a retiring justice, and (b) mandatory testing of White House personnel for illegal drugs. Both stories involve the issue of PRIVACY (隱私權). At first, the two stories seem to be separate, but then they converge toward the end of the episode in an interesting way. Both stories involve important issues relating to legal research.

Supreme Court Nominations

According to the US Constitution, the President (the Executive) nominates persons to the US Supreme Court (the Judiciary), but the nominees are subject to confirmation by the US Senate (the Legislative branch). Nomination and confirmation is a two-step process involving two branches of government. This relationship comes from Article II, Section 2, paragraph 2 of the United States Constitution, which states (emphasis added):

> "The President shall have Power, by and with the Advice and Consent of the Senate, [to[appoint Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court.....[1]

These two functions are part of the Constitution's "separation of powers" between the President (Executive) and the Congress (Legislative) branches of government. The confirmation process in the Senate, which consists of close scrutiny and public hearings, can be very difficult, and not all nominees pass it. Normally, nominees are selected from the best legal minds who are graduates of the best law schools, and who have excellent academic and professional credentials (including scholarship and publication). The White House vets each candidate carefully to ensure that there are no hidden problems in their past—no "skeletons in the closet." If the Senate rejects a nominee, this can seriously weaken the Presidency.

Privacy

Also part of the "separation of powers" is the subpoena power of Congress, which it uses to compel the testimony of government officials and others in public hearings. You will see the threat of the subpoena power with regard to the issue of illegal drugs and privacy. If a subpoena is issued and the subpoenaed person disobeys it, that person might be sent to prison. Hence, the subpoena can seriously invade a person's privacy.

[1] Further information about the Constitution's "advice and consent" clause may be read here: <http://en.wikipedia.org/wiki/Advice_and_consent>. You might also be interested in reading Allen Drury's 1959 novel, *Advise and Consent*, and the movie that was made from it, on this process.

The issue of PRIVACY is a difficult one in US Constitutional law because the word "privacy" does not appear in the text of the Constitution itself. It must be inferred from several other parts of the text such as the First Amendment (freedom of speech and expression, Third Amendment (the people cannot be forced to quarter military personnel), Fourth Amendment (prohibition of illegal and warrantless searches and seizures), Fifth Amendment (right against self-incrimination), and Ninth and Tenth Amendments (reservation of additional unspecified rights) of the Constitution's Bill of Rights.

The US Supreme Court inferred and created a "right of privacy" in the famous case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Court famously held that the "right to privacy" is found within the "penumbra" (半影 / 半陰影) of other enumerated rights. As the story discusses, privacy involves the Internet, mobile phones, a person's sexuality, and many other issues.

Not all Constitutional scholars agree with this. They argue that since the "right to privacy" is not specifically enumerated in the list of rights contained in the text of the Constitution, it does not exist, and could only exist by amending the Constitution to include it. This argument is similar to the common-law maxim, *Inclusio unius est exclusio alterius*. These critics say that it is not good constitutional interpretation for the Court to find "new" rights in the "penumbras" of other rights, and they criticize the Court for exercising the powers of the Congress and the states. The call this "judicial activism" and believe that judges have no power to engage in such activity. This is the argument made by Harrison in the *West Wing* story.

On the other hand, some scholars argue that many human rights are based on "natural law" and are valid rights even if they are not specifically enumerated in the law. Privacy is one example. A woman's "right" to an abortion is another. Such a right is not enumerated in the text of the Constitution.[2] It was, however, created by the Supreme Court in the (in)famous case of *Roe v. Wade*, 410 U.S. 113 (1973). Again,

[2] If you need help finding a copy of the US Constitution translated in your language, please let me know, and I will help you.

critics have called his a prime example of judicial activism. In the *West Wing* story, Judge Mendoza argues that a drug search ordered by the President of White House staff would constitute an illegal search and thus an invasion of privacy.

This is often the central contest whenever a President nominates a new member of the Supreme Court: Is the nominee someone who believes in construing the text (words) of the Constitution strictly (Harrison), or someone who believes it should be construed liberally to meet modern needs (Mendoza)?

What do you think? What would you do if you were appointed as a judge to the Court? Specifically, what would be your position on privacy?

Assignments

a.

As you prepare to view this episode, you will find much detail about the story online in the official West Wing Episode Guide at this Web address: <www.westwingepguide.com/S1/Episodes/9_TSL.html>. Pay special attention to the story summaries at the top of the page, and to the "Information Links" at the bottom of the page for detailed information and key words.[3] Also, you might want to familiarize yourself with the names and titles of these main characters: The President, Leo, Josh, Toby, Sam, CJ, Mandy, and Danny. In addition to this, there are also many available Chinese translations of the US Constitution. Here is one: <http://constitutioncenter.org/media/files/SCH-Constitution.pdf>. You should study the relevant portions of the Constitution (as mentioned above) before viewing the episode.

b.

[3] If you wish further viewing, see the *West Wing* episode entitled "Celestial Navigation" on the same page. It is a sequel to "The Short List."

Find the *Harvard Law Review* in the Law Library at Call No. K1 H33 L41 R4. Specifically, go to volumes 88-89 for the years 1975-76, which were published 25 years before 2000 (this is the timeline of the *West Wing* episode). Look in the Table of Contents for the section on NOTES. You will see that the Notes are unsigned articles, meaning that the name of the author is not given. Notes are written by law students under the supervision of the law faculty. Otherwise, they are the same length and quality as the signed articles—carefully researched, written, and argued. Do the following:

Write a properly formatted footnote, using the *Blue Book* format, telling which Note you looked at. You don't need to read the Note itself; just report the information about it in the footnote. Those class members who are studying US law can help the others with *Blue Book* style.

Answer this question: Why do you think the Notes are unsigned?

Hand this information to me, with your name and number on it, when you come to class.

Discussion Questions for Class

What research problems relevant to you and your present research does this episode present? How would you solve them?

What does this story tell you about writing and publishing when you are "young and stupid and trying to make some noise" (the President's words)?

Which of the two nominees, Harrison or Mendoza, would you choose? Why?

++

Additional Voluntary Research

If you wish to pursue other areas in US Constitutional law, you might be interested in reading the book *Gideon's Trumpet* by Anthony Lewis. A Chinese translation of this book is available in the library as *基甸的號角*. This story was made into a movie, and the main library has a videorecording of it. It is the true story of the US Supreme Court case of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to professional legal counsel in criminal defense).

You might also want to view the videorecording (also in the main library) of the movie *Separate But Equal*, which is the true story of the US Supreme Court case of *Brown v. Board of Education*, 347 U.S. 483 (1954) (equal right to education regardless of race). This one has a great deal of information about the central importance of advanced legal research.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

CORAL REEFS, PLAY IN THE JOINTS, DEEP WELLS, REASONABLE MINDS, AND INTERPRETERS

Five (5) principle ideas can be said to describe and characterize the common law, the legal system, and the constitutional legal process. They are (a) the image of the law gradually building up as a "coral reef [珊瑚暗礁]," (b) the need for "play in the joints [關節鬆動]" of the system and of legal analysis, (c) the "deepe well [深井]" of the law itself, and (d) the notion that "reasonable minds and reasonable people can disagree," and (e) the power of the law's interpreters. Each of these is an idea that will help you understand the reasons behind the rules of the legal system.

Coral Reef

The common law grows like a "coral reef," moves like a "glacier," and is, of course, judge-made law[1]?

As a US federal court stated:

[1] *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1061), aff'd , *Chapman v. Brown*, 304 F.2d 149 (9th Cir. 1962). See the discussion of these cases and these images in Robert J. Morris, "Products Liability in Hawaii" (1979) 14(4) *Hawaii Bar Journal* 127, esp. n. 73 and accompanying text.

"The position of an English speaking judge, especially, presents an apparent contradiction that has always exercised those who are speculatively inclined. The pretension of such a judge is, or at least it has been, that he declares pre-existing law, of which he is only the mouthpiece; his judgment is the conclusion of a syllogism in which the major is to be found among fixed and ascertainable rules. Conceivably a machine of intricate enough complexity might deliver such a judgment automatically were it only to be fed with the proper findings of fact. *Yet the whole structure of the common law is an obvious denial of this theory; it stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.'*

These familiar things would include the common law's principles of "natural justice"[2] and its process of *stare decisis* or precedent. And they would include the notion that "Justice must satisfy the appearance of justice."[3] This process has been aptly compared to the growth and stability of a coral reef. The metaphor was coined by Judge Learned Hand in his review of Benjamin Cardozo's *The Nature of the Judicial Process* in the 1922 *Harvard Law Review*.[4] He wrote that the common law

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[2] See generally, *Halsbury's Laws of Hong Kong* "Courts", pp. 109-10 [125.036, note 1], citing *Ford v. China Light and Power Co, Ltd* [1997] 2 HKC 14.

[3] *Levine v. United States*, 362 US 610 (1960), citing *Offutt v. United States*, 348 US 11, 14 (1954).

[4] Learned Hand, Book Review (reviewing Benjamin Cardozo's *The Nature of the Judicial Process*) (1922) 35(4*) Harvard Law Review* 479.

is not a "machine" that operates automatically but that its whole structure "stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work."

Play in the Joints

"The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints."[5]

Deep Well

Sir Edward Coke wrote that "the knowledge of the law is like a deepe [deep] well, out of which each man draweth [draws] according to the strength of his understanding."[6]

Reasonable Minds

"Weighing and balancing these factors is a process which may well lead different people to different conclusions, as one may readily see from consideration of the judgments of the courts below and the opinions given by the several members of the Appellate Committee of your Lordship's House [in this case]."[7]

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[5] *Bain Peanut Co. of Texas v. Pinson*, 282 US 499, 501 (1931) (Holmes, J.).

[6] Coke, *Institutes of the Laws of England* (1853); quoted in Catherine Drinker Bowen, *The Lion and the Throne* (Boston: Little, Brown, 1956), p. 63.

[7] *Campbell v. MGN Ltd*. [2004] 2 AC 462, 504 (Lord Carswell) at para. 168.

Interpreters

Finally, there is Bishop Hoadly's famous truism, “Whoever hath [has] an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.”[8]

[8] Frequently cited in histories of the common law as a statement made in a “sermon preached before the King in 1717.”

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

FEED A COLD; STARVE A FEVER

When I was a kid and felt sick, my mother told me, “Feed a cold, but starve a fever.” It was a bit of folk wisdom that she learned from her mother, my grandmother, who told me the same thing. It meant that if you have a cold, you should eat a lot of food in order to give your body strength. However, if you have a fever, you should fast (stop eating) because eating might make the fever worse. I accepted this saying without question because, like all children, I believed everything my mother told me. It seemed like a good “rule of thumb.” In fact, I found that whenever I had a fever, I didn’t feel like eating anyway. All cultures have such bits of wisdom as part of their folk traditions, law, politics, and economics. We call them truisms, because they usually guide us well enough through many of the simple routines of life.

All children have what I call an **OBEDIENT MIND**. If someone who has authority, like a parent or a teacher, tells them something, they simply accept it because it is impossible for them to believe that such a person would lie or would be misinformed. Furthermore, they cannot imagine an alternative. Many people retain this obedient mind throughout their lives.

However, some people begin to understand that having an obedient mind is not the best way to think or to understand the world. They begin to question the statements made by authority and the wisdom of culture. They begin to develop an **ANALYTICAL MIND**. This is the kind of mind that all RPG students must develop. Finding and asking the questions that lie within the statements of authority, even in simple statements such as, “Feed a cold; starve a fever,” is the beginning of analysis.

In sum, the obedient brain *accepts*, but the analytical brain *questions*. When you hear the rule, “Feed a cold, but starve a fever,” what questions come to your mind? If you are to be analytical, what are the questions you must ask?

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

SOME GOOD, PITHY LEGAL, LITERARY, & OTHER QUOTATIONS (SUITABLE FOR EPIGRAMMING)

"是何言與！是何言與！"

—孔子 (Confucius)[1]

> "[T]he difference between the almost right word and the right word is really a large matter—'tis the difference between the lightning-bug and the lightning."
>
> —Mark Twain[2]

Epigrams and quotations are wonderful. They can often state your thesis, purpose, subject—all in a single sentence that will immediately "hook" your reader's attention and whet his/her appetite to read your article. Many authors put an epigram (警句, 雋語) right after the title of their article or chapter (like the two at the top of this page) to signal the main theme that will follow. Here are twenty sets of them for you to ponder and enjoy at your leisure—and use in your own writing if you wish. This is my personal list, collected over many years of research, reading, and law practice. I hope some of them may be helpful and may pique your interest to study more—and maybe you can use one of them as an epigram in your own writing one day!

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[1] 孝經, 諫諍章第十五 (*Canon of Filial Piety*, Chapter 15, "Remonstrance"): "What words are these!? What words are these!?"

[2] Mark Twain [Samuel Clemens], *Selected Shorter Writings of Mark Twain*. Walter Blair (ed). (Boston: Houghton Mifflin, 1962), p. 226. Lightning = 閃電. Lightning bug = 螢火蟲.

It is therefore useful to search books and compilations of quotations from, by, and about the law. They are helpful in making major points in the text of your writing, and they lend credibility and authority to your arguments. Books of law quotations are usually organized and indexed by subject matter. You will find some in our Law Library in the vicinity of Call No. R K125 N8 and thereabouts.

It is a good idea to compile your own list of quotations. The attached compilation may be helpful in getting you started making your own index of quotations. Remember that whenever you add a quotation to your list, you must give the full footnote citation so that you can always refer to the primary source.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

REJECTION NOTICE

Your document/assignment is not acceptable for the reasons stated in the handwritten notes. Please correct the problems and re-submit the work at the start of our next class session.

When you re-submit your work at that time, please include the following two things:

—Your detailed list of all the changes you have made; AND

—This original document with my handwritten notes along with the new document so that I can easily compare the two and see the changes you have made.

You will receive no credit for this assignment until it fully complies with all of the applicable rules, regulations, and instructions.

ADVANCED (LEGAL) RESEARCH METHODOLOGY

(LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

AUTHOR-PUBLISHER AGREEMENT NOTES

The author's name and address should be shown as follows:

Robert J. Morris
88 Po Hong Road, Serenity Place
Block 2, 32/F, Flat F
Tseung Kwan O (Po Lam), HKSAR

The book title should be as follows:

The "New Contribution to Knowledge"—A Guide for Research Postgraduate Students of Law

The following objections are made to each of the clauses and sections designated.

2. Author's Warranty and Indemnity

Paragraph one—I have no objection to the proposed warranty if it includes the phrase, "to the best of his knowledge" as follows: "…purporting to be facts are, to the best of his knowledge, true…." However, I do not favor giving an indemnity to anyone for any purpose, particularly when this provision is read in conjunction with paragraph *19.(a) Duration and Termination of Agreement*, which allows the Press, in its sole discretion, to determine whether I have "violated" the terms of the agreement.

Paragraph two—even if I were to consent to the indemnity, when read in conjunction with *23. Heirs and Assigns*, this would obligate my family, who are not signatories to the contract, to the covenants of the contract, in some cases forever. I will not obligate my family in perpetuity for this matter, which is mine alone.

7. Royalties

The percentages offered are miniscule when compared with those of other academic presses. Such royalties do not make this project worth my time and effort.

8. Statements and Payments

Paragraph two—the author's examination of the Press's accounts should be routine and not at cost to the author.

11. Insurance

There is no good reason why the Press should "not be in any circumstances whatsoever liable" for loss of damage to items held in its sole control and custody.

12. Copyediting

Paragraph one—if any retyping, redrawing, or extensive editing are needed, these must be identified and accomplished in the manuscript now, before submission of the final manuscript, not later at my expense and at the sole discretion of the Press. This must be the full understanding of "one complete, legible manuscript" in paragraph *9. Preparation and Delivery of the Manuscript* as of the date specified. This paragraph is contradictory. I have prepared what I consider to be a full and complete manuscript. Once it is accepted, any further changes great or small will be at the instance of the copyeditor, not me. Yet if the copyeditor were to do this, it would run afoul of this same paragraph—if the Press "is not free in the process of copyediting to make substantive changes," once a "complete manuscript" has been accepted, how then could the situation possibly arise that the Press could "find it necessary to retype, extensively edit, or redraw" anything? This is the very purpose of the acquisition process and the "Final Manuscript Submission Checklist," is it not? I cannot see the sense here. Again, I will not agree to "reimburse the Press" or "pay for the costs" of anything.

16. Revised Editions

If I fail to provide "any material the Press [in its sole discretion] deem[s] necessary," then the Press can, in its sole discretion, take my book away from me and "engage a third party to do so." I will not yield such unilateral control to the Press. I can imagine a number of situations where "any material" may be impossible or unreasonable to provide. The clause should at least read, "The Author agrees, to the

best of his ability and in good faith, to correct or revise…."

19. Duration and Termination of Agreement

Paragraph (a), I repeat that I will not agree to "reimburse the Press' for anything, and do not agree to give the Press such powers to determine liability in its sole discretion

Paragraph (c), same problem, the Press may not make these key determinations in its sole discretion

Paragraph (d), same problem

23. Heirs and Assigns

In addition to the note on this provision stated above, the phrase "except as otherwise provided by the Hong Kong Copyright Ordinance or other Hong Kong laws" is too vague to know exactly what exceptions are included or what "laws" are referred to.

In sum, I find the contract to be one-sided and almost wholly in favor of the Press. The author's duties are absolute, while the Press is allowed "reasonable" latitude (p. 2). All determinations of breach and other matters are at the Press's sole discretion. I have tried in several instances to suggest language to redress this imbalance, but the fact is that it is so pervasive throughout the entire document that I finally gave up trying. Other difficulties may be present in the document, but these I have discussed are the most readily apparent.

* * * *

I have your latest expanded manuscript. Now that it has settled for a while, would you like to go through it again and see if you have any further amendments. We will then aim at transmitting it to production in the summer.

So are as I am concerned, it is now complete. However, see my notes below.

You may want to focus on…trying to cut down some of the footnotes, which I think are excessive in places.

This suggestion is problematic. In legal writing, extensive and detailed citation is *de rigeur*. Lawyers and legal scholars expect it. If you look at any of the legal sources cited in my footnotes, you will see this to be the case. The law is authority, and in legal writing whenever you make a statement, the reader's first question is, What is your authority for saying that? If you do not provide authority, your statement is questionable and will not "pass without objection in the trade." I realize this may be different from the expectations and practices in other disciplines. Nevertheless, the feel the book should model what is expected of the writing of the RPG students who read it. Also, I think detailed footnoting is required in order to satisfy the warranties as to "literary or proprietary right, copyright, or any right of privacy," which I assume also involves plagiarism, required in *2. Author's Warranty and Indemnity*. That said, I am willing to look at specific places where textual footnotes might be reduced.

Now that you have doubled the length, at the suggestion of readers and myself, there is no need to add more unless it is essential. In fact, you might consider compression of some of the more involved passages, though without losing the quirkiness and personal touch (qualities that impressed the Press Committee as well as the readers.

If the "involved passages" are turgid and difficult to understand, I am happy to try to simplify and clarify them. In order to do this, I will need to know specifically which passages are referred to (page numbers and paragraphs).

The final manuscript will, of course, go through detailed copy-editing before production, but the more that can be done by you earlier on the quicker this process will be.

Please see my notes under *12. Copyediting* above.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

COURSE-MATERIALS BINDERS EXAMINATION

April 12, 2010

_____

Name & Student Number

In the list below, each class member is assigned at random four (4) items in the Course Materials. The first item is your Index. The other three are different individual documents distributed to the entire class at different points throughout the semester.

In your binder place a yellow sticky Post-It note at the top of each of the four items assigned to you (Index + three others).

In your Index place a large, dark check mark (√) or asterisk (*) next to the titles of each of the other three items assigned to you in this list.

Then present your open binder together with this list for inspection and grading.

1. AU MAN HO

Index
Chopin's Pedal
Plagiarism Exercise I
Dictionary Work

2. BAKA ANNA EIRINI

Index

Dr. Sun’s First Lecture

Empirical: McConville’s Lecture Notes

Chicken & Egg

3. CAO LEI ELAINE

Index

Nibley’s Philosophy

Staking Your Claim

Law Library Walking Tour

4. BUI BOC SON

Index

Following Instructions

Phillips & Pugh

Archive Materials

5. CHAN SAU TO POLLY

<Audit>

6. DU RONG

Index

Literature Review (Hart)

Empirical: Professor Bloom

Attending Conferences

7. HUANG YUE ANDREW

Index

RJM Pre-Admission Research Proposal

Liu Nanping Lecture Notes

About This Book

8. JIN JING

Index

Course Prospectus

Bacon's Triangle

Common English Problems

9. LAM CHI WAI MICHAEL

Index

Editing & Proofreading

Cooley & Lewkowicz

Analysis + IRAC

10. LIANG JIEYING VIVIAN

Index

US Constitution & Declaration of Independence

Empirical Research: A Primer

Total War Part I

11. LIU LIYU ANDY

Index

Sunzi Warfare for RPG Students

Course Book Part A

Llewellyn's Cure

12. LU ZHENZHEN JESSICA

Index

Murphy's Law

Footnoting Exercise for Chinese Students

Law Librarian's PPT Pesentation

13. LUO YUE ELEANOR

Index

Adjudicating Research Materials

Hawaii Detective Story #1

Critical Legal Thinking & Adjudicating

14. MAK KWAN LUN IDA

Index

Empirical Research Ethics

Salter & Mason

Liberace’s Concert

15. PAN XIAO

Index

RJM Confirmation Presentation Slides & Notes

Hemingway’s Feast

Course Book Part A

16. SENARATNE M L K C KUMAR

Index

United States Law

Curiosity & Inquisitiveness

Serendipity

17. TIAN JING RITA

Index

Intellectual & Academic Rigour

Course Prospectus

Bacon’s Triangle

18. TSUI WAI HANG DANNY

Index

Phillips & Pugh

Dictionary Work

Course Prospectus

19. XIONG HAO

Index

Course Book Part A

Archival Research

Chopin’s Pedal

20. YU LIMENG JOY

Index

Llewellyn’s Cure

Empirical Research: Professor Bloom

Course Prospectus

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

HONG KONG UNIVERSITY PRESS
FINAL MANUSCRIPT SUBMISSION CHECKLIST

(Use only for final manuscripts under contract)

Please refer to the Manuscript Preparation Guidelines for more specific instructions. If you have any questions about submitting your final manuscript, please ask your acquisitions editor.

Please complete and return this form (1 printout and 1 digital copy) with your final manuscript.

Title Information

Author/Editor name(s) *as desired on the title page and cover:** Robert J. Morris, JD, PhD

Title of work: *The "New Contribution to Knowledge"*

Subtitle of work: *A Guide for Research Postgraduate Students of Law*

Edition: First

Additional contributor name(s) to byline
as desired on the title page: (e.g. Foreword by XXX) None

*If your work has multiple authors or editors, make sure the order is exactly the way you want it to appear on the cover and title page.

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Schedule for extended absences or travel in the next 6 months *if any:* I will be in Hong Kong but hardly at my HKU office, so contact at home phone and postal address will be more certain

General Text Preparation

Please check all that apply and fill in additional information where required.

Digital files created using
__x_ PC ____ Mac
____ Other (specify): _____

Word-processing software used
__x__ Microsoft Word
_____ Other (specify): _____

Desired note placement
__x__ back of book (best for most books)
_____ end of chapter
_____ foot of page (to be determined by HKU Press)
_____ no notes

Index
_____ Author/editor will work with a professional indexer (at their expense)
__x__ Author/editor will prepare an index
_____ No index

Manuscript word count (including frontmatter, text, notes, glossary, bibliography, appendices and captions) 52,000 words

Languages other than English? [*if Chinese is included, also fill in the 'Chinese characters' section below*]
__x__Yes (please list) Chinese (both Traditional AND Simplified), Hawaiian, Latin
_____ No

Preferred style for spelling and punctuation
_____ British
__x__ American
__x__ Other (specify): Text written by me should be American English; however, *quoted* text, if British or other non-American English, must be maintained in the original form as quoted

Chinese characters, *if any*
__x__ Traditional AND
__x__ Simplified (Both forms must be preserved as shown in the manuscript). Where I have supplied the Chinese, I have used Traditional form per Hong Kong usage. However, where I have quoted PRC sources, I have maintained their Simplified usage.

Special font used (e.g. IPA symbols; Hanyu pinyin with diacritics)
__x__ Yes (please list) Diacritic marks for Hawaiian text must be preserved, i.e., nā ʻike apau
_____ No

Items submitted

Please check all that apply. Enter N/A if not applicable.

_N/A_ 1 printout of this "Final Manuscript Submission Checklist"

_N/A_ 1 single-sided, double-spaced, legible printed copy of the complete manuscript; identical to files, with all pages numbered; free of tracked changes; unbound

__x_ 1 digital copy; labelled with the date, title of work, author name; the entire file; file name describing the file's contents (e.g. captions, preface, etc.); all double-spaced, with all pages numbered; free of tracked changes

There is only one file. There are no individual chapters. The whole book is only one "chapter" divided into very short sections.

__x_ Table of contents (avoid subheads) within text

_N/A_ List of contributors; **edited collections must include; be sure that author names match in the table of contents and on the first page of the book chapter**

__x__ List of illustrations (figures), if you want one to appear in the final book (see Table of Contents)

__x__ List of appendices, if you want one to appear in the final book (see Table of Contents)

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Contents Checklist

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The following elements will appear in the final book and are included in the printout and digital files:

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__x_ title page
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__x_ foreword
__x_ preface
__x_ acknowledgements
__x_ table of contents
__x_ list of illustrations

__x_ list of figures
__x_ The Ten Rules

_____

Main text

__x_ part/section titles
__x_ introduction

Backmatter

__x_ appendices
__x_ glossary
__x_ reference or bibliography
__x_ index (to come)

Illustrations

Please check all that apply and indicate number.

NB: All digital photographs and scanned materials must be supplied at a minimum resolution of 300 dpi. Digital files must be no smaller than 1 inch (25.4mm) on the shortest side. For legibility, maps and charts that contain text should be supplied at a minimum resolution of 600 dpi. Charts may also be supplied in Microsoft Excel or PowerPoint. Accepted file extensions for illustrations are: jpg, tif, pdf, eps, psd, xls, or ppt.

____ maps # ____ ____ charts # ____ ____ drawings #____
____ photos # ____ ____ graphs # ____
____ colour illustrations # ____ (quote corresponding figure number) _____
____ illustrations to be set in plate section # ____ (quote corresponding figure number) _____
OR
__x_ illustrations to be scattered throughout the text

Tables
_N/A_ tables # ____

Jacket/Cover Concept

If you have ideas about the design of your work, please discuss them with your acquisitions editor before submitting the final manuscript. Your editor will discuss your suggestions with marketing and production before asking you to obtain original art and permission. Please do not request permission or submit payment for cover images without prior agreement from your editor and the production department.

Although we may be able to accommodate your suggestions, HKU Press reserves the right to make the final decision on cover design and content based on marketing and design factors and budgetary constraints.

For jacket/cover design I prefer (please check one)

___x_ Image from interior illustrations (please give the corresponding figure number): I suggest that the cover somehow incorporate the triangle that is called “Figure 3” because it has the central ideas of the title, especially “new.” The cover might also include an image suggesting “students of Law” such as a courtroom, justice scales, law library, etc. I am fond of the cover of HKU Press’s Cooley and Lewkowicz book as an example. These are just suggestions—I have no real artistic, design, or marketing talent so leave it up to the Press.

_____ New image (please supply a print and a digital image)

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Author Photo

The author photo is optional. If desired, please supply a print or a digital image, along with credit line and permission to reprint the photograph.

Photo credit: (please list) I attach four (4) photos as possibilities. Photos #1, #2, and #3 are my own. Photo #4 is credited to Mr. Raymond S. C. Lam of the HKU Department of Law, who has given me permission to use it. It is the official photo used on my Department of Law home page. I will supply Mr. Lam's permission if the Press decides to use this photo.

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ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

Hong Kong University Press
Marketing Information Form

May 8, 2011

Please complete and return this form to Marketing Department, Hong Kong University Press. If you have any questions, please feel free to contact our Marketing Department at email hkupress@hku.hk or fax (852) 2875 0734.

Contact Information

Title of Book

The "New Contribution to Knowledge"—A Guide for Research Postgraduate Students of Law

(Please suggest a Chinese book title if you can, which we will include in our catalogue.)

The following are suggestions from many readers of the text. Recombinations and permutations of any of them might be useful in arriving at a final title.

知識新貢獻：法學研究生手冊
知識新貢獻：法學研究生導讀
開拓新知：法學研究生手冊
知识的创新：法学研究生指南
创造新的知识：法律研究生指南
增益之新知：法學研究生手冊
新知之增益：法學研究生手冊
增进之新知：法律學研究生指导手冊
新知之增进：法律研究生指导手冊
增益之新知：法學研究生指导手冊
新知之增益：法學研究生指导手冊
知識新貢獻：法律學研究手冊
知識新貢獻：法學研究手冊
法律知識新貢獻：研究生應用手冊
知識新貢獻：法系研究生手冊
贡献新知：法学研究指南
知識新領域：法學研究生手冊

知識新領域 ： 法學研究生指南
識故知新 ： 研究法學新知
明故知新 ： 研究法學新知
溫故知新 ： 研究法學新知
寫給法學研究生 *或* 給法學研究生的指引
开启知识新贡献之旅——法学研究生学位论文写作导览
如何贡献新知识——法学研究生实战研究技巧
欲臻新知境——写给法学研究生
知识新贡献——法学研究生论文写作宝典
知識新猷 ： 法學研究人員手冊
知識新貢獻:法學研究手冊

NOTE: Because the English title refers to students "of law" rather than "in law" or "law students," 法律 may be preferable to 法學 in order to indicate this subtle but important difference.

Author/Editor Name

Robert J. Morris 司徒毅 JD, PhD

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Tseung Kwan O, NT Hong Kong

May we release your contact information to interested parties, eg. reviewers, media interview?
__**X**_ Yes ___ No ___ Email only

Do you have a homepage? If so, what is the URL? Would you like us to include links to your homepage

from our web/online catalog? Or would you provide a link on your home page so that people can go from your page to order the book on our site?

www.robertjmorris.net

Both reciprocal links should be created. I will feature it prominently on my Web page—with appropriate logo, key words, and links—which is picked up by Google, Yahoo, Bing, and other major search engines at present. I also have mutual linkage arrangements that will be useful.

Description of the Manuscript

1. Please give a summary to describe your book in 50 words or less.

It is a unique guidebook for all RPG students "of law" in any discipline who are in any way involved in research and writing about the law as part of their research project. It is designed to be an easy-to-use practical reference book that describes the problems and challenges of making a "new contribution to knowledge" in the field of law and takes a global perspective in showing how to address and solve those problems.

2. Please provide in no more than 250 words to describe what is most important about the book, emphasizing its contribution to its field, main areas covered by the book, and a paragraph that defines the readership of the book. This important description will help us in writing jacket copy and all promotional material.

As law schools and their students integrate with the global realm of both law and non-law research postgraduate (RPG) scholarship, and as RPG scholars in other disciplines, schools, and departments increasingly incorporate legal studies in their research projects, they encounter the demands, norms, and expectations of that global realm. Among these is the requirement that the RPG candidate make a "new contribution to knowledge" by identifying and filling an important "gap" in the existing scholarship. This is variously referred to as "adding value," being "innovative," and as being "original" and "novel," and this requirement applies whether the researcher works in traditional black-letter law or in one of the many other methods of legal research. While these ideas are understood, defined, and well-settled in the sciences, humanities, and social sciences, they are problematic in legal studies. This is so because what traditional law schools and lawyers call "legal research" may not be recognized as research at all by other disciplines within the university. The law school is a creature of both the university and the legal profession, and it must serve both and work with both even though those two roles may sometimes conflict. It is a fluid and constantly evolving situation. If the work of law RPG students, and of their counterparts in other disciplines, is to achieve global recognition beyond the local law school, they must cultivate full-bodied "legal scholarship" in contradistinction or addition to traditional "legal research," with distinct understandings of what counts objectively as "new," as a "contribution," and as "knowledge,"—and to whom and why they count globally. This requires them to identify their "core competence" as RPG researchers in a world where education is increasingly commodified as a business

model. Only by doing this will their research product "pass without objection in the trade." This unique book shows how to do this.

3. A paragraph which includes 2-5 sales/marketing points of the book (This is crucial to market the book to booksellers)

- **Concise, jargon-free, simple, and easy to read**
- **Written for all RPG students researching law in any discipline, subject, college, or department**
- **Useful for beginning, middle, and advanced RPG students and their teachers and supervisors**
- **Supplements and works with other manuals for RPG students in the social sciences and humanities**
- **Provides many practical examples and solutions to problems based on real-life practice**
- **Based on up-to-the-minute research on the practicalities of modern RPG research of law**
- **Fills a gap in law research where no other guidebook is available.**
- **Essential for all graduate schools and departments that administer law research worldwide**
- **Inexpensive—affordable by RPG students**
- **Useful for supervisors and administrators of RPG programs and curriculum designers**

4. Please provide a paragraph about yourself for the author's profile.

Robert J. Morris 司徒毅 holds the Master of Arts (MA) in Chinese Language & Literature and Asian Studies, as well as the Juris Doctor (JD) and the PhD in Law. He specializes in curriculum design, teaching methods and studies of the pedagogy of law at the University of Hong Kong Department of Law.

Endorsements

Please list three to five people, and their affiliations, whom we could approach for a promotional statement. They should be chosen to represent the book to the different reader groups you hope to attract to your work. Please give their names and contact details.

HKU Department of Law[1]
Professor Douglas Arner
Professor Albert Chen
Professor Felix Chan
Professor Athena Liu

Daniel Jutras, McGill University
Day, Chancellor, Hall, Rm 15

[1] **See footnote 114 of the book manuscript for my attribution to Prof. Arner.**

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Deans of all HK university graduate schools and law schools
See their respective Web pages

HKIEd Civic & Citizenship Education Program[2]

[2] **See the link to my paper for a conference by this organization on my Web page <www.robertjmorris.net> at “My Paper on Teaching Justice.”**

<www.ied.edu.hk/gradsch/News_20100930.php>

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Market

Please list the reasons that make your book of interest to the international market, especially in:

- The USA

Much important research incorporated in the book comes from the US and is grounded in the US experience. This is not exclusive, however, and this is important because the US is a rapidly evolving market for postgraduate law studies. The book is not specific to any one area. It is designed to be of universal application in the research postgraduate world. There is at present no other book addressed specifically to RPG students dealing in any way with legal studies. Because of its complicated history

both as a subject and as a discipline within the university, the law presents several unique problems to RPG students that differ from those of other disciplines. These RPG students need a guide to help them cope with the demands of a globalized postgraduate community and its standards by which their work will be measured. The globalization of education, including postgraduate education, means that standards and expectations are both universal and objective. In many ways pertinent to RPG education, the boundaries of nations and jurisdictions are softening. Hence, the following would be interested:

Military colleges and universities
American Law Society
US War College
US Judge Advocate General School
Library of Congress
Think Tanks (i.e., Rand Corporation)
Council of Graduate Schools <www.cgsnet.org>
Many other regional "associations of graduate schools" and their deans throughout the world
Amazon.com

- The UK

Same considerations. The schools and affiliations particularly noted above, plus those teachers and educators noted in the list of possible endorsements.

- The PRC (plus Taiwan, Singapore, Overseas Chinese)

This is a potentially huge market if only because of the great number of universities with RPG programmes. Peking University and Tsinghua University are key. This is also true of the University of Singapore and National Taiwan University. Taiwan has several prominent law schools that have significant RPG programs. I received the following (unsolicited) email recently from some of my PRC students in the Advanced Research course on which this book is based:

> ***Dear Dr. Morris,***
>
> ***The collegues and I discussed about your forthcoming new book yesterday. All of us think that the book is very important for the PhD student, both in HK and other countries and areas, the mainland China especially. Because now the cultivation of the PhD students is in chaos. (in my opinion). Such a good book can guide both the PhD Students and supervisors.***
>
> ***So is it possible for the book to be published in Chinese and in mainland China? You know, We are very proud to be your students and can read your book in HK. That is one of the advantages studying in HKU and it is a pity for the follow students studying in mainland. We can not be so selfish to enjoy this book and your experience and not sharing them with the students in mainland, right? We want to do something for them, to read your book, to share your experience and suggestions, and get out of the mist.***

If that is possible, all of us in HKU are willing to be volunteers of the Chinese translation work.

- Other countries

See below.

-

The *primary market* is the major university Graduate Schools and/or Graduate Departments—primarily because they administer or coordinate *all* the RPG programmes of their entire university, not just their law schools. In other words, they coordinate all RPG students "of law" and not just those "in law." They also coordinate with all their university's libraries (main, law, medical, social science, etc.) on all RPG projects. They also coordinate with their universities' administrators and Quality Assurance teams on achieving universal standards of RPG excellence. Like the HKU Graduate School, they administer some of their own courses and have their own textbooks on RPG subjects. Most of them publish their own journals, newsletters, or bulletins. *This is the key target market.* I discuss this in the book itself.

After the graduate schools, the next two important targets are the Departments of Law and the Departments of Education. This book addresses problems in RPG *legal education*, so these two disciplines are co-equally important.

After that, specific "law-and-___" programmes and organizations should be targeted, for example, Law & Psychology. For example, the American Psychology-Law Society awards a prize for books on their subject, which can be seen at <www.ap-ls.org/awards/BookAward.php?t=1>. Whether psychology or any other non-law discipline in the sciences, social sciences, humanities, etc., all "law-and-___" programs should be of interest.

The book is of interest everywhere because the problem it addresses is universal in a globalised academic world. All jurisdictions must meet the same standards in order for the work product of their RPG students to be accepted and to "pass without objection in the trade." The research indicates that these maters are not specific to any particular jurisdiction or legal system. I would imagine, therefore, that there would eventually develop a market for *translation* of the book into other languages, as, for example, has been done with one of the books I emulate—

> **Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Buckingham: Open University Press, 3rd ed, 2002).**
>
> **E. M. 菲利普斯, D. S. 普夫著 ; 黃靜, 姚一健譯, *如何獲得博士學位 : 研究生與導師手冊* (北京 : 中國農業出版社, 1996).**

I have written the book to be non-specific to any particular jurisdiction, based on the argument that today RPG standards are indeed global, not local. Therefore, it may be of special interest in places such as the

PRC where certain universal objective standards have not traditionally been met in helping them come up to such standards. In my book I list all of the jurisdictions from which my own RPG students have come (Hong Kong, the PRC, the United States, England, the Philippines, Singapore, Indonesia, Thailand, Burma, Greece, Sri Lanka, Pakistan, Vietnam, Nepal, Japan, and South Korea), and all of these would be appropriate locations to market the book.

I expect that much the same *kind* of market exists for this book as exists for Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003)—another of the books that I emulate.

CAVEAT: While this is indeed a book "for Hong Kong" just as it is a book "for" every place else in the world, it is essential that it not be seen as a "Hong Kong book," meaning a book written especially for Hong Kong or for Hong Kong students alone or especially. It must be positioned so that readers everywhere must see it as a book for them. It is targeted at all RPG students, not just PhDs.

Reviews

Please list the 10 most important periodicals, preferably some from North American and including international scholarly journals, for review of your book.

- 6 Scholarly Journals (pls. also indicate the territory source of the journals, like USA, UK, Australia, etc.)

Journal of Legal Education (US)
Chronicle of Higher Education (US)
International Journal of the Legal Profession (UK)
Hong Kong Law Journal
Peking Law Review
The Law Teacher (UK)
Tsinghua China Law Review
Journal of Graduate Education (UK)
Sydney Law Review
Taiwan Law Review
Law Library Journal www.aallnet.org/products/pub_journal.asp
International Journal of Legal Information http://scholarship.law.cornell.edu/ijli/

Please note that almost all of the worldwide sources cited in my bibliography are articles and books that deal specifically with the problems I discuss in the book. Therefore, any of them and their authors and editors that I have cited *favorably*, especially those dated since 2000, would be appropriate for possible reviews and endorsements.

- 4 Trade Journals (general media such as newspapers, popular magazines etc)

American Bar Association Journal
Association of American Law Schools
HK Bar Association
HK Law Society
Same as above

Comparable/ Competing Books

Are there other publications which are comparable or competitive with your book?

None of which I am aware. This is a first.

Award or Prize

Are there any awards or prizes for which your book may be suitable? Please list names and organisations.

Law & Society Association Book Prizes <www.lawandsociety.org/prizes.htm>.
Society for Educational Studies Book Prizes <www.soc-for-ed-studies.org.uk/grants>
Society of Authors Education Book Prizes <www.societyofauthors.org/education-book-prizes>
American Psychology-Law Society Book Award <www.ap-ls.org/awards/BookAward.php?t=1>
HKU Annual Research Output Awards & Prizes
Academic Press competition awards

PR/Media

If you have contacts in the media, please list their names, and for each give their organization, address and telephone number.

None

Advertising/Promotion

1. Please list the three most widely read periodicals in the field.

Journal of Legal Education
Legal Education Review
Times Higher Education <www.timeshighereducation.co.uk>

All worldwide university and graduate school rating/ranking services and their publications
Journal of Higher Education
Chronicle of Higher Education
Journal of Commonwealth Law and Legal Education

2. Please list the three most important academic/professional associations in the field.

American Bar Association <www.americanbar.org>
Inter-Pacific Bar Association <http://ipba.org>
European Law Faculties Association <http://elfa-afde.eu>
International Association of Law Schools <www.ialsnet.org>
All graduate schools associations with which the HKU Graduate School is affiliated
All students and programs administered by the HKU Graduate School[3]
Council of Graduate Schools www.cgsnet.org
American Association of Law Libraries <http://www.aallnet.org/>
International Association of Law Libraries <http://www.iall.org/>

3. Please provide information about any relevant conferences where you may be giving talks and where you would like to see some publicity for the book. Please provide the name of conference, dates, venue, and organizer's contact information.

I anticipate conferences at HKIEd. Also, almost every year I attend the BEL-NET / COBRA Conference on legal education in a different part of the world <www.bel-net.org>, with which I have published several papers. I also regularly participate in all conferences on education at HKU law school and Department of Education.

Textbook Adoption

If the book is appropriate for text adoption, please list the names and level of specific courses.

Every university Graduate School or Graduate Department
Every university department that researches pedagogy
Any RPG course, in law school or any other academic department, having RPG students studying law.
A new HKU Graduate School Course[4] similar to courses listed at <www.hku.hk/gradsch/web/student>

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[3] See the information at HKU Quick Stats for total numbers <www.cpao.hku.hk/qstats>.

[4] Such as, GRSC6022—Introduction to Thesis Writing (Law & Legal Studies). See the attached New Course Proposal.

HKU Department of Law, Advanced (Legal) Research Methdology LLAW 6022

All library and library-supported training courses in legal research methods and technologies

Any course on the pedagogy of teaching law[5]

[5] See, e.g., the items collected under the links "My Bibliography on Pedagogy" and "My Article on Teaching Law" at my Web page <www.robertjmorris.net>.

ADVANCED (LEGAL) RESEARCH METHODOLOGY

(LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

Robert Morris: Making 'a new contribution to knowledge'
Report by Reader A

The book is quirky and not a typical piece legal "scholarship" (or, in the spirit of the book, should I say "research).

I take that to mean that the book itself is "new" and makes a "new contribution to knowledge." Kind words those: "quirky" and "atypical." I hope my revisions have retained those qualities.

That being the case, it will have enormous appeal to students wanting to enter into a PhD programme in HK, China and abroad. For this reason, I recommend you publish the book (even though I must say, I do not entirely agree with all points the author makes - most notably in emphasising the differences between law and other fields). I do have some comments:

I do not disagree with any of the substantive points in this paragraph, but I must at the same time emphasize that my book is not narrowly addressed to "PhD" students or programmes, but to the much broader RPG audience. This difference is essential, and I have tried to refine it in the revisions. The reader is correct that this is not written as a "typical" piece of legal scholarship because, as the working title states, it is addressed to non-lawyer and non-law students "of law" as well as those trained in law. I want it to be jargon-free and easily readable.

The reader does not specify what his/her points of disagreement with me are as relates to "law and other fields." Whether the law is "similar to" or "different from" other fields is a contested issue. RPG students need to know that it is contested and how to negotiate that contestation. In any case, I have revisited the question in the rewriting and explained it a bit more. I have said that law is "different from" other disciplines because that is the position I have taken in my previous publications, which I cite in the manuscript, and it seems wise to be consistent with myself. More importantly, if law were not somehow different or special or "set apart" from "other fields," there would be no need for this book. The books already published for RPG students in those "other fields" (social sciences, sciences, humanities) would suffice. The "difference" of the law creates the gap which this book fills. That is its very core thesis.

1. The author's approach is straight-forward and the book is well written and researched, but I would also recommend up-front (or somewhere) that the author set out the differing forms of legal scholarship - the point is not simply that legal research is different but also how to conduct legal research. There are many different approaches, some of which are discussed in the text, but it makes sense to lay them out upfront - black letter, comparative, international,

law and ___, etc... In this regard, also setting out different research methods - empirical, etc would be beneficial to budding PhD candidates.

A good point which I have taken on board. I have done this not just “up-front” but throughout. There are many taxonomies of legal research and methods, and I have synthesized a useful one for this book. Again, I stress that the book is not addressed narrowly just to “PhD candidates” but to all RPG students.

This is not precisely a book on “how to conduct legal research,” but it a discussion of some of the different research methods and approaches. This is a crucial difference. “How-to” books abound, and I am not trying here to duplicate them. The “core competence” of this book, rather, is the definition of a single concept: the “new contribution to knowledge” in the law and its implications. I hope that distinction is made clearer in the revisions.

2. In order to maximise publicity and sales, I would recommend a title change to something like, "How to Write a PhD in Law: Making A New Contribution to Knowledge". The author is write to point out that some generalist "how to write a PhD" books are not particularly applicable to law and, importantly for this recommendation, generate a lot of interest and sales.

I have no pride of ownership in my original working title—I’m amenable to good suggestions. However, “How to Write a PhD in Law” misses two essential points, the first of which I have stated twice above: this for all RPG students, not just PhDs. The second is that if the title uses the words “in law,” it may self-eliminate or at least mislead the other-disciplinary “counterparts” whom I wish to include in the audience/market. For example, there may be a medical student who is writing a double-degree dissertation in some aspect of “law-and-medicine,” but who perceives her academic base to be in the medical school, in other words, not “in law” but “in medicine” plus “of law” or “about law.” This book is still for her. I have played with the title many times and am still not satisfied with it. Further suggestions are welcome.

3. I understand that this is a handbook, but there seems to be enough information and detail to expand into a 150 page book.

This is an interesting project and one that could generate interest/sales and produce both useful results for students. The points made in the book could done in shortened form online or through a series of publications, but a slightly expanded version of the manuscript could be a worthwhile book.

Point taken. Everyone who has read the manuscript has said the same thing—make it longer. Therefore, I now have expanded the manuscript to about 170 pages. I have added several sections, including a Bibliography. The last page is for the Index, which I have not made yet per instructions in the Press’s author’s guide. That will add several more pages.

The revisions have retained the entire original core of the book—same thesis, subject, and purpose. It has merely been expanded.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

Report from Reader B

Manuscript Evaluation

"Making a New Contribution to Knowledge: The Challenge for Research Postgraduate Law Students and their Counterparts" by Robert J Morris

The subject-matter of the manuscript is very relevant to research postgraduate (RPG) students seeking to write on any area of law. It will likely to be of use to RPG students not only in Hong Kong but elsewhere in Asia and other parts of the globe.

The many kinds of RPG programmes in Hong Kong and around the world for which this work could be helpful are indicated in the research itself. In Hong Kong and at HKU, I think the most immediate links are the Law School, the Social Sciences, and the Medical School—where interdisciplinary work has already been done. Beyond Hong Kong, my sources are global, and indicate that similar problems and needs exist and are being discussed everywhere. The revisions include many more examples and citations to materials that brief these problems in diverse jurisdictions. Seeing their locales noted should given readers in these places an interest in the book. While I have extracted general principles from these sources in my text, the footnotes reveal the specific names, locations, schools, programmes, and identities of such RPG programmes. They will "see themselves" there.

The manuscript's merits are that it provides awareness of the research alternatives available to RPG students in law (or the legal system); highlights the importance of cross-disciplinary research that compels RPG students to explore and utilise non-law fields of knowledge; and draws attention to the difference between legal research and legal scholarship. It was a good read – clearly written, well argued and full of very extensive and interesting research material.

Save for my comments below, the manuscript's coverage, organization and level/style is of a good level. Its emphasis on cross-disciplinary research and legal scholarship make it unique with no real competition.

Kindly comments, for which I am grateful. These seem to agree in most aspects with the sentiments of Reader #1 as to the market and appeal of the book. I have kept the entire original book as the core of these revisions. I have deleted none of that original text—just expanded it.

At present, its size of 90 pages makes it stand between a long article and a small book. In its current state, it would be more suitable to be printed as a soft cover handbook for students. If the changes suggested below are made, I would definitely recommend this work to students undertaking RPG studies.

A "soft cover handbook for students" is indeed my vision for the book. It is not a large textbook of "RPG legal research studies." Even so, it now stands at 170 pages. I think that's the most that students will actually read and use.

1) The abstract – may be helpful also to provide a summary of the actual contents of the manuscript, perhaps by providing a short description of each section.

Now that the book is longer, the explanations are incorporated in the sections. The editors might want to consider whether the sections should become actual chapters. I think that may be a good move. Pending that decision, I have left the footnote numbering consecutive from beginning to end. When the decision is made as to chaptering, then each chapter, like each Appendix, will of course begin that part's footnotes anew with the number 1. I also assume that the footnotes will become endnotes at the end of each chapter, or at the end of the entire book.

2) Preface – for a book of 90 pages, I find that a preface of this length is quite long. It contains matters of substance that could well be moved into the main body of the book. I would usually skip the preface if I wanted to go straight to the substance of the book, but I found that the preface contains some of this substance.

This problem may be removed as the book is now 170 pages, or the Preface can simply be the first major section or chapter. This is a structural matter which the editors can decide.

3) "The Ten Rules" listed on p. 13 would also benefit from a short elaboration of them under each rule.

Done. See the Rules Redux at the end. See also the new Afterword.

4) More explanation is required about the difference between columns A and B on p. 17.

Done.

5) Generally, the Figures need more explanation. For example, I did not fully understand what Figure 2 on p. 77 was attempting to convey. It needs some specific commentary, e.g., is the "empirical" point of the triangle more important because it is located at the top? Should the arrows move simultaneously or on some sequential order?

Done.

6) The difference in the approach to law-focused RPG studies in the United States compared to the UK or Continental Europe may be helpful to point out. Highlighting or

discussing a few of main “law and __” areas as well as some particular approaches coming from Law Schools, e.g., Yale (New Haven) or Chicago. I say this because if research students are encouraged to venture into cross-disciplinary studies, it would help to point them to some of schools that have done this as examples of what can be done.

Done with reservations. See the emphasis, for example, on the work at the University of Sydney. If I get too much into talking about or recommending this or that particular school, this or that particular programme, it will inevitably omit some others that deserve mention. Need to be careful here to maintain the general applicability of the book across the world.

7) More practical instruction to students on how to start looking outside the law would also help. The example on p. 42 of the student who wrote on human rights in Africa helped understand much of the theory that was being discussed. Other concrete examples such as this would provide invaluable practical guidance for students.

Done. There are now several more examples. See especially the new Appendix C for a practical exercise from Hawai‘i.

8) A literature review of the better publications on cross-disciplinary studies or other works relevant to “legal scholarship” could also assist students searching for the right direction to take in their research. E.g., relevant books/articles on empirical research, field studies, etc.

The whole book is actually a literature review, and the expansion has added many new titles. I have made a BIBLIOGRAPHY at the end. I do not want this to become a textbook or a scholarly article as in a law review with a “formal” literature review. It is a handbook, hence does not seek to be exhaustive in reviewing all the existing scholarship. Its purpose is to define a concept and the problems surrounding it: the “new contribution to knowledge.” Even so, the bibliography has been greatly expanded in the revision.

I have tried to keep references to Web pages to a minimum as they notoriously go out of date and become inactive. I have tried to ensure that the ones which do appear are those that are likely to remain valid over time. The editors may want to look at these choices carefully.

I have not prepared an Index yet per instructions in the Press’s author’s guide.

9) It appeared to this reviewer that the manuscript contained a good deal of well-written discussion about what is the current problem with PGR in relation to law. More specifics on how to address the problem and move beyond it would make the book more practical.

The expansion of the text takes care of this.

10) Some small typographical errors – p. 70 “exist” not “exit”, p. 75 “RGP”, p. 78. “anyh”.

Done.

The market for this publication lies not only in Hong Kong but beyond. An inexpensive paperback version would sell well in the growing RPG market in Asia. One large target for the book could be the ever-growing Mainland Chinese RPG studying abroad. They would be searching for a book of this size to give them instruction on how to conduct their research or how to choose their research topic.

Again, I note that "how to conduct their research or how to choose their research topic" is not precisely the aim or purpose of this Guide. It is, rather, "how to" think about the ends in mind (the "new contribution to knowledge") when they doing those things. It is perhaps a subtle but necessary distinction. I hope I have made it clearer in the revision. There are already many, many "how to" books on specific research methodologies.

In summary, subject to points 1-10 above, I would recommend that a publishing proposal be made to publish the manuscript as a small handbook, and perhaps with a future plan to publish an improved and expanded manuscript as a book. A publication on this subject matter is definitely needed.

"Improved and expnded" yes—a second edition as, and if, good suggestions come from readers. I don't want it to become a heavy tome that sits on shelves and students never read.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD[1]

MAKING "A NEW CONTRIBUTION TO KNOWLEDGE"
The Challenge for Research Postgraduate Law Students & Their Counterparts

27, 050 words July 19, 2010

ABSTRACT

As law schools and their students integrate with the global realm of non-law research postgraduate (RPG) scholarship, they meet the demands, norms, and expectations of that realm, which are different from those of traditional black-letter "legal research." Among these is the requirement that the RPG candidate make a "new contribution to knowledge" by identifying and filling an important "gap" in the existing scholarship. While those ideas are understood, defined, and well-settled in the sciences, humanities, and social sciences, they are problematic in legal studies. This is so because what traditional law schools and lawyers call "legal research" may not be recognized as research at all by other disciplines. If the work of law RPG students, and of their counterparts who are researching law in other disciplines, is to achieve recognition beyond the law school, they must cultivate full-bodied "legal scholarship" in contradistinction or addition to traditional "legal research," with distinct

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[1] University of Hong Kong (HKU) Faculty of Law, Department of Law. Juris Doctor, University of Utah (USA) College of Law (1980); PhD, University of Hong Kong Department of Law (2007). Much of the theory that I develop in this book arises out of my experience teaching Advanced Research Methodology (ARM) (LLAW 6022) at HKU from 2005 to the present, and before that as an RPG student and PhD candidate at the University of Hong Kong 2002-2007. I am grateful to all the RPG students in those classes and their supervisors for all they have taught me about the issues discussed here and for the contributions they have made to this study.

understandings of what counts objectively as “new,” as a “contribution,” and as “knowledge,”—and to whom and why they count globally.

TABLE OF CONTENTS

Preface

The Teacher said: "There is nothing new under the sun."[2] It is a rebuttable presumption, and whoever claims to have something "new" has the burden of proving it.

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

> "Reputation ought to be the perpetual subject of my Thoughts, and Aim of my Behavior. How shall I gain a Reputation! How shall I Spread an Opinion of myself as a Lawyer of distinguished genius, Learning, and virtue…. Why have I not Genius to start some new Thought. Some thing that will *surprize the World*. New, grand, wild, yet regular Thought that may raise me *at once* to fame. Where is my Sout? Where are my Thoughts. When shall I start some new Thought, make some new Discovery, that shall surprize the World with its Novelty and Grandeur?"[3]

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

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[2] *Old Testament*, Ecclesiastes 1:9. "What has existed before will exist again, and what has been done before will be done again."

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

Thought and Time and Province Law."[4] Second, he could impress by "making Remarks, and proposing Questions [to] the Lawyers att the Bar, endeavour to get a great Character for Understanding and Learning with them," but "this is slow and tedious."[5] Third, he could "look out for a Cause to Speak to, and exert all the Soul and all the Body I own, to cut a flash, strike amazement, to catch the Vulgar,"[6] but these projects, he concluded, would not "bear Examination."[7] He continued this intellectual trial-and-error long past his twenty-fourth year. He served in the First and Second Continental Congresses as the delegate from Massachusetts, helped draft the American *Declaration of Independence*, served as minister to France and Great Britain, drafted a new constitution for Massachusetts, served as George Washington's vice-president, served as second president of the United States, appointed John Marshall as chief justice of the US Supreme Court, and did a thousand other things that secured his fame as one of the American Founding Fathers. Adams was, in all respects, a man of reputation who participated in affairs that would indeed surprise the world. His formula and his process of thought, though tortuous, is a good model for RPG law students and their counterparts: "new, grand, wild, *yet regular*," not merely something to "cut a flash, strike amazement, to catch the Vulgar." Creep or fly? It is a good way of "thinking like a lawyer," of deciding what you want to be, of making the necessary choices properly, and of raising your reputation as a world-class scholar.

The University of Hong Kong (HKU) where I teach provides orientation for newly matriculated research postgraduate (RPG) students. Regardless of which department or faculty the new student will join, the University, like universities elsewhere, requires that each of them must produce a "new contribution to knowledge" in order to qualify for a degree. To this end, the Graduate School offers a series of short general

[4] Adams *Diary*, *ibid*. p. 78.

[5] *Id*.

[6] *Id*.

[7] *Id*.

courses, some of them mandatory and all of them lasting about six weeks, which are designed to position all RPG students within the general framework of what modern RPG research is "all about." The foundational courses are the mandatory "Introduction to Thesis Writing,"[8] after which other courses provide orientation for the social sciences and humanities on the one hand, and the sciences on the other. As I can personally attest, it is not uncommon in these short orientation classes to hear the instructors say something like this: "Now, for you law students, this exercise (or chapter, or commentary, or rule) does not fully apply. You will have to ignore it or adapt it." RPG law students are constantly aware that in many ways, they are a class apart from students in other disciplines. The problem is that the law is not one of the humanities, the social sciences, or the sciences. The law is the law. Perhaps we could say that it is *almost* unique. RPG students who understand this fact, and understand why it is a fact, will do better in their legal studies. So, also, will their counterparts in other disciplines who are studying law. These Graduate School courses do not quite match the needs of RPG students in law. Not quite, but somewhat. The mismatch or interstice—perhaps parallax or differential are better words—is not utter, and it is not unbridgeable. It is that space which this book aims to occupy.

The course materials for Introduction to Thesis Writing have been collected in the book, *Dissertation Writing in Practice*.[9] It is an excellent basic work for new RPG students. But like the classes from which it is taken, it reflects the practices and rules for non-law subjects. The same is true for a well-known companion volume, *How To Get a PhD*,[10] which is widely read at HKU. Unfortunately, many of the RPG students I meet

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

[9] Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003).

[10] Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Maidenhead: Open University Press, 2005).

have not read such books, nor have they had the benefit of even such minimal instruction in RPG work. Furthermore, the principles and examples they encounter in both books and in the courses are taken from non-law disciplines, and because these texts are one-size-fits-all, the law RPG student must constantly adapt them to her own situation by laboriously walking them through her own mental processes of "thinking like a lawyer." It is something like the way new language learners mentally translate a foreign language which they are hearing or reading into their own tongue before they learn to think in the target language. This ought not to be. Filling this gap is not simply a matter of "sprinkling a little legal water" on these existing materials in the hope of providing a clear vision for RPG law students. Guidance cannot be given simply by asking them to analogize these materials to legal research. At the very least, analogizing would be superficial and uncertain. The parallax between these materials requires some real analysis if any kind of unified method is to be achieved. The similarities between legal method and other disciplines must, of course, be highlighted and harmonized, but the differences particularly must be set in sharp relief because they must be exploited, not minimized. The law and its methods cannot be *made into* something else, nor vice versa. What can and cannot be homogenized is a delicate business.

RPG students in law deserve to know up front (and thereby to be taught and forewarned of) precisely the tasks and pitfalls they must uniquely face, and especially how those tasks and pitfalls positively differ from those encountered by their counterparts in other disciplines. They must be given the exact tools they need to complete a fully worthy RPG program that commands the respect of the global academic community while remaining true to the disciplinary demands of the law. The same is true for their counterpart non-law RPG students whose research includes some aspect of the law. *A fortiori*, the increasing interest of RPG students in compound studies (law-and-____, ____-and-law) makes this balancing act even more acute, as evidenced by the increasing number of non-law academic journals publishing articles on the law written by non-lawyers. At present, no single study provides these tools, these supplemental concepts between what is found in the two example books mentioned above—hence, this study,

which does not supplant but complements the other two. Indeed, this study might be called, *Law Dissertation Writing in Practice and How To Get a Law PhD*.

The tools and goals which these students need to craft the product demanded of them are encapsulated within the well-known phrase, "a new contribution to knowledge." It includes the requirement of identifying a gap in the existing body of knowledge, conducting research to fill that gap, and thereby making a new contribution to existing knowledge. A "contribution" adds value. In any subject, the project of making a "new contribution to knowledge" requires a passionate investment in analyzing materials that are often recondite and tedious.[11] It is a principle of academics *and* a principle of competition. The difficulty is that the "new contribution to knowledge" for RPG legal studies is even more complicated, and therefore more problematic—or rather *differently* complicated and *differently* problematic—than for the social sciences, humanities, and sciences. It is a horse of another color. Like the law itself, its definition in legal studies is *almost* unique. This fact arises simply because of the history and nature of the law and of the law school. It is not due to any intentional effort to "be difficult" or "odd," but rather to the nature of the subject itself. The idea of "making a new contribution to knowledge" is not embedded in legal analysis the same way it is in other disciplines. Traditional legal analysis, for example the IRAC model (Issues, Rules, Analysis, Conclusions), begins with "spotting issues" in a legal problem. This works on law school examinations, opinion letters to clients, and court briefs. But "spotting issues" and analyzing them is not entirely coterminous with identifying a "research gap" or "making a new contribution" to knowledge in the academic disciplines. The IRAC process might lead to such a new contribution, but usually not along exactly the same paths or for the same purposes that scholarly research would. The paths are not mutually exclusive, but they require different kinds of walking shoes.

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

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

rubric of the “new contribution to knowledge” has not been entirely without conflict and misunderstanding. These are problems that exist both within the law school and within other faculties and departments which are increasingly turning their attention to the law’s impact on their professions. This study, therefore, targets two distinct but related audiences. The first is, of course, RPG law students themselves. They especially must know what is expected of them in order to get their research accepted in the global academic community. The second audience is those non-law RPG scholars in the social sciences, the humanities, and the sciences who undertake to write in any way about legal matters in relation to their own disciplines (medicine-and-law, history-and-law, etc.). In order for them to do so successfully, they must understand what “thinking like a lawyer” means and how it translates into RPG work. They must understand what their presence in the law academy, albeit partial, will feel like. Both sides of this divide often, and unfortunately, assume that they can undertake studies in the discipline of the other without the proper orientation and training. Nothing could be further from the truth. The present purpose, therefore, is to raise awareness of these issues and requirements of RPG law studies and to mark a path forward.

The notion of the globality of scholarship and the global competition to produce something “new” in legal scholarship may at first sound contradictory. After all, there is nothing more local than the law. Like species in evolution, the law colonizes the local niche where it arises. Place has priority, and law is peculiar to place. Place and law reify each other. Montesquieu famously wrote:

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

> ‘They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; *in all of which different lights they ought to be considered*.”[12]

Even in seemingly broader endeavors such as comparative law, the points of comparison are two or more sets of law in two or more specific locales. The common law is “common” only to certain countries, and even among them it has different inflections. Science tries to find universal principles in the natural world, but finding universals in law is difficult—maybe impossible, and maybe undesirable. For example, US Supreme Court Justice Oliver Wendell Holmes wrote: “I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction.”[13] Students in traditional black-letter schools may view their competition as wholly local—as being with themselves, the teacher, the examination, the school, and their fellow practitioners in the local legal community. But RPG work flattens those boundaries and expands the field to the world. It is a difference of scale. What constitutes a “new contribution to knowledge” is of truly global concern. Globality is the touchstone of RPG work. RPG

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

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

students may write about local law, but they must do so in a global way.

Beginning spring 2005 and continuing every spring thereafter, I have taught a course at the University of Hong Kong Department of Law entitled Advanced Research Methodology (ARM) for RPG students. I have taken no part in recruiting or admitting the RPG students or assigning them to their respective supervisors, nor in designing the criteria of admission to either the Graduate School or the law school. The students arrive in my class already matriculated. As part of the semester-long syllabus, I repeatedly stress to the students that they are expected to make a "new contribution to knowledge" in their theses and dissertations. I have taught more than 100 members of the classes, including students from Hong Kong, the PRC, the United States, England, the Philippines, Singapore, Indonesia, Thailand, Burma, Greece, Sri Lanka, Vietnam, Nepal, Japan, and South Korea.[14] Most of the students have been full-time, with a few part-time—a special challenge because part-time students have severe constraints of time and work. Input from this representative group over the years give me confidence that (a) the "new contribution to knowledge" is a concept that is often elusive, and (b) the principles I explicate in this study are of widespread usefulness. The written work and personal information that the students produce becomes the accumulating archive on which this study is founded. The course is a one-size-fits-all requirement that homogenizes students seeking the PhD, MPhil, SJD, and any other research postgraduate (RPG) or taught postgraduate (TPG) credential—a not unimportant distinction in itself for some purposes.[15] The class must therefore address, in a single semester, their needs in both black-letter and empirical theory and practice in different curricular settings and demands, including on-campus tenures ranging from one year to four-plus years. Within the limits of the prescribed syllabus, I use the survey documents mentioned above to tailor the class to the peculiar needs of each group. The Department of Law itself offers various

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

[15] But not for my purposes here, where I will use RPG to include both.

undergraduate courses in black-letter research, including supplemental library and computer-assisted training, but offers no training in anything like "Empirical Research Methods in Law." Students who wish to undertake the latter must go to other departments in the university. The Graduate School offers several general short courses, but these are not tailored to the needs of law students or students in other disciplines who are working with law.[16]

Before coming into the HKU RPG program, most of the students have received some kind of undergraduate credential in law, and many have intermediate RPG credentials. All have had practical experience in the practice of law, teaching law, working in their countries' judicial systems, conducting research, publishing, or combinations of these. Sophistication in research experience is highly mixed, from extensive to novice, but in no case has any student had advanced training or experience in empirical research of the kind known in the social sciences, although some have been in the midst of acquiring such skills. All have been, in other words, traditional black-letter lawyers more or less. Of those in compound programs, approximately one-third of the students have been conducting research in the law and social sciences; a handful in law and humanities, and none in law and science.[17] This class, in one form or another, has existed for many years, and many RPG students have passed through it with several instructors.

Each of these classes has been an empirical laboratory in which to observe a mix of international students presenting a whole range of research subjects, and to think about the patterns of pedagogical and theoretical problems that pertain to newly matriculated RPG students in the law. Because of these diversity and the prominent position of Hong

[16] See the courses in qualitative and quantitative methods at <www.hku.hk/gradsch/web/student/course/gs/index.htm>.

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

Kong in the global academic community, I take these *recurring patterns* to be representative of similar patterns elsewhere. During their semester with me, the students produce many short written assignments, among which are responses to a DIAGNOSTIC QUIZ and a PERSONAL INFORMATION WORKSHEET (Appendices A and B). Both of these are produced during the first week of the semester to assess where the students are academically and mentally and to provide a benchmark as they begin going through the class. It is upon these that I base my observations about their perceptions and needs at the outset of their RPG work, and regarding which I have several personal interviews with each student. In addition, at three stages during the semester, each student prepares a RESEARCH PROPOSAL, each step being more complex and sophisticated than the previous step. I assess these not as writing *per se* but for the quality of research they demonstrate. All these documents collectively comprise the emerging archive of the class on which this study is based.

The present purpose, therefore, is to assemble the key representative ideas that inform this discussion in order to assist the stakeholders in making clear and informed decisions about the paths they choose in pursuing their vocational legal work, and to help them steer along those paths. It argues that all stakeholders must conceive of the two paths as being of equal dignity and *gravitas*—of existing on the same footing—not a parts in tension with each other. Although this study is rooted in the HKU model, the breadth of the research sources indicates that it can be adapted to the situations of many law and non-law RPG programs elsewhere. Fiona Cownie notes the following regarding RPG legal education in the European Union:

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

are demanded by different educational systems."[18]

This diversity is apparent in many places. Indeed, as I travel to other universities and meet RPG students and their supervisors elsewhere, the issues discussed here seem to be universal. As the demand for a "new contribution to knowledge" is universal, so the path to achieving it in legal studies is, if not entirely universal, certainly common. We can abstract ten general principles or rules that permeate all that is presented throughout this study.

[18] Fiona Cownie, "Postgraduate Legal Education in the EU: Difference and Diversity" (2002) 9(2) *International Journal of the Legal Profession* 187, 200; emphasis added. Cownie's article is an exemplary empirical study.

THE TEN RULES

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

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

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

The "new contribution to knowledge" may be either found or created.

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

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

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

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

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

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

THE PROBLEM OF THE "NEW CONTRIBUTION TO KNOWLEDGE"

> "One way by which educational institutions can contribute to reform [of the legal system] is to mobilize their capacities for generating new knowledge."
>
> —Derek C. Bok, president of Harvard University[19]

Introduction & Background

Further versus Higher

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

What ought to be the settled *precursor* to application for RPG work turns out to be the major quest of the first year or two of RPG work *after admission*. Numerous post-RPG graduates report in exit interviews that the gap/new conundrum was conceptually the most difficult part of their entire RPG experience—a daunting and discouraging great

[19] Derek C. Bok, "A Flawed System of Law Practice and Training" (1983) 33(4) *Journal of Legal Education* 570, 581. Bok, a graduate of Harvard Law School, was president of Harvard from 1971 to 1991. He served as Dean of the Harvard Law School from 1968 to 1971.

wall that confronted them on their first day of work. Numerous frustrated thesis examiners bear witness that not every intensive four-year course of RPG work (however well intentioned and bona fide) fills any significant gap worth filling or produces any truly new contribution to knowledge.[20] A moment's reflection on the universal presence of the university requirement that an RPG student's work must result in the "production of a substantial original thesis"[21]—that it should be timely and urgent, important and distinct[22]—should suggest that the gap/new conundrum is a universal problem—else why have the requirement in the first place? On this score, many RPG students arrive at the university with an innocence that borders on naïveté. "All I want," they protest subjectively, "is to study everything about the topic that interests me so that I can make some sense of it." Or, if they come out of some calling in legal practice, they believe that their RPG thesis will be merely the familiar appellate brief or client opinion letter pumped up. Long after matriculation, they remain in Column A when they should already be well into column B (Table 1). This *a priori* question really is *a priori*. Essential to an understanding of it is Bradney's all-important insight that "university education means higher, not further, education."[23]

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[20] Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003), reports actual examples.

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

[22] Adam Przeworski and Frank Salomon, "The Art of Writing Proposals," Social Science Research Council publication, which may be read online at <www.ssrc.org/workspace/images/crm/new_publication_3/%7B7a9cb4f4-815f-de11-bd80-001cc477ec70%7D.pdf>.

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

Table 1

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

This is what distinguishes the university from the middle school—and the true RPG student from all other students—this notion of *the university*. Bradney writes:

> "What, then, *in university terms*, is knowledge about Law? This question is wholly different from the question, what is knowledge about law? The university law department should work within certain confines, search for a particular kind of knowledge…. Knowledge here is *equated with theory* and distinguished from facts…. In this case theoretical work indicates the *attempt to understand processes and structures; to go beyond the immediate*; to do that which might enable us to say, 'Now we know more'. The accumulation of facts, in contrast, implies a concern with that which is immediate and of the surface. It implies a concern with that which, if successful, [might] lead us to say, 'Now we know differently'. It is not the subject of the pursuit which is the point of concern; it is the form of that pursuit."[24]

It is this crucial more-different distinction—the distinction between "standing on the shoulders of giants"[25] versus standing side-by-side with our predecessors—that eludes many new (freshly post-middle school) RPG candidates (and indeed many others, including the university itself). It is this that makes the gap/new conundrum so troublesome. The work of column A should already have been accomplished when a candidate applies for admission to an RPG program, but often it is not. And because it is not, students have trouble with all of the subsequent issues and tasks that confront them. When they find out that their familiar practices and expectations are not sufficient to

[24] Bradney, pp. 271-72; emphasis added. A more expansive explanation of Bradney's ideas may be found in Anthony Bradney and Fiona Cownie (eds), *Transformative Visions of Legal Education* (Oxford, UK: Blackwell Publishers, 1998).

[25] "If I have seen further it is only by standing on the shoulders of giants." Isaac Newton, letter to Robert Hooke, 15 February 1676.

sustain an RPG project, they often despair and quit. But unless they come to grips with this gap/new conundrum—and solve it—they can never state the true thesis, subject, or purpose of their project. It simply will not gel—they cannot "stake their claim." The resolution of this problem should already have been achieved by the time the student applies for graduate study, and that resolution should be evident in the RPG proposal. But in many cases it is not, and the reason it is not is a conceptual problem.

Objective, Not Subjective

The quality of a genuine "new contribution to knowledge" is the benchmark by which RPG work is judged. Scholars make new contributions to knowledge in different ways: (a) the creation of new data, (b) a new organization of existing knowledge, (c) a new presentation or analysis or interpretation of existing knowledge or data, (d) a new application of existing knowledge or data, or (e) a combination of these. Finding a gap in the existing knowledge or data, which your research can fill with a new contribution, might come for a variety of reasons:

- An issue or problem makes you angry—offends morality, decency, justice.[26]
- An issue or problem excites you.[27]
- There is something new you want to teach the world.[28]
- You wish to reveal a secret.[29]
- You wish to effect change.[30]
- An issue or problem is on the cutting edge of your subject.[31]
- You want to enter a dispute with a new argument.[32]

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[26] Christine Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong: Hong Kong University Press, 2006).

[27] Robert J. Morris, "Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture and Values for the Debate About Homogamy" (1996) 8(2) *Yale Journal of Law & the Humanities* 105.

[28] Karen Man Yee Lee, *Equality, Dignity, and Same-Sex Marriage: A Rights Disagreement in Democratic Societies* (Leiden, Boston: Martinus Nijhoff Publishers, 2010).

[29] Andrew J. Nathan and Perry Link (eds), Zhang Liang (comp), *The Tiananmen Papers* (London: Little, Brown & Co., 2001).

[30] Ron Suskind, *The Way of the World: A Story of Truth and Hope in an Age of Extremism* (New York: Simon & Schuster, 2008).

[31] Colin Tudge, *The Link: Uncovering Our Earliest Ancestor* (New York: Little, Brown & Co., 2009).

[32] Bill Moyers, *Moyers on Democracy* (New York: Doubleday, 2008).

- The discussion which you wish existed about your subject doesn't exist.[33]
- Your research is "something that will surprise the world."[34]
- There is a developing area of law-and-____ that is important.[35]

Regardless of the method or the motivation, the standard of what constitutes a "new contribution to knowledge" is *objective, not subjective*. New RPG students often confuse this crucial difference. A topic or an idea is new *to them*, and so it "feels right" because researching it will make a new contribution to *their own* personal knowledge—and they often base their initial RPG research proposal on this subjective evaluation. They are still in section A (Table 1) because this is the comfortable model of "further" education they learned in middle school. The hard reality they must face is that the standard for RPG work is what constitutes a new contribution to knowledge "out there" in the worldwide community of scholars. It is that worldwide body of knowledge, not their personal body of knowledge, to which they must contribute. This, I take it, is part of the meaning of "regular" in John Adams's "new, grand, wild, yet regular." Along the way, their personal body of knowledge will no doubt expand, but that is not the "higher" education standard by which their work will be judged by their worldwide community of peers. They often confront this reality well into their research for the literature review, and it can be deflating. It is an even worse deflation than getting through an entire RPG program down to the final oral defense, only to be "scooped" by another scholar's

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

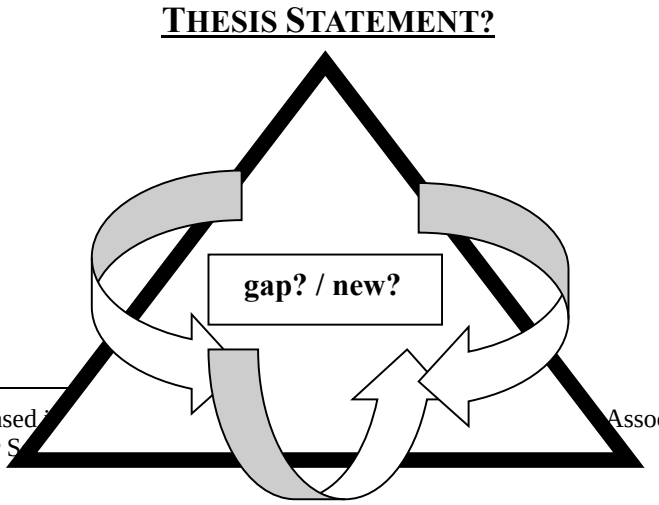
[34] John Adams, *Diary and Autobiography of John Adams*. L. H. Butterfield, Leonard C. Faber, and Wendell D. Garrett (eds). (Cambridge, MA: Belknap Press of Harvard University Press, 4 vols, 1961), I:78, 95; quoted in Susan Dunn (ed), *Something That Will Surprise the World: The Essential Writings of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

[35] Norman Polythress and John P. Petrila, "PCL-R Psychopathy: Threats To Sue, Peer Review, and Potential Implications for Science and Law. A Commentary" (2010) 9(1) *International Journal of Forensic Mental Health* 3.

publication of similar research half a world away. Getting scooped is out of the student's control. Being ignorant of existing research is not.

Gatekeepers of the graduate admissions process may not be able to police this problem well because they are not experts in the particular research question which the RPG applicant advances in her proposal. They are not in a position to adjudicate whether the proposed research project is one that will make an *objective* "new contribution to knowledge." Supervisors, once assigned, are in a better position to do this, but that means the supervisor's task for the first year is helping the student to play catch-up getting into section B (Table 1). I have known RPG students who are still shifting about trying to find yet another "gap" to fill with another "new contribution to knowledge" a full two or more years after matriculation. The inventor Thomas Edison was fond of noting that he sometimes conducted thousands of experiments in order to find one invention that worked, claiming that this was not failure because then he knew thousands of ways *not* to do the job.[36] Such knowledge may be useful for a commercial inventor, but this experimental model is not appropriate for RPG legal research. All the experimentation should have been done before the proposal so that the proposal clearly states—.

Figure 1



[36] Comments as paraphrased [illegible] Association of American Railroads, Car S[illegible]

SUBJECT/TOPIC? **PURPOSE?**

Why all this is the case is, therefore, a problem worthy of serious consideration. In legal studies particularly, the situation results from a confluence of special problems and traditions that complicate our understanding. In terms of a familiar business model, it is the problem of defining the "core competence"[37] of the law school, the RPG law student, and the RPG research project—of answering in each case the philosophical questions, Who am I?, Why am I here?, and Where am I going? The requirement of a "new contribution to knowledge" is a concept from arrives from outside the traditional black-letter law school. Until rather recently, the idea of "legal research" meant only the kind of research in cases and statutes (black-letter law) and secondary texts that practicing lawyers do when they advise clients and write memoranda for the courts, reasoning rather than empirical observation—the kind of traditional legal research traditionally taught in traditional Langdellian law schools.[38] It consists in identifying legal issues, interpreting cases and statutes, "construing." It is not empirical and is not intended to be. It deals with truths which are analytical rather than truths which are grounded in fact.[39] This "otherness" is what differentiated the black-letter tradition for other disciplines. As Jack Goldsmith and Adrian Vermeule summarized it this way in

[37] C. K. Prahalad and Gary Hamel, "The Core Competence of the Corporation" (May-June 1990) *Harvard Business Review* 79.

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

[39] To follow the taxonomy of W. V. Quine, "Two Dogmas of Empiricism" (1951) 60(1) *Philosophical Review* 20, which takes issue with this "fundamental cleavage" but is a point that, although important, does not require great elaboration here.

2002:

> "The legal academy supplies vocational rather than scientific training; law schools usually produce lawyers, not graduate students; and legal scholars often write in the lawyer's style rather than in the empiricist's because they are participants in, not just students of, the legal system's practices.
>
> "Work in this vein contains no empirical claims in any important or contestable sense—at least not if 'contestable' is defined by reference to the internal consensus of legal academics."[40]

This is not so different from the rather critical view expressed by Underhill Moore and Gilbert Sussman seventy years earlier in 1932:

> "Any attempt to define the limits of the field of law and the problems within it, what are and should be the approaches to those problems, and the data and methods for investigation *must begin* with the activities and way of thinking *of the practitioner*. These have established the boundaries of the field and the mode of its cultivation not only for the practitioner *but also for those with scientific curiosity*."[41]

Indeed, not only do the ways of the practitioner establish these boundaries, but they also exclude from these boundaries any consideration of empirical information because this "grossly inadequate" method of the practitioner (and the traditional law

[40] Jack Goldsmith and Adrian Vermeule, "Empirical Methodology and Legal Scholarship" (2002) 69(1) *University of Chicago Law Review* 153, 155; emphasis added.

[41] Underhill Moore and Gilbert Sussman, "The Lawyer's Law" (1932) 41 *Yale Law Journal* 566; emphasis added.

school) is a "failure" which blinds and obscures interaction with other disciplines.[42] This is the sort of legal research that more recently Manderson and Mohr compare to the search for dogma in theology—the search to find an existing knowledge rather than contribute to it—and for which they compare the law faculty to a "fundamentalist Christian academy."[43] It is questionable whether such lawyers (or the courts or clients) would even think in terms of their "research" as filling some sort of "gap" or of making some sort of "new contribution to knowledge" in a global sense. Researchers in this practical part of the world must adjudicate sources such as cases, statutes, and ordinances, the quality and usefulness of which are grounded in the political authority that issued them and their internal logic.[44]

The notion of *academic* legal research leading to the traditional research postgraduate[45] (RPG) degrees[46] such as PhD, SJD. and MPhil, with their universal requirement that the research be measured by its "new contribution to knowledge," was an idea that scholars in non-law fields scoffed at. How, they asked, could the endless

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[42] *Ibid*. pp. 570, 575.

[43] Desmond Manderson and Richard Mohr, "From Oxymoron to Intersection: An Epidemiology of Legal Research" (2003) 6 *Law Text Culture* 165.

[44] See, e.g., Robert J. Morris, "China's *Marbury*: Qi Yuling v. Chen Xiaoqi—The Once and Future Trial of Both Education and Constitutionalism" (2010) 2(2) *Tsinghua China Law Review* 273 (the political and legal importance of "controlling for education").

[45] In moving among materials that include the United States and other jurisdictions, the terms "graduate" and "postgraduate" can become confusing. In the US, "graduate" means all schooling past the undergraduate BA or BS. Hence, the MA and PhD are "graduate" degrees, and "postgraduate," if the term is used at all, often means the same as "postdoctoral." In other places, "postgraduate" means everything past the undergraduate degrees, and that includes not only those I mention here but also some degrees unknown in the US. For book, because I am writing at the University of Hong Kong, I adopt the terminology common here.

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

intellectual and verbal manipulation of legal doctrines[47]—what Derek Bok called the "pecking at legal puzzles within a narrow framework of principles and precedent"[48]—ever count as "real" research of the kind that paleontologists, historians, sociologists, chemists, anthropologists, and astronomers do—in other words, empirical research (both quantitative and qualitative) and "hard science" backed up by theory, field work, archival research, statistics, and sampling—with, perhaps, a jurisprudential underpinning?[49] Researchers in this part of the world must adjudicate sources such as articles and books, the quality and usefulness of which are grounded in the quality of their analysis and the veracity of the sources they in turn quote. Indeed, some called these changes in legal scholarship "so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution."[50] More specifically, it was argued that "legal scholars today are, in effect, seeking in philosophy and humanistic theory generally something that law cannot offer and *cannot even tolerate*: 'intellectual authority,' an external, non-legal source of scholarly legitimacy."[51]

The difference between these two *Weltanschauungen* is captured nicely in Thomas More's reply to Cromwell in *A Man for All Seasons*: "The world must construe according to its wits. This court must construe according to the law."[52] The world's wits versus legal construction: the two worlds seem to be conceptually and semantically "worlds

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[47] Richard A. Posner, "The Decline of Law as an Autonomous Discipline: 1962-1987" (1987) 100 *Harvard Law Review* 761, esp. 771-73.

[48] Bok *op. cit.* at 584.

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

[50] Charles W. Collier, "The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship" (1991) 41(2) *Duke Law Journal* 191, 192.

[51] *Ibid.* at 194; original emphasis.

[52] Robert Bolt, *A Man For All Seasons: A Play of Sir Thomas More* (London: Random House, 1960), p. 97, Act 2.

apart." What works perfectly well within the walls of the law school has questionable value on the outside and vice versa. What Sir Edward Coke (from whom more later) said to the King of England in 1608 is still true today:

> "[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are *not to be decided by natural reason* but by the *artificial reason and judgment of law*, which law is an act which requires *long study and experience*, before that a man can attain to the cognizance of it: and that the law was the…measure to try the causes of the subjects; and which protected his Majesty in safety and peace…."[53]

The "artificial reason and judgment of law" do not match the reason and judgment of the non-law world. To non-lawyers, the common law often does not make common sense. That reality is transferable to RPG studies. Yale law professor Peter H. Schuck observed: "Indeed, if our colleagues in those [other non-law policy-oriented] disciplines caught on to our game, the intellectual stature of the law school in the larger university community might become even more precarious than it already is."[54] In 1981, Tony Becher described traditional legal scholarship as "unexciting, uncreative, and comprising a series of intellectual puzzles scattered among large areas of description."[55] "Lawyers,"

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[53] Edward Coke, "Prohibitions Del Roy" 6 Coke Rep. 280, 282 (1608); emphasis added.

[54] Peter H. Schuck, "Why Don't Law Professors Do More Empirical Research?" (1989) 39 *Journal of Legal Education* 323, 329.

[55] Tony Becher, "Towards a Definition of Disciplinary Cultures" (1981) 6(2) *Studies in Higher Education* 109,111. But Becher must be used with caution for two reasons. First, he notes ominously: "There are no

he said, were an "appendage to the academic world"[56] in "valuing professional qualifications and experience in professional practice more highly than a doctorate."[57] In 1994, William Twining described law as having become "isolated from mainstream academic life because of its peculiar history."[58] He noted: "General philosophy, political and social theory, literature, religion, and, less confidently, science, were well represented as contributing to the mainstream of the history of ideas, but law and legal theory were not."[59] Hence, there are at least two dichotomies under surveillance here. One is the dichotomy between law practice and law school—"downtown" versus the "ivory tower." Another is the dichotomy between black-letter legal research and empirical legal research within the ivory tower.[60] The apparent disjunctions among these categories, despite their all being "law," reinforces the adage that "the map is not the territory,"[61] theory does not always describe reality. Professor Robert Gordon writes:

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grounds for asserting that the sample of just over 120 academics interviewed for the purposes of the present study was typical of the general run"—itself an admission and exemplification of the problems under consideration here. *Id*. p. 118. Second, his study is now dated by thirty years, an eon in the rapidly evolving globalized academy and the theory of pedagogy. A more recent and reliable study is Fiona Cownie, "The Importance of Theory in Law Teaching" (2000) 7(3) *International Journal of the Legal Profession* 225.

[56] Becher *ibid.*

[57] *Id*. p. 113.

[58] William L. Twining, *Blackstone's Tower: The English Law School* (London: Stevens & Sons/Sweet & Maxwell, 1994), p. xix.

[59] *Ibid.*

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

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

> "problems involved are very complicated and cannot be solved except for a *joint study* of mathematics, mathematical foundations, history of mathematics, 'logic', 'psychology', anthropology, psychiatry, linguistics, epistemology, physics and its history, colloidal

> "So if I had the power…to redirect legal scholarship, I would use it to try to promote more empirical work, institutional description, and law-in-action studies. Sometimes I think I would happily trade a whole year's worth of the doctrinal output turned out regularly by smart law review editors and law teachers for a single solid piece describing how some court, agency, enforcement process, or legal transaction actually works."[62]

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

> "Empirical social study—I include history and ethnography—is never going to yield lawlike regularities that can make law practice into some sort of exact predictive science. Social science is a value-soaked, fuzzy, messy, dispute-riddled, political enterprise like any other interpretive activity—like law for instance.[63]

Writing in a similar vein, George Priest says, "The demands of scientific theory create extraordinary conflict for the lawyer who develops an interest in social science."[64] Exactly to the contrary is the notion expressed by Richard Posner:

> "To me the most interesting aspect of the law and economics movement

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chemistry, physiology, and neurology; this study resulting in the discovery of a general semantic mechanism underlying human behaviour…." *Id*., p. 751, original emphasis.

[62] Robert W. Gordon, "Lawyers, Scholars, and the 'Middle Ground'" (1993) 91 *Michigan Law Review* 2075, 2087.

[63] *Ibid.*

[64] George L. Priest, "Social Science Theory and Legal Education: The Law School as University" (1983) 33 *Journal of Legal Education* 437, 441.

> has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully."[65]

There is hardly an element of Posner's statement that I personally agree with, yet he is a weighty authority introducing a collection of essays by weighty authorities. Posner anticipates that some people, like me, will object that law cannot be put on any "scientific basis."

> "But there are bound to be misgivings that the regularities discovered by the economic analyst are due to some underlying cultural uniformity, rather than to the existence of an economic structure to law itself."[66]

If you do not accept the "scientific" premise, can you still accept Posner's other premises, or does the subtraction of one premise change the field entirely? Does the application to law of economics (one of the *social* sciences) truly put the study of law "on a *scientific* basis"? Such questions can daunt new RPG candidates, yet each student must develop her own adjudicational skills in order to decide such matters independent of outside authority. Within the interstices of these conflicts lie the problematic differences and definitions of "new" and the "new contribution to knowledge."

"New" has two quite distinct meanings, both applicable to RPG work. First, it

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

[66] *Ibid.*

means “not old,” not recycled, not plagiarized—your own “fresh stuff” and not somebody else’s. Second, it means something not seen before (by implication substantial and important) within the scholarly realm that it seeks to enter. The satisfaction of the first definition does not necessarily imply the satisfaction of the second, and it certainly does not guarantee satisfaction of the second. In fact, it may disguise absence of the second. There is quite a lot of entirely fresh, unplagiarized writing that says absolutely nothing new. The second definition is harder to satisfy than the first, both conceptually and practically, which is why the rules against plagiarism can be taught in one class session, while the craft of making a genuinely “new” contribution to knowledge requires a lifetime. That craft is made difficult in legal studies because of the sometime confusion, conflation, ambiguity, and uncertainty—a Biblical “halting between two opinions”[67]—that attend the discipline in ways and for reasons that RPG students had best learn to navigate early in their careers. As this is true of what is “new” in RPG work, it follows that what constitutes a “gap” in existing knowledge may be similarly problematized for similar reasons—“gap” and “new” are inextricably bound together as Figure 1 shows. Law asks these kinds of questions all the time. Generations of first-year contract students are taught to problematize lexical ambiguity by asking, “What is chicken?”[68], and “who are Indians [Native Americans]?”[69], we must ask, *What is research?* The process may ultimately interrogate what “law” is and what a “law faculty” is. We must ask what it means to “think, teach, and supervise like a scholar.” The solution, I will argue, is not to eschew the two parts of the dichotomy but to embrace them. The outcomes of the two tracks may inform and fertilize each other in the real world, but their *pedagogical* methods, visions, and processes must be kept separate. This fact has deep implications

[67] *Old Testament*, 1 Kings 18:21 (Elijah speaking).

[68] *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (is frozen chicken “chicken”?).

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

for both hiring and supervision duties of the faculty.

Law School—Fish or Bear's Paw

The very idea of a "law school" as a co-equal department within the "larger university community" itself is a fairly recent innovation. As James Huffmann pointed out in 1974, "what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists."[70] He distinguished research *in* law from research *about* law. Thus, a PhD, for example, awarded by a law school for a thesis of traditional black-letter legal research (research *in* law) is, *a fortiori*, "no PhD at all." But the gap between these two worlds is a bit more nuanced and more difficult to broach than the simple in/about divide, due in part to the "increasing breadth and maturity of legal scholarship."[71] As Angela Brew has stated, "There is no one thing, nor even one set of things, which research is. It is obviously a complex phenomenon. It cannot be reduced to any kind of essential quality."[72] What counts, therefore, as "research" is absolutely crucial in the early determination of a whole range of academic questions that affect RPG students and their projects. Peer review is a central example. In the United States, traditional law reviews are student-edited—hence, publication in them by anyone other than law students is not "peer reviewed."[73] For non-student legal scholars who want to get their work accepted within the legal academy, the practicing bar, regulators of the legal profession, and lawyer organizations, this does not present a

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[70] James Huffmann, "Is the Law Graduate Prepared To Do Research?" (1974) 26 *Journal of Legal Education* 520.

[71] Michael Heise, "The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism" (2002) 2002 *University of Illinois Law Review* 819.

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

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

problem—indeed it is a kudo. What counts as "new" is what the student editors perceive as new. But getting their work accepted outside that special hermetic world presents a different problem. Consider, for example, the prestigious article, "The Chinese Communist Party and 'Judicial Independence': 1949-1959," by Jerome Cohen published in the *Harvard Law Review*.[74] It would be difficult to imagine a more prestigious and unimpeachable author, article, or journal. Yet outside the legal world, it is not unthinkable that it could be impeached by scholars in a discipline that demands true peer review. In Professor Cohen's case, most of his work is incorporated in other materials, such as books and collections, that are truly peer reviewed. But many other contributors to student-edited law reviews do not enjoy his personal status. Their work, and the work of those who cite their work, can be brought into question outside the hermetic world of black-letter law.

Unless the law school were to assume arrogantly that the rest of the non-law academic world must assimilate to *its* model of the PhD, rather than vice versa, this state of affairs must be interrogated. Otherwise, the standards and definitions of a law PhD are assailable by others in the non-law academic community. In attempting to come to grips with the issues and problems that exist within this gap, we will discover that every substantive term under consideration—legal, research, new, contribution, knowledge, research postgraduate, and gap—is contested. The idea of the "new contribution to knowledge" is repeated endlessly, often passing without much critical examination as if everyone knows what it means but shouldn't talk about it. Like pornography, "we know it when we see it."[75] The formula is so commonplace and so glib that it conceals the difficult questions of *what* it consists of and *how* it is to be accomplished. RPG students are often left to define it for themselves, and often they are wrong. The answer, of course,

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[74] Jerome Alan Cohen, "The Chinese Communist Party and 'Judicial Independence': 1949-1959" (1969) 82(5) *Harvard Law Review* 967.

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

is that all of the contested elements of the "new contribution to knowledge" must be *taught* to them, and in being taught must be *problematized* for them. The students cannot simply be abandoned to the assumed and passive "I know it when I see it" formula. But it may be unfair and unwise to compare law RPGs with other departments because it can be argued that scholars other departments don't face the same scholarship-practice dilemma (ivory tower versus downtown) in quite the same ways—law is unique. Paul Chynoweth notes:

> "This long-overdue move [by the law school] into the intellectual mainstream has been accompanied by dramatic changes in both the form, and the variety, of published legal scholarship. Although doctrinal work remains the defining characteristic of the discipline its emphasis is now less on the immediate needs of the practitioner and far more on longer term policy and law reform considerations.
>
> "As legal scholars have increasingly focused on society's wider needs and concerns they have become ever more willing to adopt the methods and approaches of the social sciences. This has given birth to perhaps the greatest change in legal scholarship in recent decades: the ongoing shift from doctrinal work to socio-legal scholarship whereby the role of law in society is examined from an external viewpoint, often through the collection and analysis of empirical data."[76]

Yet even after making these celebratory remarks, Chynoweth notes that "peer-reviewed doctrinal scholarship must be distinguished from the day-to-day doctrinal

[76] Paul Chynoweth, Editorial, "Legal Scholarship: A Discipline in Transition" (2009) 1(1) *International Journal of Law in the Built Environment* 1.

analysis undertake[n] by the practicing lawyer, or the practitioner journal."[77] The dichotomy remains—as does the dilemma. In sum, then, my purpose here is not to argue that either one of the two worlds, academics or practice, is greater or more important than the other. Indeed, the dichotomy and the dilemma may be both intractable and desirable, even productive. The purpose is, rather, to suggest that the two worlds do and should exist as discrete spaces (with overlap). When the two worlds and the standards that should apply in them become muddled and conflated, this serves neither practice nor academics.[78] Each should therefore be acknowledged and celebrated for what it is.[79] Like Frost's two roads, in most cases choosing the one or the other makes "all the difference."[80] In a similar vein, the philosopher Mencius famously said, There is fish and

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[77] *Ibid.*

[78] I base this statement not only on the research presented here, but also on my own experience of twenty years of practice followed by fifteen years of academics.

[79] I am grateful to Professor Douglas Arner for giving me the germ of this idea in a lecture he presented to my Advanced Research Class in 2008.

[80] Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth.

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

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

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

there is bear's paw, but you cannot have both at the same time.[81] I suggest that it may be possible to have both—*scholarshipwise*.

—Robert Frost, "The Road Not Taken" (1915)

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

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

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

Audiences

Traditionally, common-law lawyers were trained and qualified for practice not at university but by "reading law" (like John Adams) in the offices and chambers of senior practitioners—Dickens's Sidney Carton with C. J. Stryver. Law school, to the extent that it existed at all, was a vocational school[82] and its professors were the "teaching branch of the legal profession."[83] Those law students and lawyers who wanted to pursue academics apart from the practicing legal profession were often relegated to residency in other departments of the university in "law-and-___" or so-called "double degree" programs. While such interdisciplinary work is viewed as valuable, this meant that they were often supervised by academics who were not trained in the law. As Bruce Kimball has shown by reviewing personal letters and human resources records, law school professors were recruited based upon narrowly defined but traditional "academic merit"—grades, class rank, school rank, law review—and/or professional experience and reputation in practice.[84] Eventually, law schools and law students who were interested in academics more than practice began to catch on to the fact that some kind of field work *within the legal discipline itself* was necessary to lend credibility and *gravitas* to their theses and dissertations. Eventually, this would come to mean the dichotomizing of legal research into the study of THE LAW on the one hand, and THE LEGAL SYSTEM on the other—or as Steven M. Barkan puts it, the difference between *legal research* and *legal scholarship*.[85]

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

[83] Donna Fossum, "Law Professors: A Profile of the Teaching Branch of the Legal Profession" (1980) 1980 *American Bar Foundation Research Journal* 501.

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

[85] Steven M. Barkan, "Should Legal Research Be Included on the Bar Exam? An Exploration of the

The dichotomy is odd because, although Barkan is absolutely correct to make the distinction, the circumstances that require it must give any non-lawyer academician pause. For a long time this dichotomy did not appear—law school was all black-letter "legal research" all the time—and the emergence of the dichotomy in latter times is still somewhat tenuous. What could count for a new contribution in the law became, and still is, contested ground. The new contribution may be, we are told, incremental and not massive, but it nevertheless must be substantial and material, not make-weight—and it really must be new, and it really must be a true contribution in an objectively and globally verifiable way.[86] Something may be genuinely new and either incremental or massive, but its contribution may be negligible or trivial. Lengthy volumes of restatement generally fall within this category. The idea of a contribution is that it must be a real advance in the body of knowledge. It must have an evident *gravitas*. It may be both incremental and paradigm-changing.[87] As Whitehead says of science, the mere proof of an idea is not worth much unless we also "prove its worth." He says: "We do not attempt, in the strict sense, to prove or to disprove anything, unless its importance makes it worthy of that honour." This, for Whitehead, is what distinguishes true understanding from a mere collection of "inert ideas"—the avoidance of which is the "central problem of all education."[88]

Question" (2006) 99(2) *Law Library Journal* 403, 407. Bridget M. Hutter and Sally Lloyd-Bostock, "Law's Relationship with Social Science: The Interdependence of Theory, Empirical Work, and Social Relevance in Socio-Legal Studies" in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (Oxford: Clarendon Press, 1997), pp. 19-43, further problematizes this dichotomy.

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

[87] J. D. Watson and F. H. C. Crick, "Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid" (April 25, 1953) 171 Nature 737.

[88] Alfred North Whitehead, "The Aims of Education" in *The Aims of Education and Other Essays* (New York: The Free Press/Maxwell Macmillan, 1967), pp. 1-14, esp. pp. 1-5.

If the law school's RPG program were to confine its research product exclusively to a parochial audience of lawyers, then this might not matter so much. But if the law school, in the context of the larger academy of which it was now a part, wishes to have its research output accepted among the global academic community generally, then it needs to provide what that global academic community—not the local community—defines as a "new contribution to knowledge." Many new RPG students have no background in empirical research, field work, quantitative or qualitative analysis, or statistics and sampling (with their concomitant archival research).[89] Even those new RPG students who have published in traditional law journals face this problem.[90] When President Bok of Harvard called for "generating new knowledge" in legal education, he was addressing this problem. His examples of "generating new knowledge" comprise a long list of empirical projects in the "legal system." His conclusions bear quoting at length:

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

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

[90] E.g., Richard Delgado, "How To Write a Law Review Article" (1986) 20 *University of San Francisco Law Review* 445, is a good example setting forth the traditional model.

> Christopher Columbus Langdell was fond of asserting that law is a science and 'that all the available materials of that science are contained in printed books.' More recently, a witty law professor is said to have remarked: 'All research corrupts, but empirical research corrupts absolutely.'"[91]

This crucial difference in *audiences*—that of "the law" and that of "the legal system"—makes all the difference in the whole paradigm of what qualifies as "legal research" and what qualifies as a "new contribution." The first audience deals in persuasion, the second in discovery. Suddenly, the Legal System looms as large as, if not larger than, The Law itself, and many new traditionally trained RPG students are not comfortable with this fact. They are used to acting *within* the Legal System but not studying it as an *object* of academic research. To traditionally trained lawyers, The Law is everything, and the Legal System merely its by-product. For them, the Penal Code is the central inquiry—not the operations of the prisons themselves.[92] The statutory product of the legislature is far more important than the political operation of the legislature itself. But this view has increasingly come under fire as being too narrow and unproductive. Academic lawyers have increasingly shown that law in practice, applied law, is not only important but is the key litmus test of the validity of the law itself. The pedagogical challenge, then, is how to accommodate this expanded notion of "legal research" for the training of modern RPG students in the law school so that their concept of the "new contribution to knowledge" conforms more closely to the expectations of the academy at large—the greater audience. Students whose former experience in interviewing has been only work with clients will now be asked to conduct far-ranging interviews, including the

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

[92] See, e.g., Frank Dikötter, *Crime, Punishment and the Prison in Modern China* (Hong Kong: Hong Kong University Press, 2002).

use of questionnaires, in the field. Students who may have no experience whatsoever in statistical modeling or analysis will now be asked to undertake RPG-level work in these areas. Much of this activity will likely follow the models developed in the social sciences as being the closest by analogy to studies of the legal system, but that does not exclude the "pure" sciences and technology,[93] and it does not exclude the humanities and other non-law disciplines.

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

A Case Study: *That* versus *How*

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

However, in his final chapter the author included some materials, largely from other authors, that provided an opening for me to interrogate the adequacy of the book-to-be in terms of its "new contribution to knowledge." I first pointed out my opinion that for him to conclude there was a need for more "participatory democracy" as a solution to human rights problems in Africa was unremarkable, mundane, certainly nothing new, and probably false. Anyone even superficially acquainted with the endless discussions of human rights in Africa has read or heard these ideas before. I pointed out that not only

were these suggestions old and worn, but that indeed in most instances they had not worked—and the evidence for this lay within the very sources which my author had cited in his own research. In his final chapter he had applied the traditional IRAC model (Issues, Rules, Applications, Conclusions) of black-letter legal analysis by noting the key international covenants and other human rights laws that arguably applied to the situations he described, and then by arguing that these "should be applied" and that "if they were applied," the situation would likely improve. He had also assembled perhaps a dozen other scholarly sources all of which said that some "new thinking" or "better ideas" were needed and "would solve" the problems. They argued that someone needed to provide "more creative solutions" and "greater advocacy" (including "participatory democracy") if true answers were only to be found. He had, in other words, put together an impressive and convenient assemblage of somebody else's "stuff" in a single volume with the hope that that would provide a platform for others to do the work that eventually "would solve" the problems.

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

I suggested to my author that for *him* to rise to these challenges would indeed be his "new contribution to knowledge." This was the gap he needed to fill—to devise ways in his research to *operationalize* his thesis. Unfortunately at this point, he had no solutions and offered no leadership, only theory and reasoning rather than observation, and without them the statements he adduced from the sources were mere truisms. He had

thought it through enough merely to demonstrate *that* the problems existed and *that* leading scholars in the field knew this—all as demonstrated by his masterful bringing together and intellectual manipulation of primary and secondary legal texts including a literature review with analysis and theory. This, he believed, should be enough to "get others thinking" about creative solutions to the problems he had identified. In other words, he viewed his scholarly task as being that of *provocateur*, of "identifying the issues" and leaving it to "others" to work them out in practice. He would provide the theory within The Law (the bringing together or *assemblage*), but leave it to others to manipulate and reify that theory within The Legal System (the putting together or *fusion*). He was still very much invested in the "book report" mindset of a middle-school student—the teacher assigns the student to read a book and "report" on it to the class. The "report" goes something like this:

> This is the title of the book I read. It was written by this author. It is "about" this subject. This report is evidence of the fact of reading—of the fact that I read the book.[94]

He believed that if he simply assembled enough of these book reports into a chapter called his "literature review," with a little further adjudication and analysis, he was thereby making a "new contribution to academic knowledge." This mindset is not uncommon. He was, in short, thinking more like a traditional practicing lawyer assembling case and statutory authorities for a court or a client than as an RPG academic. He was not making a new contribution to *academic* knowledge in an *academic* format with an *academic* model and methodology. Despite the academic façade of his writing, by the mere marshalling of sources, without more, he was still (in Bok's words) "pecking at legal puzzles within a narrow framework of principles and precedent" in the manner of

[94] An exercise taken to task admirably in Chris Hart, *Doing a Literature Review: Releasing the Social Science Research Imagination* (London: Sage, 1998).

practicing lawyers, yet all the while thinking he was doing what academicians do. As I noted earlier in my discussion of the two distinct meanings of "new," the satisfaction of the first definition (dealing with "stuff") does not necessarily imply the satisfaction of the second (providing analysis), and it certainly does not guarantee satisfaction of the second. *In fact, it may disguise absence of the second*. Indeed, my author's writing exemplified Barkan's insight that "[w]hat might initially be perceived as poor writing often is actually a manifestation of inadequate research."[95] In other words, merely working within the academy using scholarly trappings and formats does not add up to "legal scholarship" as Barkan distinguishes it from "legal research." So long as the writer's mindset is "legal research," that is what the product will be, and it will make no "new contribution to knowledge" as scholars in other disciplines understand that idea. Its audience and purpose are still largely the practicing profession. An expansion of that "legal research" to include empirical research and archival research[96] could verify Macdonald's observation that "some of the most interesting legal scholarship is being undertaken by… [scholars] in departments of history, sociology, anthropology, criminology, political science, women's studies, native studies, communications, and so on."[97] Mike McConville has produced decades' worth of valuable and original empirical research in several legal systems throughout the world, focusing often on various aspects of criminal justice, and stresses the value of empirical-*cum*-archival work.[98] Archival research is often more overlooked than even empirical research, yet the two combined can add up to

[95] Barkan *op. cit.* at 407.

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

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

[98] Mike McConville and Chester L. Mirsky, *Jury Trials and Plea Bargaining: A True History* (Oxford: Hart, 2005).

a double “new contribution to knowledge” if used in conjunction with each other.[99]

[99] Louise Craven (ed), *What Are Archives? Cultural and Theoretical Perspectives: A Reader* (Aldershot, England & Burlington, VT: Ashgate, 2008).

"Jack-of-All-Trades" Academicians

The problems described above are, if not universal or even identical in all places, widespread enough to warrant concern, and they are often potentiated by another related problem: practicing or academic lawyers who think that a traditional law degree (JD, LLB, PCLL, etc.) qualifies them to research, write about, and pontificate upon, any and every subject that may interest them or that the law may touch and concern. I call this the Jack-of-All Trades Theory of legal research. It is the problem of the dilettante: "As a Legal Jack-of-All-Trades, I can and will undertake anything and everything I want to." It is a failure to define one's "core competence" and avoid anything that it does not include. Judge Harry Edwards notes this problem: "Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it."[100] There are two cautions here. One is that the RPG student is astute enough to identify the jack-of-all-trades syndrome in others; the second is that she does slip into simulating it herself.

It is no wonder, therefore, that it is only with the greatest difficulty that new RPG students learn to grasp the necessity and skills—let alone the *duty*—to adjudicate such materials as Judge Edwards describes. Within the huge volume of legal literature that is their source material, they find a plethora of writings by authors on subjects for which they have no visible qualifications or credentials whatsoever,[101] yet these are the

[100] Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 *Michigan Law Review* 34, 36; original emphasis.

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

(sometimes peer-reviewed) writings of the credentialed "masters" whom the students are supposed to emulate. This difficulty often occurs in the "law-and-___" fields, but is also common in studies with names like "The History of Chinese Commercial Law" or "Ancient Greek Jurisprudence." A similar problem occurs when authors untrained in empirical research undertake to do empirical research, especially with a statistical component, on a self-taught, on-the-job-training basis, or take courses outside the law school.[102] Socio-legal research, which encompasses all forms of empirical and archival research, is itself a complex discipline that requires expert training and credentialing.[103] In any of these situations, a traditional black-letter law degree, without more, is not enough. Yet, this is a common attitude among new RPG students. Just because the law itself touches and concerns something (it touches and concerns everything), *they* believe they can, too. They see others do it, so they do it. The Harvard paleontologist Stephen Jay Gould (1941-2002) confronted this problem when he responded to a book entitled *Darwin on Trial* by Berkeley (Boalt Hall) law professor and Christian "philosophical theist" Phillip E. Johnson. The book purported to enter the science-creation debate that is rampant in the United States. Gould's criticism is pungent:

> "Now, I most emphatically do not claim that a lawyer shouldn't poke his nose into our [the scientists'] domain; nor do I hold that an attorney couldn't write a good book about evolution. A law professor might well compose a classic about the rhetoric and style of evolutionary discourse;

Persuade? Some Thoughts on the Market for 'Empirical Legal Studies'" (2008) 71 *Law & Contemporary Problems* 17.

[102] For example, the HKU Computer Centre offers courses in the use of statistical software for correlation and regression analysis of data; <www.hku.hk/cc>. The law school does not offer such courses.

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

> subtlety of argument, after all, is a lawyer's business. *But, to be useful in this way, a lawyer would have to understand and use our norms and rules, or at least tell us where we err in our procedures; he cannot simply trot out some applicable criteria from his own world and falsely condemn us from a mixture of ignorance and inappropriateness*…. I see no evidence that Johnson has ever visited a scientist's laboratory, has any concept of quotidian work in the field or has read widely beyond writing for nonspecialists and the most 'newsworthy' of professional claims."[104]

To Johnson's "false and unkind accusation that scientists are being dishonest when they claim equal respect for science and religion," Gould offers the ultimate retort: "Speak for yourself, Attorney Johnson."[105] New RPG students often manifest these kinds of problems when they declare their intended subject of research, and their problems often arise out of an excess of ambition and energy. For example, a student will declare her intention to write a thesis on the comparative law of China, the European Union, Brasil, and South Korea. (A surprising number of students get admitted on the strength of such proposals.) When I eventually see her in my Advanced Research Methodology (ARM) class, I will ask her the most fundamental question of all: "Do you have command of the languages of each of the areas you intend to study (i.e., China, the European Union, Brasil, and South Korea)—and not just the language generally, but the special 'covenant language of the law' as it is inflected in each of those locales?" Are you trained to think like a lawyer in each of those systems? The answer, sadly, is almost invariably no. I then ask: "If you do not have those languages and that training, how then can you make a 'new contribution to knowledge'? You must work from translations, and

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[104] Stephen Jay Gould, "Impeaching a Self-Appointed Judge" (July 1992) 267(1) *Scientific American* 118-21; reprinted in Liz Rank Hughes (ed), *Reviews of Creationist Books* (Berkeley, CA: National Center for Science Education, 2nd ed, 1992), pp. 79-84, 79; emphasis added. A concise biography of Johnson may be found in Randy Moore and Mark D. Decker, *More Than Darwin: The People and Places of the Evolution-Creationism* Controversy (Berkeley: University of California Press, 2009), pp. 193-95.

[105] Gould, *ibid.* at p. 82.

the discipline of translation studies tells us that translations, like translators and interpreters, are notoriously unreliable.[106] That will not be good enough for RPG work, especially if you need to conduct empirical research in each of those languages in the field." Any purported "new contribution to knowledge" that might come from such a project would be immediately suspect in the global scholarly community. One key opens one lock; a different key opens a different lock (一把鑰匙開一把鎖). As Professor Hugh Nibley observed, you must either get all the tools, and precisely the right tools, necessary to your research project, or move on to some other project.[107]

> If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years— *or else shift to some other problem*.[108]

One implication of Nibley's paradigm is that there is a difference between a lawyer writing about science (or a scientist writing about law) on the one hand, and a lawyer who *is* a scientist (or a scientist who *is* a lawyer) on the other. To push the examples further, suppose another matriculating RPG student, who has practiced commercial law, declares his subject to be "A History of Chinese Commercial Law," the next relevant question is, "In addition to being qualified as a lawyer and specialist in Chinese commercial law, are you properly credentialed as a historian?" Or the reverse: "If you are properly qualified as a historian, do you also have the necessary credential in the law with a specialty in Chinese commercial law? If your answer is no, you must shift

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[106] Robert J. Morris, "Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation" (2006) 51(3) *Journal of Homosexuality* 225.

[107] Robert J. Morris, "Globalizing and De-Hermeticizing Legal Education" 2005(1) *Brigham Young University Education & Law Journal* 53, discusses Nibley's ideas. We shall return to Nibley later.

[108] Hugh Nibley, "A New Look at the Pearl of Great Price, Part I: Challenge and Response (Continued)" (Feb. 1968) 71 *Improvement Era* 14 (emphasis added).

to some other topic. If you do plan to get the necessary qualifications, how do you plan to get them—and when?" Part of the problem of the Jack-of-All-Trades Syndrome arises out of the continuing conflation of the differences between legal research in practice on the one hand, and academic legal research on the other. Lawyers in practice confront a bewildering array of subjects and problems, even within their own areas of specialization. In many ways, their research for clients and the courts must be generalist in nature and must allow for the constantly shifting mix of facts and law in actual cases. They must be masters not only of substantive law but of procedure, evidence, rules of conduct, and so on. What a medical malpractice lawyer knows about medicine often rivals that of a physician. A lawyer whose only language is English may be called upon to represent a Muslim client and necessarily to work through translators and interpreters. In any case, the "new contribution to knowledge" in legal practice may be the winning argument in an appeal that becomes a new case precedent. And this model of generalism in legal practice can often influence RPG work, especially if the RPG student has a background in practice before crossing into the academic sphere. It has the same implications for faculty supervision of RPG students.

A recent example of the difficulty that arises when the two spheres get conflated can be seen in the book, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* by Michael Salter and Julie Mason,[109] written primarily for use in British-style educational and legal systems. The title contains two confusions, one explicit, the other implicit. The explicit confusion is the "writing" preceding the colon with the "research" following the colon. The implicit confusion is between writing in the academy (dissertations) and what the bulk of the work really addresses, which is methods of writing for the courts (practice). It homogenizes the two as if they were interchangeable. Because the text itself conflates these two purposes throughout, it is necessary for readers to parse the text on a page-by-page basis in order to tease apart the

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

materials that apply to the one or the other kind of research and writing. Although the authors pay lip-service to the conduct of socio-legal and empirical research, all of the sources they cite are *published* articles and books. They do not adduce any empirical or archival research of their own, nor do they cite any actual theses or dissertations. This might seem odd in a book on the subject of "writing law dissertations" until we recall that it is odd only within the context of the *global* academic community. This is a model of the conceptual problems under review here as well as of the research structures of many law schools with both traditional black-letter degrees and RPG degrees.[110]

[110] T. C. Daintith, "Postgraduate Legal Education—the EUI Example" in John P. Grant, R. Jagtenberg, and K. J. Nijkerk (eds), *Legal Education 2000* (Aldershot, Hants: Avebury, 1988), pp. 279-85

What Counts as "New"

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

> "find one new point, one new insight, one new way of looking at a piece of law, and organize *your entire article* around that. One insight from another discipline, one application of simple logic to a problem where it has never been made before *is all you need*."[111]

This is to be accomplished by reading everything that bears on your subject—"every significant idea, book, or article that is out there."[112] After you have "read everything" and documented that work so that you will be able to prepare adequate footnotes, *then* you are "ready to write."[113] There is no intervention here of empirical work "in the field," no consultation of unpublished archives, and the finished product is envisioned as a sort of lengthy literature review in which only one single new theoretical angle need be demonstrated. This is the basic model for legal research and writing for practicing lawyers, and it is the reason that (a) the adjective "legal" needs to be appended before the word "writing," and (b) other disciplines such as the sciences and social sciences do not recognize "legal research" as "research at all." Merely figuring out one new insight in literature that already exists does not, for them, qualify as "new." This traditional form of "thinking like a lawyer" may be sufficient for RPG work intended only for an audience strictly within the practicing legal community[114], but it will not

[111] Delgado, *op. cit.*, p. 448; emphases added.

[112] *Ibid*. p. 450.

[113] *Id.* p. 451.

[114] Robert J. Morris, "Not Thinking Like a Nonlawyer: Implications of 'Recogonization' for Legal Education" (2004) 53(2) *Journal of Legal Education* 267, explores the meanings of "thinking like a lawyer" in the traditional black-letter sense.

serve for any kind of interdisciplinary "law-and-___" work that in intended to be examined, read, and accepted globally by scholars in other fields.[115] The issue for law school administrators is where to position their RPG programs between these two choices, or along their overla, and how to train and supervise candidates in "thinking like a lawyer who is thinking like a ___."[116]. *A fortiori*, a professor trained and working solely in black-letter law is not qualified alone to guide an empirical or archival RPG project.[117]

Computer-assisted searchable databases have revolutionized legal research. The forms and structures of published legal information, and the fact that they can be searched as a concordance, have influenced and changed how lawyers think about the law[118]—in other words, what counts as "thinking like a lawyer." The implications for both the law and the academy of this in terms of what counts as "new," as well as how something new is identified and structured, are vast. Anthropologist Allan Hanson, among others, discusses the contrasting worldviews of "classificatory" and "indexical" approaches to law and other subjects. The older classificatory approach prefers to learn or to make a "new contribution to knowledge" within structures of established knowledge—of "what is out there." On the other hand, the newer indexical approach (the concordance) organizes what is out there in terms of what they want to know.[119] This

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

[116] Richard Mohr (ed), "Legal Intersections" (2002) 6 *Law Text Culture*, Special Issue, which collects a group of articles that "discuss and critically assess the diverse research methods which can be employed in law-related research from 'conventional' legal doctrinal analysis to methods of empirical data collection and analysis drawn from other disciplines."

[117] Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (London: Oxford University Press, 2010 forthcoming), deals with the subject of qualifications; it may be previewed online at <http://fds.oup.com/www.oup.co.uk/pdf/catalogues/scholarlylaw/General_and_Reference.pdf>.

[118] Richard A. Danner, "Legal Information and the Development of American Law: Further Thinking about the Thoughts of Robert C. Berring" (2007) 99 *Law Library Journal* 193, summarizes the literature and analyzes these ideas.

[119] F. Allan Hanson, "From Key Numbers to Key Words: How Automation Has Transformed the Law"

represents the difference between a "new contribution to knowledge" that is *found* and one that is *made*. It is not a hard and fast dichotomy, and in fact many creative researchers combine "what is out there" and "what they want to know." Hanson argues that the shift to the indexical approach provides "greater flexibility and creativity" in legal research. He explains:

> "The person who would learn something, or make a new contribution to knowledge, must relate it to the structure of established knowledge. Established knowledge is taken to be certain, which is why proposed paradigm shifts provoke stiff resistance and why those that are ultimately successful are considered to be momentous developments. The certainty built into this view of things also means that when people encounter ways of thinking and behaving different from their own, their typical reaction is to assume that the alien ways are at best misguided, and at worst heretical and evil. Divergent notions about the structure of reality mean that many different worldviews are included within the classificatory type, and they often find themselves at odds with each other."[120]

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> "Non-automated techniques such as encyclopedias, treatises and the key number system are classified indexes. Much as other encyclopedias and library cataloging systems, they organize the law in a hierarchical system of categories that also serve as devices for finding legal information. For those imbued with such research techniques [using classified indexes], the

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(2002) 94 *Law Library Journal* 92; F. Allan Hanson, "From Classification to Indexing: How Automation Transforms the Way We Think" (2004) 18(4) *Social Epistemology* 333.

[120] Hanson, "From Classification," p. 346.

> classificatory scheme underlying them reveals what the structure of the law really is. A good example is legal positivism: the view that the law exists in its own right and is out there, waiting to be discovered."[121]

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> "Legal research of any sort, be it in case law, regulatory law, or the academic literature, is being weaned away from the hierarchical categories embedded in the traditional research tools. As a result, lawyers are coming to think of the law as a collection of facts and principles that can be assembled, disassembled and reassembled in a variety of ways for different purposes This could call into question the notion that the law actually *has* an intrinsic, hierarchical organization, and that would signal a basic change in the perception of legal knowledge and of the law itself."[122]

This is more than a mere argument for computer and Internet literacy. If a scholar, through concordanced thinking, is free to assemble, disassemble, and reassemble legal facts and principles for new and different purposes, then the possibilities for "thinking like a lawyer" and making a "new contribution to knowledge" expand exponentially—but in ways different from the traditional models. Earlier I cited the example from my editing of a book manuscript of the author who raised a series of suggestions about participatory democracy in Africa from the exiting literature, to whom I replied: *Will YOU now provide this new thinking—these better ideas? What are YOUR more creative solutions? What is YOUR greater advocacy?* A moment's thought will reveal that even if this author undertakes to provide his own answers to these questions, but does so only by manipulating existing ideas from his literature review as suggested by Delgado and

[121] *Id.* at 348.

[122] *Id.* at 348-49; original emphasis.

similar writers, his offering will not count for much in the larger academic community as a “contribution” of anything “new,” for it is grounded in nothing more than his own abstract theory-making. In reality, it will be nothing better than the existing suggestion of the need for more “participatory democracy” and will merely reify that truism. A truism reified is still a truism. What the student produces in this case will not be a true RPG product but merely the “research paper” or “book report” of the middle-school kind. This is not to say that such a product is bad or wrong. It depends on the audience for the product. If the audience (say the court or a client) is expecting such a report as the result of legal “research,” with a legal conclusion and recommendation for action, then that is what it paid for and that is what counts as “new.” However, if the audience is the larger global RPG and academic community that includes humanists, scientists and social scientists, it will not count as a “new contribution.”

What Counts as "Knowledge"

If there are two contingent spheres of legal inquiry—practice and scholarship—then the preliminary question must be, Which knowledge are you talking about—the knowledge of the law, or the knowledge of the legal system? The common law rightly prides itself on its rules of evidence. These have been pruned and developed over long years of experience to include and exclude information based on its probity. Under the rules of evidence, "knowledge" means the information provided by a percipient witness as credible evidence. This, and only this, counts as knowledge. All else is opinion, speculation, faith, hearsay—and is usually inadmissible. The most notable exception to this rule is the opinion of "expert" witnesses, but even that is based upon the expert's special empirical and scientific training and experience, not mere textual exegesis.[123] A medical expert can give expert testimony only on her own area of personal expertise. "What do you know, and how do you know it?" is the key question—not the "grandiose reflections about political philosophy, legal history,[124] and social order" noted by Ely, written primarily for other professors and the occasional judge.[125] If this is true, then the only way for the RPG law student to make a real contribution of "knowledge" is to participate in substantial empirical and archival research—in other words, to become a percipient witness of something and then to "bear witness" of that something in a written thesis or dissertation. There is no way around this reality. But as Peter Shuck notes, empirical work is "grunt work," costly in time and money, and it is uncertain:

"The payoff from empirical work is substantially contingent in a way that

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

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

[125] Ely *op. cit.* at 491.

> most traditional legal scholarship is not. Until one gathers and analyzes the data, one cannot know whether one will make important new findings or 'merely' confirm what everybody (especially is retrospect) 'already knows.' In contrast, the [black-letter] articles that we typically write [for law reviews] exhibit a kind of predestination; once we have thought our ideas through, we know where we are headed."[126]

This unsettling reality defines the crucial difference. The audience in "the law" expects such predestination. The audience in "the legal system" does not. This difference can arise with shocking surprise early in the career of any RPG law student, and it might send that student fleeing to the comforting arms of black-letter predestination. Increasingly, RPG examinations are seeing questions about empirical and archival research being raised in what the candidate proposed only as a black-letter subject. Conversely, some proposals that are strongly empirical or archival are challenged as to the lack of robustness in their black-letter underpinnings. Either way, in addition to new questions of methodology and theory, the inclusion of empirical work implicates a whole set of ethical concerns. In "predestinated" black-letter research, we usually teach the prohibition against plagiarism and its cognates as the greatest ethical problem. In empirical research, the study of human subjects implicates an additional cluster of regulations and precautions (informed consent, privacy, invasiveness, insurance, liability) that apply only in that arena.[127] And the regulations caution:

> "***Competence*** Researchers should undertake only such research that they and their fellow researchers and research students are competent to,

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[126] Peter H. Shuck, "Why Don't Law Professors Do More Empirical Research?" (1989) 39 *Journal of Legal Education* 322, 331.

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

> so that the safety of all research participants, and the ethical integrity of the research, might not be compromised for reasons of incompetence.[128]

Of course, this automatically excludes the jack-of-all-trades and the dilettante. But it says much more than that. The ensuring of "competence" is the first ethical responsibility, and lack of it is as serious as plagiarism.[129] Only such competence can generate acceptable "knowledge." Phillips and Pugh tell RPG students that they are on their way to becoming full-fledged members of a worldwide peer group of scholars, membership in which confers upon them the status to examine other people's theses and dissertations with authority.[130] It is therefore essential for such scholars-to-be to understand fully the respective "rules of the game" that apply to that part of the club they are joining, and to understand them in the incipiency of their candidature.

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[128] The full list of requirements for such "Research Ethics" may be read at <http://web.edu.hku.hk/research/research_ethics/Policies_&_Principles.pdf>.

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

[130] Phillips and Pugh, *How To Get a PhF*, pp. 20-23.

Non-Law Law

A special problem arises when a law teacher is employed in a non-law department such as business, education, architecture, building and real estate, medicine, dentistry, business, agriculture, management, and so on—even medicine and nursing. This often occurs at universities which have no law school. The primary purpose is not to create amateur barristers but to provide both non-law undergraduates and postgraduates with a sufficient knowledge of the law in order to (1) reduce the incidence of liability due to malpractice, (2) know when a true legal problem exists, and (3) improve ability to work more effectively with lawyers when legal problems cannot be avoided. Increasingly such departments are offering and often requiring their students to take basic classes in the law that applies to their disciplines.[131] In addition to these concerns, it is obvious that the students who graduate from such programs will someday hopefully contribute to the interdisciplinary scholarship of the law in their own non-law fields published in non-law journals.[132] I taught such classes with such students in the Department of Building and Real Estate (BRE) at the Hong Kong Polytechnic University for two years.[133] The "Poly U" does not have a law school; the BRE is a department faculty comprised of architects, surveyors, management specialists, business specialists, and the like. During that process I published several academic papers, including a "pure" law paper on a Hong Kong statute,[134] plus a conference paper regarding the pedagogy of teaching law outside the law

[131] Points noted and problematised in Roderick A. Macdonald, "Still 'Law' and Still 'Learning'? *op. cit.*.

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

[133] The department's main page may be viewed online at <www.bre.polyu.edu.hk>.

[134] Robert J. Morris, "The Hong Kong Lands Resumption Ordinance: Implications of Law and Public Policy for International Construction Projects" in Edwin H. W. Chan (ed), *Contractual and Regulatory*

school, which included a small amount of empirical data.[135] Despite the different nature of both articles, each was addressed to a practical concern *within the building professions* and did not target legal professionals or other law scholars or law students as its primary audience.

In such departments it is common nowadays to require all faculty members to record the data regarding their scholarly publications in some sort of uniform database that provides a weight and value to each publication which is then included as part of the professor's performance-review dossier for purposes of promotion, salary increases, ranking, and so on.[136] The matrix compares all faculty members and their publications within their department, with the larger faculty or school of which it is a part, and with the university as a whole. The program is designed to evaluate publications according to the standard criteria of the disciplines based on their accepted standards and methodologies that define what "research" is for them. Among other functions, it ranks publications according to the fame and importance of the journals themselves. What, then, of the law professor who records a "pure" law paper in such a system within a non-law department where all faculty members but himself are evaluated on the basis of criteria and methods of, say, the social sciences—where "what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists."[137]—while his research and publications conform to the traditional law-school pattern of "legal research"? What of the RPG students who are his co-authors? Aside from questions of fairness and equity, how can such publications truly be compared at all? Is it in the interest of the university and the departments to attempt such

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Innovation in the Building and Real Estate Industry (Hong Kong: Pace Publishing, 2008), pp 88-94.

[135] Robert J. Morris, "Improving Curriculum Theory and Design for Teaching Law to Non-Lawyers in Built Environment Education" (2007) 25(3-4) *Structural Survey* 279; Robert J. Morris, "The Teaching of Law to Non-Lawyers: An Exploration of Some Curriculum Design Challenges" (2010) ___ *International Journal of Law in the Built Environment* (in press).

[136] See, e.g., the databases of the HKU Department of Research Services at <www.hku.hk/rss>.

[137] James Huffmann, *op. cit.*.

homogenization? Should the law teacher be required to publish only those materials that conform to the norms of the non-law disciplines?

A recent empirical study in the Netherlands addressed some of these issues.[138] Questionnaires were distributed to scholars in "four larger Flemish universities" in order to assess general academic activities and specifically publication lists ("bibliometric indicators") as methods of evaluating the job performance of law academics ("juridical research")—what many universities call "performance review" or "performance review and development" (PRD). Two committees were involved—a peer-review committee of all research activities in law at the four universities, and a committee of deans of Flemish law departments. Among the theoretical underpinnings of the study was the acknowledgement that "[m]any scholars, particularly those in the USA, may argue that law is not a typical humanities field"[139]—an interesting departure from the law-as-social-science model discussed earlier. It also recognized that the "main impediment to such a ranking [of law journals] was that most law journals show large variations in the quality of the papers published."[140] Furthermore, the "role of journals was found to be less prominent in communicating research results in juridical research than it is in many fields in natural and life sciences." The results of the study reify and further problematize some of the fundamental dichotomies we have already observed, and therefore bears quoting at length:

> … the [peer review] Committee stressed that attempts should be made to distinguish between 'genuine' scholarly contributions on the one hand, and *informative publications aimed primarily at providing social services, on*

[138] Henk F. Moed, "A Case Study of Research Performance in Law" in Henk F. Moed, *Citation Analysis in Research Evaluation* (Dordrecht, The Netherlands: Springer, 2005), pp. 159-66.

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

[140] Epstein and King, "The Rules of Inference" *op. cit.*

the other. Genuine scholarly publications conform to criteria of methodological soundness, thoroughness and significance. In the Committee's view, it is the first category of publications that *distinguishes between a juridical scholar and a practitioner or a professional legal expert*. Academic scholars should primarily be evaluated according to their contribution to scholarly progress, rather than to their practical activities.

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The relationship between juridical research and practice was also addressed in a second report by a committee of Deans of Flemish Law Departments. However, this Committee stated that juridical research primarily serves the 'practice', a basic characteristic that creates difficulties in distinguishing between fundamental and applied juridical research. *It is worth noting that the two committees apparently did not have fully coinciding viewpoints*.[141]

The report concluded by noting that the peer-review Committee "stated that it would continue to work on the development of criteria for measuring research performance in the field of Law, and that it would be unfortunate if findings from the report were to be applied 'in a premature way' in university research policy."[142] If two such committees cannot agree on policy or criteria for evaluating research activities among law scholars, how can it be expected that universities and their non-law departments that include a law component can do so in any kind of meaningful way? Amid the lack of "fully coinciding viewpoints" of the two committees, it is difficult to

[141] Moed *ibid*. at 160; emphasis added.

[142] *Id*. at 166.

know where my own two Poly U publications might properly be located or evaluated. The dichotomy between “scholarly progress” and “practical activities” is alive and well.

Supervisors

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

> The ever-increasing scope of knowledge necessary to cope with the great problems of our day has led to increasing emphasis on a maxim that would have sounded very strange only a few years ago: 'There are no fields—there are only problems!'—meaning that one must bring to the discussion and solution of any given problem *whatever is required to understand it*: If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years— *or else shift to some other problem*. *Degrees and credentials are largely irrelevant where a problem calls for more information than any one department can supply or than can be packaged into any one or a dozen degrees*.[143]

This prescription, now almost fifty years old and yet more important than ever, is focused on the requirements for the student, the RPG candidate, and is a statement about "core competence." If the candidate is working across disciplines and departments, then s/he must assemble the necessary cluster of interdisciplinary skills needed to address that body of recombinant information in order to address the gap/new conundrum. Yet its reverse application has important implications for the RPG law program as well: Who will supervise the RPG student whose project needs empirical research in the academic

[143] Hugh Nibley, "A New Look at the Pearl of Great Price, Part I: Challenge and Response (Continued)" (Feb. 1968) 71 *Improvement Era* 14 (emphasis added).

mode?[144] Certainly it cannot be a faculty member whose sole training, orientation, and reward structure are to black-letter "legal research." If the student needs multiple languages, credentials, skills, and degrees, plus the skills for good field research and statistical analysis, so also does the supervisor. A supervisor adept only at doctrinal legal research cannot supervise an RPG student conducting a project of empirical and archival legal scholarship. Some individuals bridge the gap between both worlds—they not only teach doctrinal subjects and supervise RPG research in the law school, but they also serve the practicing community. But individuals who are not qualified to do both must not be pressed into service from one sphere into the other. To do so would cheat the supervisor, the student, the law school, and the academic community. Ron Griffiths sums up the complexity of the situation:

> "In any department, the supervision of dissertations usually draws on a wide range of staff, often with different perspectives on what counts as a 'proper' research question and approach. Students can, therefore, find themselves caught between conflicting lines of advice, some insisting on conventional, value-neutral, exploration-oriented, 'scientific' questions and methods; others happy to accept more context-specific, problem-focused, value-engaged and methodologically eclectic projects."[145]

Typically in the sciences, the humanities, and the social sciences, the supervisor assumes a large managerial role[146], and she and the supervisee become collaborators. They go on an intellectual journey together, working on the same projects, publishing papers sharing the same by-line along with other RPG students and other faculty

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[144] Desmond Manderson, "FAQ: Initial Questions About Thesis Supervision in Law" (1997) 8 *Legal Education Review* 121.

[145] Ron Griffiths, "Knowledge Production and the Research-Teaching Nexus: The Case of the Built Environment Disciplines" (2004) 29(6) *Studies in Higher Education* 709, 724.

[146] Tricia Vilkinas, "The PhD Process: The Supervisor as Manager" (2002) 44(3) *Education & Training* 129.

colleagues. The list of co-authors on publications is truly an ensemble.[147] This is how students learn to write and how they get their first professional publications. The professor's project is the student's project. Felix Frankfurter recognized this need for the law academy as early at 1930. He wrote:

> "The ultimate concern of the social sciences, law among them, is the conquest of knowledge leading, one hopes, eventually to new and important insights into the good life of society. [For that we need] a very small number of rigorously selected graduate students…. Graduate work implies a personal relation between two students, one of whom is a professor. If there is not common intellectual enterprise between professors and graduate students, there may be facilities for giving degrees but not graduate work in any fruitful meaning of the term."[148]

However, this is not the usual case in traditional law school "supervision," where such collaboration is the exception.[149] Law professors may have research assistants, but they are not the RPG students, and if they are credited at all, they often do not share the by-line. Supervisors and supervisees are generally assigned to each other because their respective projects share a common subject (i.e., commercial law), not because they will collaborate on a common project. Frankfurter would not have accepted this state of affairs. One of his great scholarly models was Charles Darwin and his exemplary empirical study, *On the Origin of Species*. Frankfurter celebrated the empirical methods

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[147] As but one typical example, see the publications list of my colleague Dr. Derek S. Drew at the Hong Kong Polytechnic University online at <http://home.bre.polyu.edu.hk/~bsdsdrew>.

[148] Felix Frankfurter, "The Conditions for, and the Aims and Methods of, Legal Research" (1930) 15 *Iowa Law Review* 129, 139. Frankfurter (1882-1965) was a justice of the US Supreme Court from 1939 to 1962.

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

and aims of the social sciences but lamented the gap between them and the law:

> "We are mostly only talking about collaboration, and have as yet hardly begun to experiment on the processes by which to integrate or coördinate or collaborate with one another. We have hardly got over the discovery that we are members of the same family; we have not yet acquired family habits with one another."[150]

That Frankfurter articulated these admonitions as early as 1930 is perhaps as astonishing as the lack of "family habits" that still remains eighty years later. One possible way to explain the apparent lack of familiality, especially among the law and other disciplines, is to note what some writers have called the fear of "reductionism" when one discipline is "colonized" by another or wishes for the kind of certainty or methodology of another.[151] Different disciplines have different kinds of certainty, different powers and paradigms of explanation, different rules of causation and effect, and different scales of what counts as evidence and general theory—of what counts, in other words, as "new," "contribution," and "knowledge." The proximate and general explanations that lead to theory in the different disciplines may conflict and thus disrupt each other.[152] Michael Ruse argues that the fear of degrading one discipline by another's methods is a "rape,"[153] and this might be said to be true even of "the law" and "the legal system." Where disciplines claim to be special or unique, and to have sole control of themselves, their practitioners must surely sense a reason for caution here. They may

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[150] *Ibid*. at 133.

[151] See the discussion generally in Jim McKnight, *Straight Science? Homosexuality, Evolution and Adaptation* (London and New York: Routledge, 1997), pp. 173-77 *passim*.

[152] Richard D. Alexander, "The Search for A General Theory of Behavior" (1975) 20 *Behavioral Science* 77-100,

[153] Michael Ruse, "Are There Gay Genes?" (1981) 6 *Journal of Homosexuality* 5, 29.

fear the overreaching tendency to “jump disciplines” as a kind of poaching or trespassing that leads to disciplinary drift and dilution. Darwin wrote of collaboration and of comparison with other disciplines in the light of the intellectual values under consideration here:

> I have no great quickness of apprehension or wit which is so remarkable in some clever men…. I am therefore a poor critic: a paper or book, when first read, generally excites my admiration, and it is only after considerable reflection that I perceive the weak points.
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> * * *
>
> Some of my critics have said, ‘Oh, he is a good observer, but he has no power of reasoning!’ I do not think that this can be true, for the 'Origin of Species' is one long argument from the beginning to the end, and it has convinced not a few able men. No one could have written it without having some power of reasoning. I have a fair share of invention, and of common sense or judgment, *such as every fairly successful lawyer or doctor must have, but not, I believe, in any higher degree*.
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> * * *
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> As far as I can judge, I am not apt to follow blindly the lead of other men. I have steadily endeavoured to keep my mind free so as to give up any hypothesis, however much beloved (and I cannot resist forming one on every subject), as soon as facts are shown to be opposed to it. Indeed, I have had no choice but to act in this manner, for with the exception of the Coral Reefs, *I cannot remember a single first-formed hypothesis which had not after a time to be given up or greatly modified*. This has naturally

> led me to distrust greatly deductive reasoning in the *mixed sciences*. On the other hand, I am not very skeptical,—a frame of mind which I believe to be injurious to the progress of science. A good deal of scepticism in a scientific man is advisable to avoid much loss of time, but I have met with not a few men, who, I feel sure, have often thus been deterred from experiment or observations, which would have proved directly or indirectly serviceable.[154]

The implications of these principles for RPG students and their supervisors, where assimilation to (an)other discipline(s) in "sociolegal studies" occurs, are profound. They must manage what I call the *parallax view* of interdisciplinary and comparative scholarship. As Paul Chynoweth notes, supervision, peer review, methodology, theory, research outputs, communications between disciplines, and almost every other aspect become problematized.[155] This problem can become especially poignant when the RPG project tries to join the law with another, more determinate discipline. In an informal seminar of RPG students from several disciplines at my university, a disagreement arose over the interpretation of secondary-source commentaries on religious texts regarding extramarital sex. A Hong Kong sociology student wrote this account of his exchange with a law student:

> "I noted that I put myself into a very dangerous situation in which I am easily criticized by researchers from Law. Meanwhile, my research would not be able to go further from sociological viewpoint. I would take [____]'s view to go back to look at how the [_____] and [_____]

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

[155] Paul Chynoweth, "Legal Research" in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Oxford, UK: Wiley-Blackwell, 2008), pp. 28-38, esp. p. 37.

> [primary-source texts] say about extramarital relations. This suggestion helps to avoid any confusion from some second-hand resources."[156]

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

> "In my opinion, the problem is the classic knowledge/power problem. We Chinese researchers keep learning from the west, using their terms and methodologies. But it's difficult for us to discuss with western colleagues equally, because we don't quite understand them and they don't care about us either. If they want to know about China, they have their own experts and all they want is a brief conclusion. Actually this is the same for Chinese scholars."[157]

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

> "The definition of a value field makes the contents of the field exportable. That is to say, if we understand a proposition in the context of its own field

[156] Personal communication on file with author.

[157] Personal communication on file with author.

we can translate the proposition into language that will convey the same informational content in any other value field we understand."[158]

Yet even granting the fact that here Cohen uses "translation" here with reference to ideas rather than words, anyone familiar with modern translation theory must recognize that this states a bit much—exact equivalence between words, fields, or ideas cannot be achieved.[159] But a reduction of the indeterminacy to a minimal may be "good enough." Ken Kress observes, "Law is indeterminate to the extent that legal questions lack single right answers."[160] This probably strikes non-lawyers as odd (the mere idea that the question, "What is chicken?"[161], can be asked at all), but black-letter practitioners and scholars within the common-law tradition are at ease with this lack of "single right answers" and with Coke's "artificial reason and judgment of law"—indeed they glory in it. Its process has been aptly compared to the growth and stability of a coral reef. The metaphor was coined by Judge Learned Hand in his review of Benjamin Cardozo's *The Nature of the Judicial Process* in the 1922 *Harvard Law Review*.[162] Hand wrote that the common law is not a "machine" that operates automatically but that its whole structure "stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work." But to non-lawyer ears, this sounds more like evolution than academics: the common law moves like a "glacier," and it is, of course, judge-made law[163] As Robert Gordon noted earlier, social science is a

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[158] Felix S Cohen, "Field Theory and Judicial Logic" (59 *Yale Law Journal* 238, 265.

[159] Robert J. Morris, "Translators, Traitors, and Traducers" *op. cit*.

[160] Ken Kress, "Legal Indeterminacy" (1989) 77 *California Law Review* 283.

[161] *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

[162] Learned Hand, Book Review (reviewing Benjamin Cardozo's *The Nature of the Judicial Process*) (1922) 35(4*) Harvard Law Review* 479.

[163] *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1061), aff'd , *Chapman v. Brown*, 304 F.2d 149 (9th Cir.

"value-soaked, fuzzy, messy, dispute-riddled, political enterprise like any other interpretive activity—like law for instance,[164] but the respective fuzzinesses appear to differ in their characteristics.

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

> "What is considered profound innovation in one field may be regarded with skepticism, if not derision, by another, and where a field (or supervisor) lies along the continuum will naturally have a significant steering effect on the nature of the dissertation proposal."[165]

Kilbourn goes on to note that the crucial importance of the research proposal is that all these issues must be *worked out in advance* of the student's embarking on the dissertation project itself.[166] Hence, the confrontation and management (if resolution is too much to expect) of the continuum—the parallax—is an essential first step for the new RPG student, and yet it is one of the most theoretically and methodologically difficult in addressing the gap/new conundrum. This early understanding is crucial also if the RPG project is to manage Bradney's "more-different" divide and truly end up with a "new contribution to knowledge" in the *university* sense without skepticism or derision on any

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1962). See the discussion of these cases and these images in Robert J. Morris, "Products Liability in Hawaii" (1979) 14(4) *Hawaii Bar Journal* 127, esp. n. 73 and accompanying text.

[164] Gordon, *op. cit.*

[165] Brent Kilbourn, "The Qualitative Doctoral Dissertation Proposal" (2006) 108(4) *Teachers College Record* 529, 536.

[166] *Ibid*. p. 572.

side. Finding the way to do this may itself become the student's "new contribution to knowledge."

Summary, Conclusions, & Recommendations

Does having neither fish nor bear's paw mean that you cannot have some of each? Mencius thought not. The choices to be made are not based on a simplistic either-or binary nor a zero-sum game. In defining its "core competence," if the law school chooses to dichotomize itself between the professional and the academic, between legal research and legal scholarship, it should not homogenize the two. In fact, the dichotomy should be widened. Both missions of the law school are important in the globalized world, each should have its own special preserve, and both should stand on equal footing.[167] There is nothing wrong with researching and writing in either mode or both modes so long as what one is doing is clearly acknowledged and exploited for its particular strengths and methods—so long, in other words, as one is not assumed naïvely to be the other. Audience is all-important. Bok's "pecking at legal puzzles within a narrow framework of principles and precedent" is precisely the value-added *desideratum* which the legal profession needs and wants—in other words, it *is* the very "new contribution to knowledge" as defined in that community. It is how the "coral reef" of the common law is built up case by case, generation by generation. On the other hand, if the audience is the global scholarly community in law and all other non-law disciplines that law touches and concerns,[168] then *their* definition of the "new contribution to knowledge" must prevail. The two spheres should not greatly overlap lest the Jack-of-All Trades Syndrome emerge. Neither sphere of legal research or legal scholarship can abide a dilettante. The differences between the two spheres of legal research and legal scholarship, the law and the legal system, should be recognized and embraced. One is

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

[168] I have elsewhere noted that the law, like the "ocean," touches and concerns all other subjects, departments, disciplines, and ideas (the "islands"). Robert J. Morris, "Globalizing" *op. cit*.

not privileged over the other. If the difference between legal research and legal scholarship is at present perceived as odd, the solution is for the law school to embrace them both, to celebrate the differences, and to give full support to both worlds without conflating or homogenizing them. Students on either track should not have to "go outside" the law school to get the training they need. This is the conclusion reached by Manderson and Mohr, who note that—

> "If legal advocacy is based in argument for a foregone (or pre-financed) conclusion, then the training of the advocate *cannot be reconciled with that of the legal scholar*. No graduate program has yet acknowledged the paradoxical implications of this position. A masters or doctoral program that wishes to take the idea of legal research seriously…*must look very different* from a law degree which trains outcome-oriented advocates, either at masters' or undergraduate level."[169]

They recommend dedicated and separate programs for each track where traditional legal researchers are not pressed into service for legal scholarship. Barkan reaches the same conclusion and notes that perhaps this is the reason "why so few faculty members are willing to teach legal research, and why the subject has traditionally suffered in status."[170] Tracey E. George argues that a truly successful empirical movement in the law school must necessarily be "faculty-based as opposed to program-based" for the permanence, longevity, and funding they imply.[171] If "what the law schools and lawyers call legal research is not research at all as the term is understood by

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[169] Manderson and Mohr, *op. cit.* at 5 *passim*, emphasis added.

[170] Barkan, *op. cit.* at 407.

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

physical and social scientists"[172] and if a PhD or other RPG credential awarded by a law school for traditional black-letter legal research is "no credential at all," then the gap between these two worlds should be spanned by acknowledging the unique place of each in the legal world and ensuring that each receives the support and the legitimacy it needs to recognize its own special nature in its own unique sphere. In other words, their differences should be accentuated, not homogenized—and those differences should be made know to, and understood by, all newly entering RPG candidates. It may be too extreme to suggest that a student must choose between "thinking like a lawyer" and "thinking like a scholar," but if Nibley is right, the student must understand the requirements of both worlds in order to make any choice. The coin of the realm in one sphere is of partial value in the other—and that is all right. RPG students who expect to get their research accepted within the global community of scholars must understand what they must do to compete in that larger context. These subjects should be the subject of at least annual in-house training conferences involving all the local stakeholders as well as invited guests from other jurisdictions concerned with the RPG community. And finally it must include the personal and institutional willingness on the part of faculty supervisors to co-supervise and to co-publish with members of non-law faculties and their RPG supervisees in order to avoid the jack-of-all-trades problem. But as Professor Fortney notes:

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

[172] Huffmann, *op. cit.*

between law professors and researchers in different parts of the university."[173]

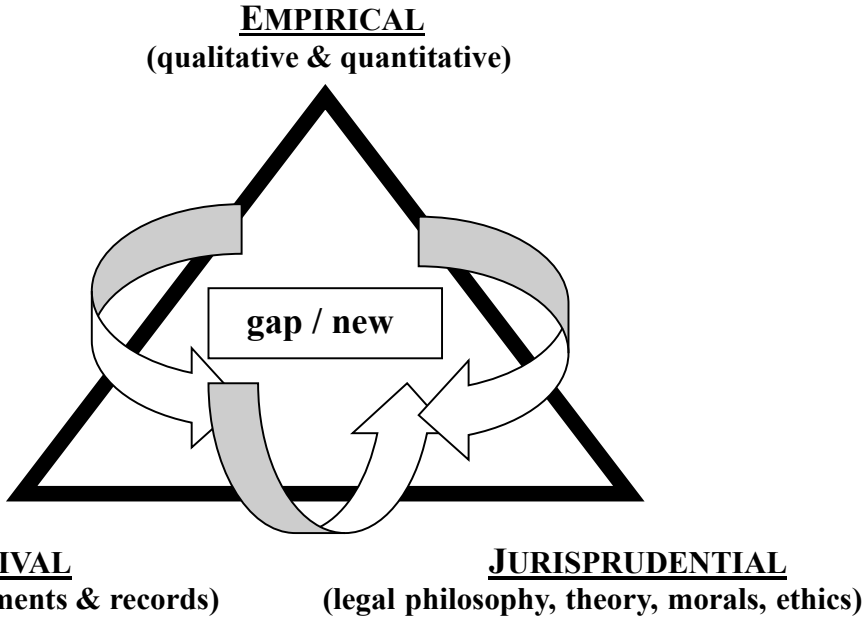
A way to help address these problems of barriers or impediments for RGP students is to see combinations of empirical, jurisprudential[174], and archival research as three methods to identify, supplement, and potentiate more clearly their research questions, goals, strategies, "gaps," and "new" contributions—particularly if the basic research program is black-letter law. The jurisprudential component suggests the possibility of choosing research questions that engage the moral and ethical senses beyond the purely textual problems of the canons of construction. One current example of this is the rapidly developing area of "savior siblings"—children specifically conceived in a kind of "genetic supermarket" to benefit a living sibling with a genetic disorder.[175] The choices among all these possibilities need not be binary. A properly designed research project can have both fish and bear's paw. The idea can be diagrammed thus:

[173] Susan Saab Fortney, "Taking Empirical Research Seriously" p. 1482 (emphasis added). Daintith, *op. cit*., also addresses this question of impediments.

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

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

Figure 2


EMPIRICAL
(qualitative & quantitative)
gap / new
ARCHIVAL
(unpublished documents & records)
JURISPRUDENTIAL
(legal philosophy, theory, morals, ethics)

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

For many legal scholars, myself included, law really is a discipline unto itself. It is not "one of" the humanities, the social sciences, the sciences, the arts, or anything else.[176] It is the sea that touches and concerns all of these islands, and many more besides. In this metaphor we see a definition of "the legal system" that is much more expansive than the courts, the prisons, the legislature, the legal profession, and so on. It includes everything that the law touches and concerns—which is everything: medicine, sex, broadcasting, shipping, football, astrophysics, hot dogs, everything. The law is not the legal system ("the map is not the territory"), but they are related. Sir Edward Coke, who spoke of the "artificial reason and judgment of law," gave in the *Institutes of the Laws of England* this most enduring metaphor: "Our student shall observe, that the knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding."[177] This much is taught by rote to new law students even today. But

[176] Interdisciplinary work might bring the fields together in a comparison between cause and effect in tort and in science using, for example, Ernst Mayr, "Cause and Effect in Biology" (1961) 134 *Science* 1501.

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

the rest of Coke's paragraph also bears quoting at length:

> "He that reacheth deepest, he seeth the amiable and admirable secrets of the law, wherein, I assure you, the sages of the law in former times…have had the deepest reach. And as the bucket in the depth is easily drawn to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawne up but with great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, *so long as he keepe himselfe in his own proper element*."[178]

In this study we have defined THE LAW and THE LEGAL SYSTEM as the two such equal and "proper elements." Surely the great company of the sages of the law, in their deepest reaches, admit no dilettante there. In this lies the challenge of crafting appropriate ways to make a "new contribution to knowledge" in RPG legal studies without forcing one element into another, nor being forced into a mold which legal scholarship cannot abide—in other words, of keeping each RPG student herself within her own proper element. Like the Flemish peer-review committee which we discussed earlier, we should "continue to work on the development of criteria for measuring research performance in the field of Law." It is an unfinished task. At the same time, the traditional law school should not be abandoned, either. The two must stand on equal footing as we draw the buckets up. In the quest for something "new, grand, wild, yet regular," curricula and classes cannot provide everything. Ultimately, as Nibley says,

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

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

each student must assume responsibility for acquiring the requisite tools and skills—"*one* must *get* them." There is a point after which they cannot be *given*. We are nowhere near that point yet. RPG students should never be in the position of thinking they have produced something objectively new, when in reality they have only produced something subjectively analytical.

THE TEN RULES REDUX

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

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

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

The "new contribution to knowledge" may be either found or created.

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

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

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

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

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

analysis.

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

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

DIAGNOSTIC QUIZ

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

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

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

TRUE FALSE

3. "Plagiarism" can be most properly defined as—

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

A. I and II only
B. I, II, and III only
C. IV only
D. I and IV only

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

5. Regarding primary sources:

I Published material is the most important primary source for legal research.
II Archival material is the most important primary source for legal research.
III Quantitative material is the most important primary source for legal research.
IV Qualitative material is the most important primary source for legal research.

A. All of the above
B. None of the above
C. I and IV only
D. II and III only

6. What is a "thesis statement"?

7. The primary purpose(s) of a footnote is/are—

I To demonstrate your scholarship and erudition
II To impress your supervisor, editor, professor, and/or colleagues
III To help you avoid plagiarism
IV To assist others in finding your sources

A. All of the above
B. IV only
C. I only
D. I, III, and IV only

8. What is a "research gap"?

9. In doing postgraduate research work, as in your professional life generally, it is most correct to say that you are in competition with whom:

A. The professor
B. Yourself
C. The exam
D. Each other

10. Go to the law library and find the following book, which is on reserve at the circulation counter:

Jon Meacham, *American Lion*.

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

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

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

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

to keep in your files. Why do you think I suggest this?

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

a) Poor English

b) Poor logic and argument

c) Poor footnotes and bibliography

d) Poor format and structure

12. What is justice?

13. Do you love the law?

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

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

PERSONAL INFORMATION WORKSHEET

Name & Student Number:

Name to use in class:

Complete contact information:

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

When did you first matriculate at HKU?

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

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

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

Country of origin & native language:

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

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

Why have you chosen the HKU Law School?

What do you expect to get from this class?

How do you plan to leverage your residence at HKU in your research project? How will you operationalize that unique experience so that your finished product demonstrates "Hong Kong characteristics" / 香港特色?

Research Topic, Title, or Project:

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

Will your research project be—

_____ Black-letter/doctrinal

_____ Empirical (Quantitative, Qualitative)

_____ Archival

_____ Theoretical, Jurisprudential, Philosophical

_____ Other (specify)

The Research Gap to be filled:

The Thesis Statement:

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

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

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

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

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

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

MAKING "A NEW CONTRIBUTION TO KNOWLEDGE"

The Challenge for Research Postgraduate Law Students & Their Counterparts

By Robert J. Morris (司徒毅), JD, PhD[1]

27, 050 words July 26, 2010

ABSTRACT

As law schools and their students integrate with the global realm of non-law research postgraduate (RPG) scholarship, they meet the demands, norms, and expectations of that realm, which are different from those of traditional black-letter "legal research." Among these is the requirement that the RPG candidate make a "new contribution to knowledge" by identifying and filling an important "gap" in the existing scholarship. While those ideas are understood, defined, and well-settled in the sciences, humanities, and social sciences, they are problematic in legal studies. This is so because what traditional law schools and lawyers call "legal research" may not be recognized as research at all by other disciplines. If the work of law RPG students, and of their counterparts who are researching law in other disciplines, is to achieve recognition beyond the law school, they must cultivate full-bodied "legal scholarship" in contradistinction or addition to traditional "legal research," with distinct understandings of what counts objectively as "new," as a "contribution,"

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[1] University of Hong Kong (HKU) Faculty of Law, Department of Law. Juris Doctor, University of Utah (USA) College of Law (1980); PhD, University of Hong Kong Department of Law (2007). Much of the theory that I develop in this book arises out of my experience teaching Advanced Research Methodology (ARM) (LLAW 6022) at HKU from 2005 to the present, and before that as an RPG student and PhD candidate at the University of Hong Kong 2002-2007. I am grateful to all the RPG students in those classes and their supervisors for all they have taught me about the issues discussed here and for the contributions they have made to this study.

and as “knowledge,”—and to whom and why they count globally.

TABLE OF CONTENTS

Preface

The Teacher said: "There is nothing new under the sun."[2] It is a rebuttable presumption, and whoever claims to have something "new" has the burden of proving it.

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

> "Reputation ought to be the perpetual subject of my Thoughts, and Aim of my Behavior. How shall I gain a Reputation! How shall I Spread an Opinion of myself as a Lawyer of distinguished genius, Learning, and virtue…. Why have I not Genius to start some new Thought. Some thing that will *surprize the World*. New, grand, wild, yet regular Thought that may raise me *at once* to fame. Where is my Sout? Where are my Thoughts. When shall I start some new Thought, make some new Discovery, that shall surprize the World with its Novelty and Grandeur?"[3]

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

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[2] *Old Testament*, Ecclesiastes 1:9. "What has existed before will exist again, and what has been done before will be done again."

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

Thought and Time and Province Law."[4] Second, he could impress by "making Remarks, and proposing Questions [to] the Lawyers att the Bar, endeavour to get a great Character for Understanding and Learning with them," but "this is slow and tedious."[5] Third, he could "look out for a Cause to Speak to, and exert all the Soul and all the Body I own, to cut a flash, strike amazement, to catch the Vulgar,"[6] but these projects, he concluded, would not "bear Examination."[7] He continued this intellectual trial-and-error long past his twenty-fourth year. He served in the First and Second Continental Congresses as the delegate from Massachusetts, helped draft the American *Declaration of Independence*, served as minister to France and Great Britain, drafted a new constitution for Massachusetts, served as George Washington's vice-president, served as second president of the United States, appointed John Marshall as chief justice of the US Supreme Court, and did a thousand other things that secured his fame as one of the American Founding Fathers. Adams was, in all respects, a man of reputation who participated in affairs that would indeed surprise the world. His formula and his process of thought, though tortuous, is a good model for RPG law students and their counterparts: "new, grand, wild, *yet regular*," not merely something to "cut a flash, strike amazement, to catch the Vulgar." Creep or fly? It is a good way of "thinking like a lawyer," of deciding what you want to be, of making the necessary choices properly, and of raising your reputation as a world-class scholar.

The University of Hong Kong (HKU) where I teach provides orientation for newly matriculated research postgraduate (RPG) students. Regardless of which department or faculty the new student will join, the University, like universities elsewhere, requires that each of them must produce a "new contribution to knowledge" in order to qualify for a degree. To this end, the Graduate School offers a series of short general

[4] Adams *Diary*, *ibid*. p. 78.

[5] *Id*.

[6] *Id*.

[7] *Id*.

courses, some of them mandatory and all of them lasting about six weeks, which are designed to position all RPG students within the general framework of what modern RPG research is "all about." The foundational courses are the mandatory "Introduction to Thesis Writing,"[8] after which other courses provide orientation for the social sciences and humanities on the one hand, and the sciences on the other. As I can personally attest, it is not uncommon in these short orientation classes to hear the instructors say something like this: "Now, for you law students, this exercise (or chapter, or commentary, or rule) does not fully apply. You will have to ignore it or adapt it." RPG law students are constantly aware that in many ways, they are a class apart from students in other disciplines. The problem is that the law is not one of the humanities, the social sciences, or the sciences. The law is the law. Perhaps we could say that it is *almost* unique. RPG students who understand this fact, and understand why it is a fact, will do better in their legal studies. So, also, will their counterparts in other disciplines who are studying law. These Graduate School courses do not quite match the needs of RPG students in law. Not quite, but somewhat. The mismatch or interstice—perhaps parallax or differential are better words—is not utter, and it is not unbridgeable. It is that space which this book aims to occupy.

The course materials for Introduction to Thesis Writing have been collected in the book, *Dissertation Writing in Practice*.[9] It is an excellent basic work for new RPG students. But like the classes from which it is taken, it reflects the practices and rules for non-law subjects. The same is true for a well-known companion volume, *How To Get a PhD*,[10] which is widely read at HKU. Unfortunately, many of the RPG students I meet

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

[9] Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003).

[10] Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Maidenhead: Open University Press, 2005).

have not read such books, nor have they had the benefit of even such minimal instruction in RPG work. Furthermore, the principles and examples they encounter in both books and in the courses are taken from non-law disciplines, and because these texts are one-size-fits-all, the law RPG student must constantly adapt them to her own situation by laboriously walking them through her own mental processes of "thinking like a lawyer." It is something like the way new language learners mentally translate a foreign language which they are hearing or reading into their own tongue before they learn to think in the target language. This ought not to be. Filling this gap is not simply a matter of "sprinkling a little legal water" on these existing materials in the hope of providing a clear vision for RPG law students. Guidance cannot be given simply by asking them to analogize these materials to legal research. At the very least, analogizing would be superficial and uncertain. The parallax between these materials requires some real analysis if any kind of unified method is to be achieved. The similarities between legal method and other disciplines must, of course, be highlighted and harmonized, but the differences particularly must be set in sharp relief because they must be exploited, not minimized. The law and its methods cannot be *made into* something else, nor vice versa. What can and cannot be homogenized is a delicate business.

RPG students in law deserve to know up front (and thereby to be taught and forewarned of) precisely the tasks and pitfalls they must uniquely face, and especially how those tasks and pitfalls positively differ from those encountered by their counterparts in other disciplines. They must be given the exact tools they need to complete a fully worthy RPG program that commands the respect of the global academic community while remaining true to the disciplinary demands of the law. The same is true for their counterpart non-law RPG students whose research includes some aspect of the law. *A fortiori*, the increasing interest of RPG students in compound studies (law-and-____, ____-and-law) makes this balancing act even more acute, as evidenced by the increasing number of non-law academic journals publishing articles on the law written by non-lawyers. At present, no single study provides these tools, these supplemental concepts between what is found in the two example books mentioned above—hence, this study,

which does not supplant but complements the other two. Indeed, this study might be called, *Law Dissertation Writing in Practice and How To Get a Law PhD*.

The tools and goals which these students need to craft the product demanded of them are encapsulated within the well-known phrase, "a new contribution to knowledge." It includes the requirement of identifying a gap in the existing body of knowledge, conducting research to fill that gap, and thereby making a new contribution to existing knowledge. A "contribution" adds value. In any subject, the project of making a "new contribution to knowledge" requires a passionate investment in analyzing materials that are often recondite and tedious.[11] It is a principle of academics *and* a principle of competition. The difficulty is that the "new contribution to knowledge" for RPG legal studies is even more complicated, and therefore more problematic—or rather *differently* complicated and *differently* problematic—than for the social sciences, humanities, and sciences. It is a horse of another color. Like the law itself, its definition in legal studies is *almost* unique. This fact arises simply because of the history and nature of the law and of the law school. It is not due to any intentional effort to "be difficult" or "odd," but rather to the nature of the subject itself. The idea of "making a new contribution to knowledge" is not embedded in legal analysis the same way it is in other disciplines. Traditional legal analysis, for example the IRAC model (Issues, Rules, Analysis, Conclusions), begins with "spotting issues" in a legal problem. This works on law school examinations, opinion letters to clients, and court briefs. But "spotting issues" and analyzing them is not entirely coterminous with identifying a "research gap" or "making a new contribution" to knowledge in the academic disciplines. The IRAC process might lead to such a new contribution, but usually not along exactly the same paths or for the same purposes that scholarly research would. The paths are not mutually exclusive, but they require different kinds of walking shoes.

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

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

rubric of the “new contribution to knowledge” has not been entirely without conflict and misunderstanding. These are problems that exist both within the law school and within other faculties and departments which are increasingly turning their attention to the law’s impact on their professions. This study, therefore, targets two distinct but related audiences. The first is, of course, RPG law students themselves. They especially must know what is expected of them in order to get their research accepted in the global academic community. The second audience is those non-law RPG scholars in the social sciences, the humanities, and the sciences who undertake to write in any way about legal matters in relation to their own disciplines (medicine-and-law, history-and-law, etc.). In order for them to do so successfully, they must understand what “thinking like a lawyer” means and how it translates into RPG work. They must understand what their presence in the law academy, albeit partial, will feel like. Both sides of this divide often, and unfortunately, assume that they can undertake studies in the discipline of the other without the proper orientation and training. Nothing could be further from the truth. The present purpose, therefore, is to raise awareness of these issues and requirements of RPG law studies and to mark a path forward.

The notion of the globality of scholarship and the global competition to produce something “new” in legal scholarship may at first sound contradictory. After all, there is nothing more local than the law. Like species in evolution, the law colonizes the local niche where it arises. Place has priority, and law is peculiar to place. Place and law reify each other. Montesquieu famously wrote:

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

> ‘They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; *in all of which different lights they ought to be considered*.”[12]

Even in seemingly broader endeavors such as comparative law, the points of comparison are two or more sets of law in two or more specific locales. The common law is “common” only to certain countries, and even among them it has different inflections. Science tries to find universal principles in the natural world, but finding universals in law is difficult—maybe impossible, and maybe undesirable. For example, US Supreme Court Justice Oliver Wendell Holmes wrote: “I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction.”[13] Students in traditional black-letter schools may view their competition as wholly local—as being with themselves, the teacher, the examination, the school, and their fellow practitioners in the local legal community. But RPG work flattens those boundaries and expands the field to the world. It is a difference of scale. What constitutes a “new contribution to knowledge” is of truly global concern. Globality is the touchstone of RPG work. RPG

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

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

students may write about local law, but they must do so in a global way.

Beginning spring 2005 and continuing every spring thereafter, I have taught a course at the University of Hong Kong Department of Law entitled Advanced Research Methodology (ARM) for RPG students. I have taken no part in recruiting or admitting the RPG students or assigning them to their respective supervisors, nor in designing the criteria of admission to either the Graduate School or the law school. The students arrive in my class already matriculated. As part of the semester-long syllabus, I repeatedly stress to the students that they are expected to make a "new contribution to knowledge" in their theses and dissertations. I have taught more than 100 members of the classes, including students from Hong Kong, the PRC, the United States, England, the Philippines, Singapore, Indonesia, Thailand, Burma, Greece, Sri Lanka, Vietnam, Nepal, Japan, and South Korea.[14] Most of the students have been full-time, with a few part-time—a special challenge because part-time students have severe constraints of time and work. Input from this representative group over the years give me confidence that (a) the "new contribution to knowledge" is a concept that is often elusive, and (b) the principles I explicate in this study are of widespread usefulness. The written work and personal information that the students produce becomes the accumulating archive on which this study is founded. The course is a one-size-fits-all requirement that homogenizes students seeking the PhD, MPhil, SJD, and any other research postgraduate (RPG) or taught postgraduate (TPG) credential—a not unimportant distinction in itself for some purposes.[15] The class must therefore address, in a single semester, their needs in both black-letter and empirical theory and practice in different curricular settings and demands, including on-campus tenures ranging from one year to four-plus years. Within the limits of the prescribed syllabus, I use the survey documents mentioned above to tailor the class to the peculiar needs of each group. The Department of Law itself offers various

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

[15] But not for my purposes here, where I will use RPG to include both.

undergraduate courses in black-letter research, including supplemental library and computer-assisted training, but offers no training in anything like "Empirical Research Methods in Law." Students who wish to undertake the latter must go to other departments in the university. The Graduate School offers several general short courses, but these are not tailored to the needs of law students or students in other disciplines who are working with law.[16]

Before coming into the HKU RPG program, most of the students have received some kind of undergraduate credential in law, and many have intermediate RPG credentials. All have had practical experience in the practice of law, teaching law, working in their countries' judicial systems, conducting research, publishing, or combinations of these. Sophistication in research experience is highly mixed, from extensive to novice, but in no case has any student had advanced training or experience in empirical research of the kind known in the social sciences, although some have been in the midst of acquiring such skills. All have been, in other words, traditional black-letter lawyers more or less. Of those in compound programs, approximately one-third of the students have been conducting research in the law and social sciences; a handful in law and humanities, and none in law and science.[17] This class, in one form or another, has existed for many years, and many RPG students have passed through it with several instructors.

Each of these classes has been an empirical laboratory in which to observe a mix of international students presenting a whole range of research subjects, and to think about the patterns of pedagogical and theoretical problems that pertain to newly matriculated RPG students in the law. Because of these diversity and the prominent position of Hong

[16] See the courses in qualitative and quantitative methods at <www.hku.hk/gradsch/web/student/course/gs/index.htm>.

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

Kong in the global academic community, I take these *recurring patterns* to be representative of similar patterns elsewhere. During their semester with me, the students produce many short written assignments, among which are responses to a DIAGNOSTIC QUIZ and a PERSONAL INFORMATION WORKSHEET (Appendices A and B). Both of these are produced during the first week of the semester to assess where the students are academically and mentally and to provide a benchmark as they begin going through the class. It is upon these that I base my observations about their perceptions and needs at the outset of their RPG work, and regarding which I have several personal interviews with each student. In addition, at three stages during the semester, each student prepares a RESEARCH PROPOSAL, each step being more complex and sophisticated than the previous step. I assess these not as writing *per se* but for the quality of research they demonstrate. All these documents collectively comprise the emerging archive of the class on which this study is based.

The present purpose, therefore, is to assemble the key representative ideas that inform this discussion in order to assist the stakeholders in making clear and informed decisions about the paths they choose in pursuing their vocational legal work, and to help them steer along those paths. It argues that all stakeholders must conceive of the two paths as being of equal dignity and *gravitas*—of existing on the same footing—not a parts in tension with each other. Although this study is rooted in the HKU model, the breadth of the research sources indicates that it can be adapted to the situations of many law and non-law RPG programs elsewhere. Fiona Cownie notes the following regarding RPG legal education in the European Union:

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

are demanded by different educational systems."[18]

This diversity is apparent in many places. Indeed, as I travel to other universities and meet RPG students and their supervisors elsewhere, the issues discussed here seem to be universal. As the demand for a "new contribution to knowledge" is universal, so the path to achieving it in legal studies is, if not entirely universal, certainly common. We can abstract ten general principles or rules that permeate all that is presented throughout this study.

[18] Fiona Cownie, "Postgraduate Legal Education in the EU: Difference and Diversity" (2002) 9(2) *International Journal of the Legal Profession* 187, 200; emphasis added. Cownie's article is an exemplary empirical study.

THE TEN RULES

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

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

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

The "new contribution to knowledge" may be either found or created.

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

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

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

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

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

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

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

MY RESPONSES TO THE READERS' COMMENTS

I welcome both readers' positive evaluations and their recommendations for publication of the book. Both were quite enthusiastic and complimentary. I agree with their assessments that the book will find a worldwide audience. In response to the comments, I have already taken their substantive points on board and have expanded the manuscript from the original 75 pages to 175 pages to include a larger literature review and more discussions of certain key areas as requested. All specific suggestions about further explanations of figures and diagrams, the 10 Rules, and other explanations have already been incorporated. My responses to a few of their suggestions require a bit of elaboration.

I have kept the book international rather than focused on any one jurisdiction. Recommending one particular school or programme would inevitably omit some others that deserve mention. This maintains the general applicability of the book across the world. I note that "how to conduct their research" or "how to choose their research topic" is not precisely the aim or purpose of this Guide. It is, rather, "how to" think about the ends in mind (the "new contribution to knowledge") when RPG students are doing those things. It is a subtle but necessary distinction which I have clarified in the expansion. The book cannot be called "How To Write a PhD in Law." It is not narrowly addressed to "PhD" students or programmes, but to the much broader global RPG audience. This difference is also essential. As the working title states, it is addressed to non-lawyer and non-law students "of law" as well as to those trained *in* law. This maximizes the global audience. If the title uses the words "in law," it may self-eliminate or mislead the other-disciplinary "counterparts" whom I wish to include in the audience/market. For example, there may be a medical student writing a double-degree dissertation in some aspect of "law-and-medicine," but who perceives her academic base to be in the medical school, not "in law" but "in medicine" plus "of law" or "about law." This book is for her.

One reader mentions some disagreement with me as relates to "law and other fields." Whether the law is "similar to" or "different from" other fields is a contested issue. RPG students need to know that it is contested and how to negotiate that contestation. I have said that law is "different from" other disciplines because that is the position I have taken in my previous publications, which I cite in the

manuscript, and it seems wise to be consistent with myself. More importantly, if law were not somehow different or special or "set apart" from "other fields," there would be no need for this book. The books already published for RPG students in those "other fields" (social sciences, sciences, humanities) would suffice. The "difference" of the law creates the unique gap which this book fills. That is its very core thesis, and this is what makes it unique and globally marketable.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

NEW COURSE PROPOSAL

This is a proposal for a new dedicated research postgraduate (RPG) course to be entitled as follows:

ADVANCED CREATIVE LEGAL WRITING (LLAW 60xx)

Nature, Purpose & Design of the Proposed Class

At present, I teach the above-captioned Advanced (Legal) Research Methodology (ARM) course, which is (and always has been since its inception some years ago) a one-semester course that teaches only research. This proposal suggests that that course be expanded and augmented to two semesters which will integrate advanced legal research *and advanced legal writing* for Research Postgraduate (RPG) Students in the HKU Faculty of Law, Department of Law. The two semesters would commence in the Fall and conclude in the Spring each year, beginning with Fall 2011 and continuing through Spring 2012. As explained below, these two semesters would not be sequential (i.e., research first, then writing), but would combine research and writing at the same time for a full academic year. The curriculum contemplated in this proposal is to teach and practice all forms of RPG writing—theses and dissertations in the first instance, plus research papers, journal articles, book chapters, and papers for academic conferences. This would include instruction in the peer review and editorial processes, in the latter case, and the examination process for the oral defense for theses and dissertations. The work on papers for academic conferences would also include the "platforming" process and skills of oral presentation.

The motive for this proposal is that, without exception, all RPG students (and most supervisors) in the present and past ARM that I have taught have asked for a

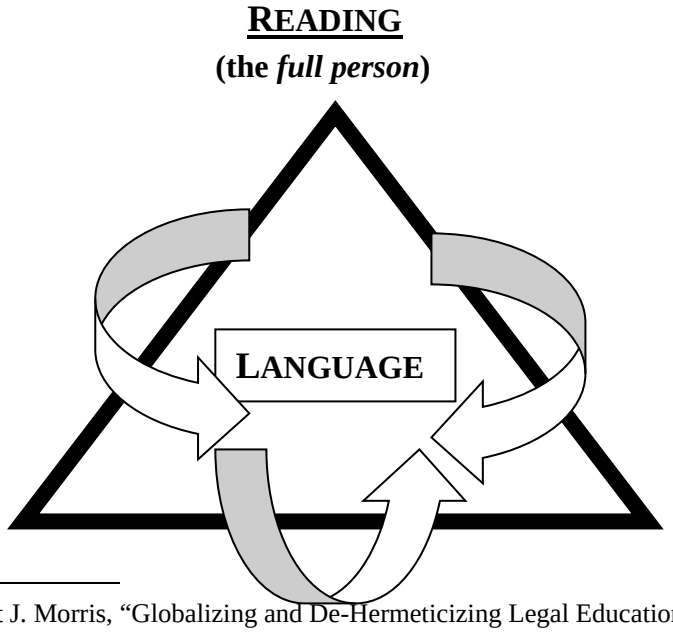
class in “advanced legal writing.” It is remarkable that every single RPG student makes this request and sees the need to combine advanced writing with the present advanced research curriculum. It is a gap that instruction from the students’ individual tutors and supervisors, even if it is given, does not adequately fill. It is also worth noting that many leading law RPG programs in other universities around the world routinely teach RPG legal writing as mandatory instruction. Stated another way, an RPG law program that does not contain such an in-house component is an oddity in the global marketplace.

Many, perhaps most, of our non-Hong Kong RPG students come from jurisdictions where research and writing conventions for scholarly work (including publication) are different from those employed and expected here in Hong Kong. And while the law school does have several existing writing programmes in the present curriculum, none is dedicated solely to RPG students, and, what is worse, none dedicated specifically to law students. The proposed course is not designed to compete with or replace any of these existing non-law courses but to augment them and to fill the gap for RPG legal writing.

Nor can it be assumed, at least given present admission practices, that all RPG students come to us already schooled in legal writing *at any level*. Everyone who has taught the ARM course as it is at present constituted knows that despite the description “advanced” in the title of the class, for many of the students it is in fact their introduction to “beginning” legal research. The same assumption must *a fortiori* hold true for “advanced” legal writing. In teaching these subjects, it is axiomatic that we must still begin at the beginning. Often, even where students have had some instruction and practice in legal research and writing, they must now “unlearn” bad habits and improper skills which they acquired elsewhere. This untoward diversity is becoming especially acute as the processes of academic globalization gather strength. These concerns are especially potentiated when we consider the fact that by far the majority of our RPG students are working in Legal English as their second language. This means that they need help not only with the actual writing-up of their work, but also with such basics as grammar and editing. In other words, some of their “advanced” work is in fact remedial. These realities demand new approaches that differ from the traditional materials on “how to teach legal writing.” Hence, the word “creative” in the title of the proposed class.

Theory & Model of the Proposed Class

The model and pedagogical philosophy upon which this proposal is based have been thoroughly discussed in publications to which the reader is referred.[1] They are based on a simple but profound expression of Sir Francis Bacon which has proven effective in practice in many other educational contexts. Bacon (1521-1626), the great writer, scholar, lawyer, scientist, and Renaissance Man, said: "Reading maketh a Full Man; Conference a Ready Man; And Writing an Exact man."[2] Bacon's paradigm, this triangle of skills, all interacting with and folding back into each other at the same time, is still *the best summation of education* that I know. They are not three different things but all part of the same thing—manifestations or facets of the same jewel of good scholarship. They are not sequential. All three skills touch and concern language. Top scholars are prodigious practitioners of all three skills at the same time:



[1] Excerpted from Robert J. Morris, "Globalizing and De-Hermeticizing Legal Education" (2005) *BYU Education and Law Journal* 1; see also Robert J. Morris, "Not Thinking Like a Nonlawyer: Implications of 'Recogonization' for Legal Education" (2003) 53(2) *Journal of Legal Education* 267; and Robert J. Morris, "Improving Curriculum Theory and Design for Teaching Law to Non-Lawyers in Built Environment Education" (2007) 25(3/4) *Structural Survey* 279. Other related sources and information may be found at my Web page: <www.robertjmorris.net>.

[2] Sir Francis Bacon, *Of Studies*, in *The Essayes or Counsels, Civill and Morall* 152-53 (Michael Kiernan ed., Clarendon Press 1985), p. 152-53.

CONFERENCE **WRITING**
(the *ready person*) **(the *exact person*)**

The operative word in Bacon's statement is the conjunction "And"—we must never think of the three elements of this triumvirate in the disjunctive. Reading maketh a Full Man; ***And*** Conference a Ready Man; ***And*** Writing an Exact man; ***And***….. This is represented by the interflowing arrows. Several crucial corollaries flow from Bacon's idea:

—Extensive and forensic ***reading*** of all sorts, not just in one's chosen discipline, and not just in one's native language;

—Frequent ***dialogue*** with an audience and interlocutor(s) whereby the learner "stands and delivers" before his fellows and with his master, making an argument, expressing himself forcefully, and conferencing with others; as with Confucius's Zengzi (曾子) and Plato's Socrates, this is not casual conversation over coffee but the pitched, sharp, intense discussion that lawyers have when they *argue* and that judges have when they *deliberate*—discussion with a purpose, intended to focus issues and thinking—in other words, the *Classroom* and the *Academic Conference* and the *Oral Presentation*; and

—Constant ***writing up*** for publication what one has learned in order to make a fresh contribution to knowledge[3]—and then *cycling back* to re-reading, re-debating, and re-writing some more.

My unalterable motto is, *all good writing is rewriting*. The same is true of all good reading (*re*reading) and all good conferencing (*re*conferencing). All three of these activities go on *all the time* and *at the same time*. They do not happen sequentially. In other words, the proposed class is not a division of two classes, research *then* writing. The large arrows in the triad diagram above reveal this: You

[3] And facing the editorial process, which sometimes includes being rejected or severely criticized. Dan Subotnik & Glen Lazar, "Deconstructing the Rejection Letter: A Look at Elitism in Article Selection" (1999) 49(4) *Journal of Legal Education* 601 (1999).

continuously write *as* you read *as* you conference *as* you write *as* you read *as* you conference *as* you write *as* you read *as* you conference—and on and on. This paradigm demonstrates why the present research-only ARM course, no matter how well taught or by whom, is deficient: It lacks at least one full leg of Bacon's triad, and part of a second.

Through all of this runs the adage that "great minds discuss ideas, average minds discuss events, and small minds discuss people."[4] This kind of education of great minds is a serious matter for serious adults. Here is Professor Carl Sagan's description of just such a class in critical thinking that he taught at Cornell University:

> We stress written assignments *and* oral argumentation. Towards the end of the course, students select a range of wildly controversial social issues in which they have major emotional investments. *Paired two-by-two* they prepare for a succession of end-of-semester *oral* debates. A few weeks before the debates, however, they are informed that it is the task of each *to present the point of view of the opponent in a way that's satisfactory to the opponent*—so the opponent will say, 'Yes, that's a fair presentation of my views.' In the joint *written* debate they explore their differences, but also how the debate process has helped them to better understand the opposing point of view.[5]

At present, the ARM class is attended by most class members just prior to their mandatory oral presentation of the research proposal for confirmation of their candidature (at eighteen months for full-time students). Thus, they see the ARM course in part as a preparatory course for that crucial event. However, at present the course can only partially facilitate that hope. The new proposed course would allow time for preparation, review, and rehearsal of the oral "confirmation presentation"—activities which cannot now be accomplished because of lack of time and mandate. This would complete the activities of Bacon's triangle.

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[4] Attributed to many sources, but perhaps most frequently to Eleanor Roosevelt

[5] Carl Sagan, *The Demon-Haunted World: Science as a Candle in the Dark* (New York: Random House 1995), p. 435 (emphasis added). Sagan discusses throughout the book these consequences, including their implications for law and democracy. James Boyd White, *The Legal Imagination* (Chicago: University of Chicago Press, 1985), makes the same points at length.

The new class need not necessarily be taught by a single teacher. Co-teaching or team-teaching might also be appropriate, and to this end senior RPG students, who are nearing completion of the thesis writing, might be enlisted to mentor the newer students. It may be possible out of this empirical laboratory to develop our own new legal writing writing text.

It is hoped that if this proposal is approved, the newly designed class can commence operation in the Fall Semester 2011. As with all new classes, it is expected that an initial trial-and-error period of testing and design of at least three years would be required to bring the course fully up to proper operation.

Respectfully submitted,

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Robert J. Morris

ADVANCED (LEGAL) RESEARCH METHODOLOGY

(LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

NEW COURSE PROPOSAL

April 20, 2011

This is a proposal for a new course to be taught through the HKU Graduate School. It will be a required course to be designated as—

GRSC6022—Introduction to Thesis Writing (Law & Legal Studies).

The text for the new course will be:

THE "NEW CONTRIBUTION TO KNOWLEDGE"
A Guide for Research Postgraduate Students of Law
by Robert J. Morris, JD, PhD
(Hong Kong: University of Hong Kong Press, 2012).

<u>Rationale for the Course</u>

The HKU Graduate School at present already provides a number of required and elective courses for the benefit of the university's RPG students in all disciplines, faculties, and departments, as described on the Graduate School's Web page: <www.hku.hk/gradsch/web/student/course/gs/index.htm>. These are short, basic, introductory courses usually taken by newly matriculated RPG students.[1] Among the

[1] The law school provides a required course entitled Advanced Research Methodology LLAW 6022. The proposed GRSC *introductory* course is not designed or intended to supplant that *advanced* course but to be a prerequisite for it.

compulsory courses are several Core Course I and Core Course II subjects as follows:

Core Course I - compulsory:

- GRSC6001 Introduction to Thesis Writing *or*
- GRSC6020 Introduction to Thesis Writing (The Humanities & Related Disciplines) *or*
-
- GRSC6021 Introduction to Thesis Writing (The Sciences & Related Disciplines)

Core Course II - compulsory:

- GRSC6009 Research Ethics for Graduate Students

The instructions for these courses specify: "Please note that the course is divided into 4 subclasses specifically developed for students in different disciplines. Students are required to select the subclass in accordance to their Faculties." The difficulty lies in the fact that none of these compulsory courses is designed specifically for students "of law." Thus, there is no "selection" for them to make. The most generalizable of the courses for most students "of law" are probably GRSC5001 and GRSC6020. Even so, there is much in these courses that is not directly applicable to law and which the students must therefore try their best to adapt and modify. What is worse, there is some material in these courses that may be misleading and counterproductive to students "of law." Clearly, a better solution is needed.

In addition to the compulsory courses, there are numerous other elective courses dealing with specific problems and topics in RPG research. While useful also in a general way, they, too, are not specifically adapted to studies "of law." In all of these, the course descriptions for the existing courses homogenize law into a cluster of other

seemingly cognate disciplines. For example, the course description for GRSC6009 Research Ethics for Graduate Students states as follows:

> Subclass D - Social Sciences, Education, *Law* and Business (i.e. Students enrolled in the Faculties of Architecture, Arts, Business & Economics, Education, *Law* and Social Sciences)

This homogenization appears to be more for pedagogical and administrative convenience that for any demonstrable affinity among the subjects listed. No one disputes the fact that the ethical concerns covered in the course are as fully applicable to RPG students of law as to all other disciplines, but the law presents some additional and special ethical concerns, as well as topical concerns, associated with the legal profession and legal research that need to be taught independently as well. The same may be said for the subjects of thesis writing, academic presentations, transferrable skills, publishing, empirical and archival research, computer-assisted research, and English requirements. This is especially true with regard to logic and critical thinking (GRSC6010). What is taught under this heading ("logic")in the Department of Philosophy and the university generally is emphatically *not* the logic and critical thinking of the law—and ignoring or conflating the two worlds of "logic" can be hugely misleading and confusing to students, especially those who are studying law but who are not specially trained in the law. The advice of the jurist and legal scholar Edward Coke (1552 – 1634) to the King of England is traditionally cited to illustrate this point:

> "[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with

> excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are *not to be decided by natural reason* but by the *artificial reason and judgment of law*, which law is an act which requires *long study and experience*, before that a man can attain to the cognizance of it: and that the law was the…measure to try the causes of the subjects; and which protected his Majesty in safety and peace…."[2]

This new course rectifies these discrepancies for all RPG students "of law" in all disciplines and departments by providing basic training in RPG work for students in any discipline, subject, or department who are researching the law as a component of their RPG project, or whose work may touch and concern the law (or vice versa) incidentally. By definition, students in non-law disciplines, subjects, and departments who are conducting research "of law" are engaged in interdisciplinary and "trans-systemic" work, and the new course will address the special concerns of this reality.

Mechanics of the New Course

The new course will follow the same general rules for structure, procedures, organization, hours, enrollment, assessment, credit, and outcomes that are applicable to the other existing Graduate School courses noted above with only the *proviso* that all activities of the new course are directed toward preparing the students for conducting their research *of the law*. For example, the Learning Outcomes for the

[2] Edward Coke, "Prohibitions Del Roy" 6 Coke Rep. 280, 282 (1608); emphasis added.

class will state: “At the end of the course, participants' awareness of the various concerns at different stages of writing a thesis *in law* will be enhanced and they will be able to move forward in their legal research and writing systematically.”

The course will be led by members of the law faculty or by practicing lawyers who themselves are RPG-qualified. It is also anticipated that the course could well be team-taught with members of non-law disciplines contributing their insights to the interdisciplinary aspect.

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

Robert J. Morris (司徒毅), JD, PhD

NOTES ON THE HKU RPG PROGRAM IN LAW

By Robert J. Morris **April 6, 2011**

The following are some notes and suggestions for ideas to help improve our RPG program in Law. At present, we have a good RPG program. It could be better. In some respects it is far behind the programs of other law schools. The following comments are based on my experience as an RPG student beginning in 2002, and the director of the advanced RPG research class since 2005. All of these suggestions are based on the notion that the RPG program would benefit from greater structure, organization, and pro-active management. These suggestions are based on the most recent published research on RPG programs from many different parts of the world and the requirements of globalization and the world-class standards it requires. These suggestions are presented in no particular order of importance.

Higher Standards of RPG Admission

There are some RPG students—a minority—who should not be admitted to our RPG program because they are not qualified. This may be because they do not have the requisite language skills, research skills, intellectual skills, or academic background. RPG means research *post*graduate, and should assume a substantial pre-existing set of skills and qualifications. RPG work should not be a place for remedial work of any kind. Intensification of this initial gate-keeping function would substantially improve our RPG program. It should recognize the clear difference between, say, MPhil and Phd level qualifications.

Higher Standards of RPG Confirmation and Graduation

At present, it is generally assumed that the confirmation of candidature at 18 months

is assured for every RPG student, even though a few may have to give their confirmation presentations more than once. This assumption should be discontinued. The confirmation process should be a true "trial by fire" to weed out any under-performing students early so that others more qualified can take their place. As part of their preparation for this crucial presentation, RPG students should received mandatory training in the skills of giving an oral presentation. See the attached PLATFORMING document.

A Dedicated RPG Thesis and Dissertation Writing Course

The published research shows unequivocally that major law RPG programs around the world provide formal in-house training in RPG writing. Our law school does not yet have such a program. It should. The assumption at present seems to be that students either come to us already knowing how to produce RPG-quality writing, or that somehow they will learn it during their RPG tenure with us—without formal instruction. This is overwhelmingly a false assumption. By far the majority of our entering RPG students have never published a single peer-reviewed piece of research. See the attached NEW CLASS PROPOSAL.

An RPG Student Organization or Association

The undergraduate students have several formal organizations, sponsored and recognized by the law school, that bring them together in common causes to further their studies and give them support. RPG students should have something of the same. At present, there are some very informal gatherings of RPG students, but they need more support and structure.

Regular Meeting and Training of RPG Faculty and Staff

Our law school has regular meetings, seminars, and conferences—both formal and informal—throughout the year for those involved in the undergraduate programs. These include updating on matters such as pedagogical skills, "learning outcomes," new academic policies, and the like. No such activities occur with regard to the RPG program. They should. At least once every year, preferable once every semester,

all faculty stakeholders in the RPG program should meet to exchange notes, socialize, receive updating and instructions, assess their performance in terms of the Graduate School's "best practices" and other regulations, and chart the course for the future. This seems to be particularly important and necessary for all RPG supervisors. Such activities should be firmly grounded in the published research on RPG pedagogy.

Increase of International and Interdisciplinary Student Diversity

We have always had a fairly good mix of students from around the world, but this diversity could be substantially increased. The globalization of education demands that RPG students from many different backgrounds and cultures be brought together in a work environment that facilitates their common and frequent interaction. Experience teaches that classes are much more productive and exciting when the class membership is diverse. Our present RPG program is deficient in truly interdisciplinary students and research. We should actively recruit students who have one foot in other departments, disciplines, and universities. Some of the best RPG law programs around the world are actively working with their universities' medical schools, social science departments, humanities departments, and science department to produce exciting new research—much of which is published outside of traditional "law review" journals.

Increase of Co-Authored Published Research and Conferencing

Of all the academic disciplines, law seems to be peculiar in that most of its scholarship, especially in the law journals, is always single-authored. All other disciplines regularly co-author papers, and the co-authors include students under the supervision of the primary faculty authors. In the other academic disciplines, it is common to see published papers bearing the names of half a dozen co-authors. This practice should be adopted as mandatory in our RPG program. It should be part of the RPG supervisory process as a measure of the quality of supervision. It should also be one of the gate-keeping measures of qualification for a student's graduation. So, also, should attending and presenting papers at conferences. Other disciplines regularly encourage this also. See the attached document on ATTENDING CONFERENCES. Other departments hold regular RPG conferences: <www.hku.hk/socsc/rpc/2011>. Both conferences and co-authoring, like peer review and active supervision, reduce the incidence of plagiarism and increase the

likelihood that the student will make a truly "new contribution to knowledge."

Increase in Socio-Legal (Empirical) Training for Students and Faculty

The clear trend in RPG legal training around the world is the move toward greater empirical research over and above traditional black-letter law. Some universities now require empirical research, both quantitative and qualitative, as part of the final thesis in order for it to qualify as true "research." This may include original archival research. At present, we offer *no such training of any kind*. Students who wish to obtain empirical research skills must go to other departments, at their own expense, to obtain it. Social Sciences is an example: <www.hku.hk/socsc/ssrm/2011>. Contrast this with the rich resources available at other law schools, even for undergraduate students. Fordham University Law Library is a good example: <http://researchguides.lawnet.fordham.edu/empiricalresearchguide>. These impediments seriously impoverish our program and often discourage our students from pursuing the empirical work which their research projects truly require. This makes our program and our products (both students and research) less competitive globally. Either we should offer such training in-house, or within a formal cooperative dedicated program with other departments such as the social sciences.

Longitudinal Information About Post-RPG Students

We need to track our alumni to understand what professional contributions they are making to the scholarly world after they graduate. Except through anecdotal evidence, or as they may choose to stay in touch with us through the years, we have no formal mechanism to record their contributions. Surely, this must be an important component of calculating the quality of their education here, as well as of the quality of the law school and of our graduates' "knowledge exchange" success.

Hong Kong/HKU *Sine Qua Non* in RPG Projects

Every RPG student who occupies a place in the RPG Programme should be able to justify his/her necessity for being in Hong Kong to conduct that particular research project. There must be some substantial nexus to Hong Kong and HKU. No

proposal should be accepted that suggests a project which the student could do just as well "back home." The nexus may be manifest in many ways. It may be Hong Kong's strategic location within Greater China or East Asia for purposes of comparative research. It may be Hong Kong's academic freedoms that permit research in materials that are censored elsewhere. It may be a special archive, Faculty professor, or programme that cannot be accessed elsewhere or by remote learning or online. But every project must have some element for which the student's presence in Hong Kong and at HKU is the *sine qua non.*

Attachments

Platforming
New Course Proposal
Attending Academic Conferences

See also—

www.hku.hk/socsc/ssrm/2011
www.hku.hk/socsc/rpc/2011
<http://researchguides.lawnet.fordham.edu/empiricalresearchguide>
(Thanks to Irene Shieh for this)

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

By Robert J. Morris (司徒毅), JD, PhD

THE "NEW CONTRIBUTION TO KNOWLEDGE"
A Guide for Research Postgraduate Students of Law

June 2011

ABSTRACT

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

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

Acknowledgments

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

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

The law is the calling of thinkers.

—Oliver Wendell Holmes, Jr.

Inā he ʻike hou aku kekahi, e pono ke aliʻi e hele ilaila, no ka mea, aia nō ka pono o kēia hana ʻo ka pau mai o nā ʻike apau, o pā auaneʻi i ka hoa hoʻopāpā.

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

—Hawaiian story of Kalapana

TABLE OF CONTENTS

LIST OF FIGURES

APPENDICES

Foreword

The Teacher said: "There is nothing new under the sun."[1] It is a rebuttable presumption, but whoever claims to have something "new" to contribute has the burden of proving it. Newness that matters, substantive newness, is never assumed. It must be demonstrated. Surely, a scholarly offering in the law must be not only new but importantly new, yet it must respect the law's reverence for form, tradition, precedent, and authority.[2] This may be difficult to achieve. "What's new" runs the gamut from the trivial to the unique—and every point in between.

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

[1] *Old Testament*, Ecclesiastes 1:9. "What has existed before will exist again, and what has been done before will be done again."

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

what we now call the future.

* * *

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

> "Reputation ought to be the perpetual subject of my Thoughts, and Aim of my Behavior. How shall I gain a Reputation! How shall I Spread an Opinion of myself as a Lawyer of distinguished genius, Learning, and virtue…. Why have I not Genius to start some new Thought. Some thing that will *surprize the World*. New, grand, wild, yet regular Thought that may raise me *at once* to fame. Where is my Soul? Where are my Thoughts. When shall I start some new Thought, make some new Discovery, that shall surprize the World with its Novelty and Grandeur?"[3]

The diary entry is dated March 14, 1759. Adams was twenty-four, admitted to practice at the Massachusetts bar the same year after having graduated from Harvard College and having "read law" for nearly three years in the office of an established practitioner. The question that nagged him was: "Shall I creep or fly[?]" In the passage quoted, he pondered, then rejected, three possibilities by which to distinguish himself. One, he could make "frequent Visits in the Neighbourhood and converse familiarly with Men, Women and Children in their own Style," but that would "take up too much Thought and Time and Province Law."[4] Second, he could impress by "making Remarks,

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

[4] Adams *Diary*, *ibid*. p. 78.

and proposing Questions [to] the Lawyers att the Bar, endeavour to get a great Character for Understanding and Learning with them," but "this is slow and tedious."[5] Third, he could "look out for a Cause to Speak to, and exert all the Soul and all the Body I own, to cut a flash, strike amazement, to catch the Vulgar,"[6] but these projects, he concluded, would not "bear Examination."[7] He continued this intellectual trial-and-error long past his twenty-fourth year. He served in the First and Second Continental Congresses as the delegate from Massachusetts, helped draft the American *Declaration of Independence*, served as minister to France and Great Britain, drafted a new constitution for Massachusetts, served as George Washington's vice-president, served as second president of the United States, appointed John Marshall as chief justice of the US Supreme Court, and did a thousand other things that secured his fame as one of the American Founding Fathers. He contributed to the milieu that assisted others in creating the US Constitution and the massive co-authored and interdisciplinary legal dissertation which provided the research and argument that supported it—*The Federalist Papers*.[8] Adams was, in all respects, a man of reputation who participated in affairs that would indeed surprise the world and result in a new "creation"—a new law and a new legal system.[9] He created a body of work that was indeed new and important—a paradigm shift. His formula and his process of thought, though tortuous, is a good model for RPG law students and their counterparts: "new, grand, wild, *yet regular*," not merely something to "cut a flash, strike amazement, to catch the Vulgar." Creep or fly? It is a good way of "thinking like a lawyer," of deciding what you want to be, of making the necessary choices properly, and

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[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, Isaac Kramnick ed (London & New York: Penguin Books, 1987).

[9] Joseph J. Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic* (New York: Knopf, 2007).

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

> "The Federalist, when I read it many years ago, seemed to me a truly original and wonderful production for the time. I do not trust even that judgment unrevised when I remember that the Federalist and its authors struck a distinguished English friend of mine as finite…. When we celebrate Marshall we celebrate at the same time and indivisibly the inevitable fact that the oneness of the nation and the supremacy of the national Constitution were declared to govern the dealings of man with man by the judgments and decrees of the most august of courts…. My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which…have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law. *The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind*."[10]

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

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

essential conflicts, contraries, and tensions[11]—that every RPG student must face and resolve in dealing with any research project in the law that aims to take its place globally: the location and boundedness of a "new" production in its "time," the adjudication as to whether it is "truly original" or merely "finite" (and whether after the passage of time it remains so), the "germs" of ideas that may work "profound interstitial changes," the need for "transforming thought," and the common-law tension between originality and judgment based on authoritative precedent.

The University of Hong Kong (HKU) where I teach provides orientation for newly matriculated research postgraduate (RPG) students in all disciplines. Regardless of which department or faculty the new student will join, the University, like universities elsewhere, requires that each of them must produce a "new contribution to knowledge" in order to qualify for a degree. Such requirements are set forth in the *Graduate School Handbook* published every two years and on the Graduate School's Web page.[12] To this end, the Graduate School offers a series of short general courses, some of them mandatory and all of them lasting about six weeks, which are designed to position all RPG students within the general framework of what modern RPG research is "all about." The foundational courses are the mandatory "Introduction to Thesis Writing,"[13] after which other courses provide orientation for the social sciences and humanities on the one hand, and the sciences on the other. Several of these include substantial grounding in empirical research. These courses are generally useful, but as I can personally attest, it is not uncommon in these short orientation classes to hear the instructors say something like

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[11] Peter Elbow, *Embracing Contraries: Explorations in Learning and Teaching* (New York and Oxford: Oxford University Press, 1986).

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

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

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

> "University *legal* education could so easily be the *paradigm* of *university* education. Law is at the intersection of the ideal and the real, of metaphysics and magic, of the actual and the possible, of ideas and power, of fact and value, of is and ought, of the past and the future, of the individual and the social, of economics and politics."[14]

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

[14] Peter Wesley-Smith, "'Neither a Trade Nor a Solemn Jugglery': Law as a Liberal Education" in Raymond Wacks (ed), *The Future of Legal Education and the Legal Profession in Hong Kong* (Hong Kong: University of Hong Kong Faculty of Law, 1989), pp. 60-76, at p. 60, quoting Philip Allott; emphasis added.

with it. In every system there should be "a little play in its joints,"[15] but this was not even a system. It was a dysfunctional amalgamation of systems—metric and imperial, digital and analog, Copernican and Galilean—all trying to interface but not quite knowing how. I did not realize it at the time, but this problem was emblematic of a whole cluster of disciplinary and institutional problems that, if I could understand them, I could understand it and work through it, maybe even to my advantage. The mismatch or gap—perhaps parallax or differential are better words—exists for many complex reasons, but it is not utter, and it is not unbridgeable. It is that space which this Guide aims to occupy.

The course materials for Introduction to Thesis Writing have been collected in the book, *Dissertation Writing in Practice*.[16] It is an excellent basic work for new RPG students. But like the classes from which it is taken, it reflects the practices and rules for non-law subjects. The same is true for a well-known companion volume, *How To Get a PhD*,[17] which is widely read at HKU and around the world. Unfortunately, many of the RPG students I meet have not read such books, nor have they had the benefit of even such minimal instruction in RPG work. Furthermore, the principles and examples they encounter in both books and in the courses based on them are taken from non-law disciplines, and because these texts are one-size-fits-all, the law RPG student must constantly adapt them to her own situation by laboriously *walking them through* her own mental processes of "thinking like a lawyer." It is something like the way new language learners mentally translate a foreign language which they are hearing or reading into their own tongue before they learn to think in the target language. This ought not to be. Filling this gap is not simply a matter of "sprinkling a little legal water" on these existing materials in the hope of providing a clear vision for RPG law students and their counterparts. Guidance cannot be given simply by asking them to analogize these

[15] *Bain Peanut Co. of Texas v. Pinson*, 282 US 499, 501 (1931) (Holmes, J).

[16] Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003).

[17] Estelle M. Phillips and Derek S. Pugh, *How To Get a PhD: A Handbook for Students and Their Supervisors* (Maidenhead: Open University Press, 2005).

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

RPG students in law deserve to know up front (and thereby to be taught and forewarned of) precisely the tasks and pitfalls they must uniquely face, and especially how those tasks and pitfalls positively differ from those encountered by their counterparts in other disciplines. They must be given the exact tools they need to complete a fully worthy RPG program that commands the respect of the global academic community while remaining true to the disciplinary demands of the law.[18] The same is true for their counterpart non-law RPG students whose research includes some aspect of the law. *A fortiori*, the increasing interest of RPG students in compound studies (law-and-____, ____-and-law) makes this balancing act even more delicate, as evidenced by the increasing number of non-law academic journals publishing articles on the law written by non-lawyers. At present, no single study provides these tools, these supplemental concepts between what is found in the two example books mentioned above. Hence, this study does not supplant but complements the other two.

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

[18] Chang-fa Lo, "Driving an Ox Cart To Catch Up with the Space Shuttle: The Need for and Prospects of Legal Education Reform in Taiwan" (2006) 24(1) *Wisconsin International Law Journal* 41, 69-74.

contribution to existing knowledge. It is often expressed in a "mission statement." A "contribution" is an innovation that adds value and brands its author as a creative thinker—indeed helps create the author's academic "brand name." In any subject, the project of making a "new contribution to knowledge" requires a passionate investment in analyzing materials that are often recondite and tedious.[19] It is a principle of academics *and* a principle of competition. In order to be genuinely new, the research product may not be mere reiteration or "bombastic redescription"[20] of what has been said before. It must meet the tests of reliability, validity, and transparency under the intense cross-examination of supervisors, professors, peer reviewers and readers, internal and external examiners, proofreaders—and all others worldwide whom it will reach or who will seek it out. The damage that a defective scholarly product can do is incalculable. Here is a story about Ernest Hemingway that will illustrate this point.

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

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

[20] Paul Edwards, "Professor Tillich's Confusions" (1965) 74 *Mind* 192, 206-08.

not to be believed, but some so true they changed you as you read them…."[21] That idea in that sentence changed my life—even as I read it. *Ideas and writing so great they changed you even as you read them!* I hope all of us have had that kind of experience one way or another—with a book, a movie, a poem, music—to pass though an experience and come out at the end a different person from the person we were at the beginning. That's what something "new" that "surprises the world" is all about.

Over a period of more than 20 years, I taught that idea to my students. I told them, "Always try to associate yourself with the greatest minds, the greatest writings, the greatest music—things that change you as you experience them. Never settle for anything that is petty, paltry, and pedestrian." I also began to try to live that idea in my own life. I thought, What if *I* could write something that would change someone else even as s/he read it? Being the best is, of course, "high as a mountain and harder to climb," but it is worth the effort. Follow your bliss, and find your excellence! Do everything you can to distinguish[22] yourself from all the others. Keep climbing! Keep moving toward excellence! I recurred constantly to Hemingway, and through him Dostoyevsky. I read the Garnett translations, too. I had my students read Garnett and Hemingway, and together we read that sentence in *A Moveable Feast* together. Then one day late in 1990, I read a review of a new translation of Dostoyevsky's book.[23] The book review, written by Andrei Navrozov, praised the new translation and was highly critical of Constance Garnett and her translations of Dostoyevsky—the translations Hemingway had read and said they "changed you as you read them." The new translators were Richard Pevear and Larissa Volokhonsky. Garnett's translations, Navrozov said, were lies, emendations, rewritings, camouflage—all without the music of the original. This new information devastated me: Hemingway had based his great statement—the one that

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[21] Ernest Hemingway, *A Moveable Feast* (New York: Charles Scribner's Sons, 1964), p. 133.

[22] Set apart from, differentiate from, be different from.

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

changed my life—on a falsehood. Therefore, what I had believed and taught my students was based on a falsehood, or a series of falsehoods—both Garnett's and Hemingway's—Garnett's intentional, Hemingway's unknowing because he did not read Russian and had to rely on a translation.[24] A whole chain of communication, thought, and analysis in my life and profession over a period of several decades, was suddenly without a basis in truth.[25] What had surprised the world with its newness had cloyed. Constance Garnett died in 1946. Ernest Hemingway died in 1961. I eventually lost contact with most of my students, but the moral and scholarly dilemma remained. How could I remediate this? Could I still cling to the *idea* even if the *source* were false? Can I still teach Hemingway? What would you do, if anything? What does this story say about the adjudication of sources?[26] I don't read Russian, so if I couldn't trust Hemingway or Garnett, can I trust Navrozov or Pevear and Volokhonsky? Can I really trust Dostoyevsky? At the very least, the experience made me a sceptic, maybe a cynic. I learned to question everything—translators, authorities, sources—everything. These are RPG questions. Science, we are told, is a "history of corrected mistakes"—a "constant and largely successful struggle to overcome confirmatory biases."[27] Perhaps also the social sciences and the law could be described that way. Surely, that must be the kind of effort we put into making our RPG research product in law.

The modern globalized world is a "knowledge economy" in which knowledge is the high-impact product exchanged in high-impact "knowledge exchange."[28] These are

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[24] See generally Jacqueline Tavernier-Courbin, *Ernest Hemingway's A Moveable Feast: The Making of Myth* (Boston: Northeastern University Press, 1991).

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

[26] Susan Šarčević, *New Approach to Legal Translation* (The Hague: Kluwer Law International, 1997), discusses this whole set of problems.

[27] James M. Wood and N. Teresa Nezworski, "Science as a History of Corrected Mistakes: Comment" (Sept. 2005) 60(6) *American Psychologist* 657.

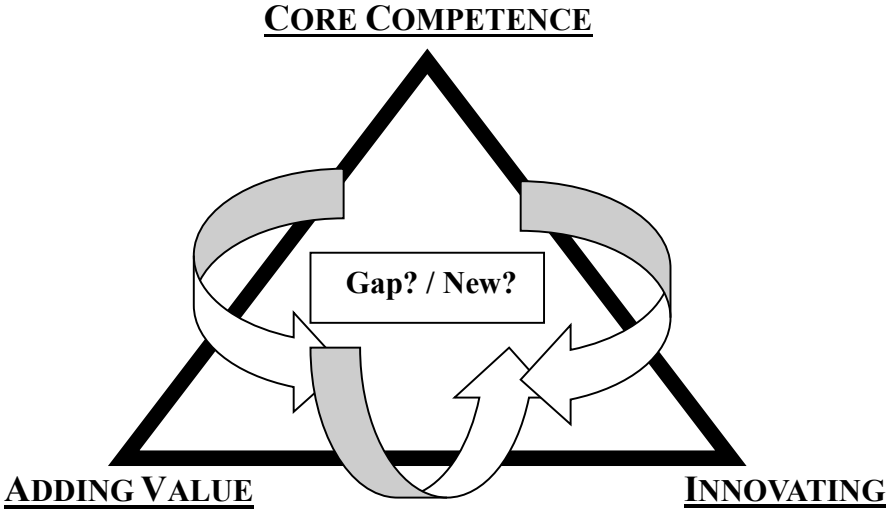
[28] Lee Epstein and Charles E. Clarke, Jr., "Academic Integrity and Legal Scholarship in the Wake of *Exxon*

the godwords and mantras of our age. In order to illustrate this complex of ideas, we can borrow a business or corporatist model of education[29] by using this diagram:

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

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

Figure 1



In the business world, creating or adding value means creating profitability of shared economic value in the market. In scholarship, sharing the value of profitability means adding value to the knowledge pool—the university, other scholars, other disciplines. This new contribution to knowledge is the profitability of the academic enterprise. It is, both literally and figuratively, what make a "profitable" scholar and a "profitable" academy. The triangle, like all the "parts of threes in this book," is infinitely rotatable. There is no priority to the top point or to "core competence." Both "adding value" and "innovating" could be placed there, and rotated from there. In other words, all three are co-equal and co-important. The measurement of success in this academic enterprise is the impact of the new contribution to the knowledge pool and all its stakeholders. The knowledge pool is the marketplace, and the new contribution arrives there by "passing without objection in the trade" because of its quality as measured by global standards.[30] Charles Irish has noted this in arguing that law schools and law professors need to become more "entrepreneurial" in the global marketplace:

> "There is no reason to believe that what is so widely accepted in all other areas of economic activity is somehow suspended in the context of legal education. Legal education is, after all, a service, and it seems quite plausible that if legal education is subject to competitive pressures the resulting product will be of a higher quality and lower cost…."[31]

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

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

[31] Charles R. Irish, "Reflections of an Observer: The International Conference on Legal Education Reform" (2006) 24(1) *Wisconsin International Law Journal* 5, 20.

Getting to "new," staying at "new," and moving on to a new "new," present special challenges. Like the law itself, the definition of "new" in legal studies is *almost* unique. This fact arises simply because of the history and nature of the law and of the law school—its necessarily "schizoid" nature because it addresses itself to both the academy and the legal profession. For example, it is common for the law faculty to included a "practice professorate" who come from the practicing bar (barristers and solicitors) and who "are not deeply engaged with the full range of scholarly work required of professoriate staff" of the university.[32] These peculiarities are not due to any intentional effort to "be difficult" or "odd" or "perverse," but rather to the nature of the subject itself. The idea of "making a new contribution to knowledge" is not traditionally embedded in legal analysis the same way it is in other disciplines. Traditional legal analysis, called "black-letter law," for example the IRAC model (Issues, Rules, Analysis, Conclusions), begins with "spotting issues" in a legal problem. This works on law school examinations, opinion letters to clients, and court briefs. But "spotting issues" and analyzing them is not entirely coterminous with identifying a "research gap" or "making a new contribution" to knowledge in the academic disciplines. The IRAC process might lead to such a new contribution, but usually not along exactly the same paths or for the same purposes that scholarly research would or as would be required by the university. Mary Daly argues that the disjunction between the legal academy and the legal profession continues to grow, while the boundaries between the law and other disciplines blur.[33] The paths are not mutually exclusive, but they require different kinds of walking shoes.[34]

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

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[32] Richard Wu, "Reform of Professional Legal Education at the University of Hong Kong" (2004) 14(2) *Legal Education Review* 153.

[33] Mary C. Daly, "The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization" (2002) 52(4) *Journal of Legal Education* 480.

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

rubric of the "new contribution to knowledge" within the university at large has not been entirely without conflict and misunderstanding.[35] These are problems that exist both within the law school and within other faculties and departments which are increasingly turning their attention to the law's impact on their professions.[36] This study, therefore, targets two distinct but related audiences. The first is, of course, RPG law students themselves. They especially must know what is expected of them in order to get their research accepted in the global academic community. The second audience is those non-law RPG scholars in the social sciences, the humanities, and the sciences who undertake to write in any way about legal matters in relation to their own disciplines (medicine-and-law, history-and-law, etc.).[37] In order for them to do so successfully, they must understand what "thinking like a lawyer" means and how it translates into RPG work. They must understand what their presence in the law academy, albeit partial, will feel like. Both sides of this divide often, and unfortunately, assume that they can undertake studies in the discipline of the other without the proper orientation and training. Nothing could be further from the truth. There is no room for dabblers and dilettantes in RPG law work.[38] The present purpose, therefore, is to raise awareness of these issues and requirements of RPG law studies and to mark a path forward.

The notion of the "globality" of scholarship and the global competition to produce something "new" in legal scholarship[39] may at first sound contradictory for the law.[40]

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[35] Paul A. Samuelson, "The Convergence of the Law School and the University" (1975) 44(2) *American Scholar* 256; Philip C. Kissam, "The Decline of Law School Professionalism" (1986) 134(2) *University of Pennsylvania Law Review* 251.

[36] Mary Keyes and Richard Johnstone, "Changing Legal Education: Rhetoric, Reality, and Prospects for the Future" (2004) 26(4) *Sydney Law Review* 537.

[37] See, e.g., Alexa Z. Chew, "Nothing Besides Remains: Preserving the Scientific and Cultural Value of Paleontological Resources in the United States" (2005) 54(4) *Duke Law Journal* 1031.

[38] Deborah L. Rhode, "Legal Scholarship" (2002) 115(5) *Harvard Law Review* 1325, esp. pp. 1343, 1352.

[39] E.g., the standards of the British Council's "Going Global" international education conferences at <www.britishcouncil.org/goingglobal>.

[40] Louis F. Del Duca, "Emerging Worldwide Strategies in Internationalizing Legal Education" (2000) 18(3)

After all, there is nothing more local than the law. Like species in evolution, the law colonizes the local niche where it arises. Place has priority, and law is peculiar to place.[41] Place and law reify each other, as do legal research and RPG methodology. Montesquieu famously wrote:

> "[The political and civil laws of each nation] should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.
>
> 'They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, *and to the order of things on which they are established; in all of which different lights they ought to be considered*."[42]

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

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Dickinson Journal of International Law 411.

[41] As, indeed, Pierre Legrand argues, is everything else that is claimed to be "global." Pierre Legrand, "On the Singularity of Law" (2006) 47(2) *Harvard International Law Journal* 517.

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

comparison are two or more sets of law in two or more specific locales. The common law is "common" only to certain countries, and even among them it has different inflections. Science tries to find universal principles in the natural world, but finding universals in law is difficult—maybe impossible, and maybe undesirable. For example, US Supreme Court Justice Oliver Wendell Holmes wrote: "I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction."[43] Students in traditional black-letter schools may view their competition as wholly local—as being with themselves, the teacher, the examination, the school, and their fellow practitioners in the local legal community. But RPG work flattens those boundaries and expands the field to the world. It is a difference of scale. What constitutes a "new contribution to knowledge" is of truly global concern. Globality is the touchstone of RPG work. RPG students may write about local law, but they must do so in a global way.

Beginning spring 2005 and continuing every spring thereafter, I have taught a course at the University of Hong Kong Department of Law entitled Advanced Research Methodology (ARM) for RPG students.[44] I have taken no part in recruiting or admitting the RPG students or assigning them to their respective supervisors, nor in designing the criteria of admission to either the Graduate School or the law school. The students arrive in my class already matriculated. Most of them arrive in their second semester of study. As part of the semester-long syllabus, I repeatedly stress to the students that they are expected to make a "new contribution to knowledge" in their theses and dissertations. I have taught more than 100 members of the classes, including students from Hong Kong,

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

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

the PRC, the United States, England, the Philippines, Singapore, Indonesia, Thailand, Burma, Greece, Sri Lanka, Pakistan, Vietnam, Nepal, Japan, and South Korea.[45] Most of the students have been full-time, with a few part-time—a special challenge because part-time students have severe constraints of time and work. Input from this representative group over the years gives me confidence to assert that (a) the "new contribution to knowledge" is a concept that is often elusive, and (b) the principles I explicate in this study are of widespread usefulness. The written work and personal information that the students produce have become the accumulated archive on which this study is founded. The course is a one-size-fits-all requirement that homogenizes students seeking the PhD, MPhil, SJD, and any other research postgraduate (RPG) or taught postgraduate (TPG) credential—a not unimportant distinction in itself for some purposes,[46] and a not unimportant homogenization. The class must therefore address, in a single semester, their needs in both black-letter and empirical theory and practice in different curricular settings and demands, including on-campus tenures ranging from one year to four-plus years. Within the limits of the prescribed syllabus, I use the survey documents mentioned above to tailor the class to the peculiar needs of each group—and those needs and groups vary significantly from year to year. The Department of Law itself offers various undergraduate courses in black-letter research, including supplemental library and computer-assisted training, but offers no training in anything like "Empirical Research Methods in Law." Students who wish to undertake serious empirical research must go to other departments in the university such as the Social Sciences faculty.[47] The Graduate School offers several general short courses, but these are not tailored to the needs of law students or students in other disciplines who are working with law.[48]

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

[46] But not for my purposes here, where I will use RPG to include both.

[47] Which offers an annual intensive summer course in empirical methods <www.hku.hk/socsc/ssrm/2011/>.

[48] See the courses offered by the HKU Graduate School in qualitative and quantitative methods at

Before coming into the HKU RPG program, most of the students have received some kind of undergraduate credential in law, and many have intermediate RPG credentials (PhD candidates often have the MPhil). All have had practical experience in the practice of law, teaching law, working in their countries' judicial systems, conducting research, publishing, or combinations of these. Sophistication in research experience is highly mixed, from extensive to novice, but in no case has any student had advanced training or experience in empirical research of the kind known in the social sciences, although some have been in the process of acquiring such skills. All have been, in other words, traditional black-letter lawyers more or less. Of those in compound programs, approximately one-third of the students have been conducting research in the law and social sciences; a handful in law and humanities, and one in law and science.[49] Several are engaged in comparative law. This class, in one form or another, has existed for many years, and many RPG students have passed through it with several instructors.

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

<www.hku.hk/gradsch/web/student/course/gs/index.htm>.

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

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

> "It is clear from the results of this project that European postgraduate legal education, while sharing some broad similarities, remains diverse. This is clearly true of research degrees, which, while appearing broadly similar in nature at a macro-level, featuring an emphasis on original research contained in a thesis, nevertheless possess considerable local variations, *these being particularly obvious as regards the entry qualifications* which are demanded by different educational systems."[50]

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

[50] Fiona Cownie, "Postgraduate Legal Education in the EU: Difference and Diversity" (2002) 9(2) *International Journal of the Legal Profession* 187, 200; emphasis added. Cownie's article is an exemplary empirical study.

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

THE TEN RULES

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

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

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

The "new contribution to knowledge" may be either found or created.

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

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

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

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

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

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

THE PROBLEM OF THE "NEW CONTRIBUTION TO KNOWLEDGE"

> "One way by which educational institutions can contribute to reform [of the legal system] is to mobilize their capacities for generating new knowledge."
>
> —Derek C. Bok, president of Harvard University[51]

Introduction & Background

Further versus Higher

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

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

[51] Derek C. Bok, "A Flawed System of Law Practice and Training" (1983) 33(4) *Journal of Legal Education* 570, 581. Bok, a graduate of Harvard Law School, was president of Harvard from 1971 to 1991. He served as Dean of the Harvard Law School from 1968 to 1971.

RPG graduates report in exit interviews that the gap/new conundrum was conceptually the most difficult part of their entire RPG experience—a daunting and discouraging great wall that confronted them on their first day of work. Numerous frustrated thesis examiners bear witness that not every intensive four-year course of RPG work (however well intentioned and bona fide) fills any significant gap worth filling or produces any truly new contribution to knowledge.[52] A moment's reflection on the universal presence of the university requirement that an RPG student's work must result in the "production of a substantial original thesis"[53]—that it should be timely and urgent, important and distinct[54]—should suggest that the gap/new conundrum is a universal problem—else why state the requirement in the first place? On this score, many RPG students arrive at the university with an innocence that borders on naïveté. "All I want," they protest subjectively, "is to study everything about the topic that interests me so that I can make some sense of it. Then I will write up everything that I have studied, and that will be my dissertation." Or, if they come out of some calling in legal practice (we have many judges and government officials), they believe that their RPG thesis will be merely the familiar appellate brief or client opinion letter pumped up to 400 pages. Long after matriculation, they remain in Column A when they should already be well into column B.

[52] Linda Cooley and Jo Lewkowicz, *Dissertation Writing in Practice: Turning Ideas Into Text* (Hong Kong: Hong Kong University Press, 2003), reports actual examples.

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

[54] Adam Przeworski and Frank Salomon, "The Art of Writing Proposals," Social Science Research Council publication, which may be read online at <www.ssrc.org/workspace/images/crm/new_publication_3/%7B7a9cb4f4-815f-de11-bd80-001cc477ec70%7D.pdf>.

Figure 2

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

The problems that arise when students linger in Column A—or worse, *revert* to Column A—are horrendous. I stay in touch with my advanced research students for the remainder of their tenure as RPG students even after they leave my class. And it is not uncommon for me to receive a dejected message such as this from a student in mid-course of a four-year program: "I had to change my topic and thesis statement, which meant I had to rewrite my entire proposal—and get a new supervisor." This return to Column A after two years in the RPG program is costly in money, time, and psychological stress. If you don't come to the first day of your RPG program already in Column B—already having thought through and surveyed the whole list of items in Column B—you need to take all deliberate measures to get to Column B as quickly as possible. This *a priori* question—the gap/new conundrum and its whole cluster of considerations—really is *a priori*. Essential to an understanding of it is Bradney's all-important insight that "university education means higher, not further, education."[55] This is what distinguishes the university from the middle school—and the true RPG student from all other students—this notion of *the university*. Bradney writes:

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

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

> successful, [might] lead us to say, 'Now we know differently'. It is not the subject of the pursuit which is the point of concern; it is the form of that pursuit."[56]

It is this crucial more-different distinction—the distinction between "standing on the shoulders of giants"[57] versus standing side-by-side with our predecessors—that eludes many new (freshly post-middle school) RPG candidates (and indeed many others, including the university itself and sometimes RPG supervisors). It is this that makes the gap/new conundrum so troublesome. The work of column A should already have been accomplished when a candidate applies for admission to an RPG program, but often it is not. And because it is not, students have trouble with all of the subsequent issues and tasks that confront them. When they find out that their familiar practices and expectations from middle school are not sufficient to sustain an RPG project, they often despair and quit. But unless they come to grips with this gap/new conundrum—and solve it—they can never state the true thesis, subject, or purpose of their project. It simply will not gel—they cannot "stake their claim." The resolution of this problem should already have been achieved by the time the student applies for graduate study, and that resolution should be evident in the RPG proposal for admission. But in many cases it is not, and the reason it is not is a conceptual problem.

Objective, Not Subjective

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

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[56] Bradney, pp. 271-72; emphasis added. A more expansive explanation of Bradney's ideas may be found in Anthony Bradney and Fiona Cownie (eds), *Transformative Visions of Legal Education* (Oxford, UK: Blackwell Publishers, 1998).

[57] "If I have seen further it is only by standing on the shoulders of giants." Isaac Newton, letter to Robert Hooke, 15 February 1676.

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

- An issue or problem makes you angry—offends morality, decency, justice.[58]
- An issue or problem excites you.[59]
- There is something new you want to teach the world.[60]
- You wish to reveal a secret.[61]
- You wish to effect change.[62]
- An issue or problem is on the cutting edge of your subject.[63]
- You want to enter a dispute with a new argument.[64]
- The discussion which you wish existed about your subject doesn't exist.[65]
- Your research is "something that will surprise the world."[66]

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[58] Christine Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong: Hong Kong University Press, 2006).

[59] Robert J. Morris, "Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture and Values for the Debate About Homogamy" (1996) 8(2) *Yale Journal of Law & the Humanities* 105.

[60] Karen Man Yee Lee, *Equality, Dignity, and Same-Sex Marriage: A Rights Disagreement in Democratic Societies* (Leiden, Boston: Martinus Nijhoff Publishers, 2010).

[61] Andrew J. Nathan and Perry Link (eds), Zhang Liang (comp), *The Tiananmen Papers* (London: Little, Brown & Co., 2001).

[62] Ron Suskind, *The Way of the World: A Story of Truth and Hope in an Age of Extremism* (New York: Simon & Schuster, 2008).

[63] Colin Tudge, *The Link: Uncovering Our Earliest Ancestor* (New York: Little, Brown & Co., 2009).

[64] Bill Moyers, *Moyers on Democracy* (New York: Doubleday, 2008).

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

- There is a developing area of law-and-____ that is important.[67]

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

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

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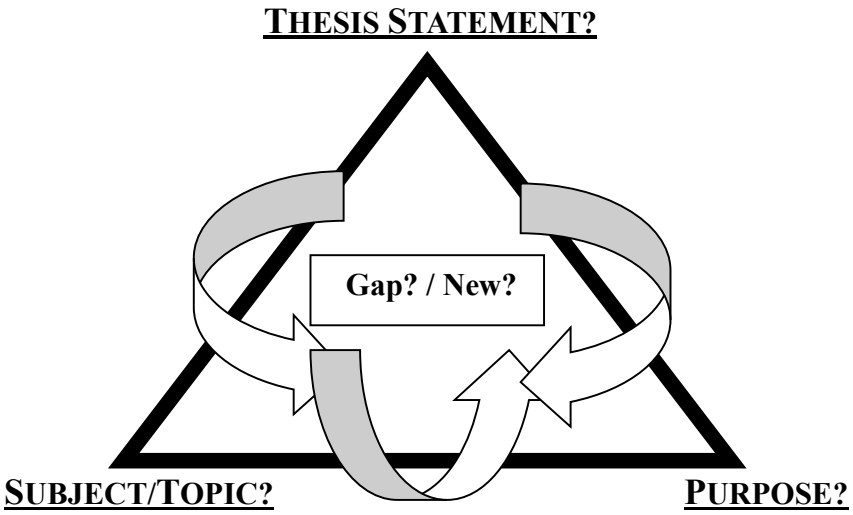
[66] John Adams, *Diary and Autobiography of John Adams*. L. H. Butterfield, Leonard C. Faber, and Wendell D. Garrett (eds). (Cambridge, MA: Belknap Press of Harvard University Press, 4 vols, 1961), I:78, 95; quoted in Susan Dunn (ed), *Something That Will Surprise the World: The Essential Writings of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

[67] Norman Polythress and John P. Petrila, "PCL-R Psychopathy: Threats To Sue, Peer Review, and Potential Implications for Science and Law. A Commentary" (2010) 9(1) *International Journal of Forensic Mental Health* 3.

which the RPG applicant advances in her proposal. They may not be in a position to adjudicate whether the proposed research project is one that will make an *objective* "new contribution to knowledge." Supervisors, once assigned, are in a better position to do this, but that means the supervisor's task for the first year is helping the student to play catch-up getting into section B (Table 2). I have known RPG students who are still shifting about trying to find yet another "gap" to fill with another "new contribution to knowledge" a full two or more years after matriculation—because they keep learning that the "gap" they thought they had found was only personal, not objective. The inventor Thomas Edison was fond of noting that he sometimes conducted thousands of experiments in order to find one invention that worked, claiming that this was not failure because then he knew thousands of ways *not* to do the job.[68] Such knowledge may be useful for a commercial inventor, but this experimental model is not appropriate for RPG legal research. All the experimentation should have been done before the proposal so that the proposal clearly states—.

[68] Comments as paraphrased in *Proceedings of the Regular Meeting* (1924) by The Association of American Railroads, Car Service Division, p. 23.

Figure 3



Again, this triangle can be rotated—there is no priority of place to Thesis Statement. But why all this worry about preparation? That it is the case is a problem worthy of serious consideration. In legal studies particularly, the situation results from a confluence of special problems and traditions that complicate our understanding. In terms of a familiar business model, it is the problem of defining the "core competence"[69] of the law school, the RPG law student, and the RPG research project—of answering in each case the philosophical questions, Who am I?, Why am I here?, Where am I going?, and What value can I add?[70] What is the special thing I can do better than anyone else? These questions should be answered in a written Mission Statement. The requirement of a "new contribution to knowledge" is a concept from arrives from outside the traditional black-letter law school. Until rather recently, the idea of "legal research" meant only the kind of research in cases and statutes (black-letter law) and secondary texts that practicing lawyers do when they advise clients and write memoranda for the courts, reasoning rather than empirical observation—the kind of traditional legal research traditionally taught in traditional Langdellian law schools.[71] It consists in identifying legal issues, interpreting cases and statutes, "construing" texts. It is not empirical and is not intended to be. It deals with truths which are analytical rather than truths which are grounded in fact.[72] It is judged solely within its own context. This "otherness" is what differentiated the black-letter tradition for other disciplines. As Jack Goldsmith and Adrian Vermeule summarize:

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

[70] Michael E. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (New York: Free Press, 1985).

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

[72] To follow the taxonomy of W. V. Quine, "Two Dogmas of Empiricism" (1951) 60(1) *Philosophical Review* 20, which takes issue with this "fundamental cleavage" but is a point that, although important, does not require great elaboration here.

> "The legal academy supplies vocational rather than scientific training; law schools usually produce lawyers, not graduate students; and legal scholars often write in the lawyer's style rather than in the empiricist's because they are participants in, not just students of, the legal system's practices.
>
> "Work in this vein contains no empirical claims in any important or contestable sense—at least not if 'contestable' is defined by reference to the internal consensus of legal academics."[73]

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

> "Any attempt to define the limits of the field of law and the problems within it, what are and should be the approaches to those problems, and the data and methods for investigation *must begin* with the activities and way of thinking *of the practitioner*. These have established the boundaries of the field and the mode of its cultivation not only for the practitioner *but also for those with scientific curiosity*."[74]

Indeed, not only do the ways of the practitioner establish these boundaries, but they also exclude from these boundaries any consideration of empirical information because this "grossly inadequate" method of the practitioner (and the traditional law school) is a "failure" which blinds and obscures interaction with other disciplines.[75] This

[73] Jack Goldsmith and Adrian Vermeule, "Empirical Methodology and Legal Scholarship" (2002) 69(1) *University of Chicago Law Review* 153, 155; emphasis added.

[74] Underhill Moore and Gilbert Sussman, "The Lawyer's Law" (1932) 41 *Yale Law Journal* 566; emphasis added.

[75] *Ibid*. pp. 570, 575.

is the sort of legal research that more recently Manderson and Mohr compare to the search for dogma in theology—the search to find an existing knowledge rather than contribute to it—and for which they compare the law faculty to a "fundamentalist Christian academy."[76] It is questionable whether such lawyers (or the courts or clients) would even think in terms of their "research" as filling some sort of "gap" or of making some sort of "new contribution to knowledge" in a global sense. Researchers in this practical part of the world must adjudicate sources such as cases, statutes, and ordinances, the quality and usefulness of which are grounded in the political authority that issued them and in their internal logic.[77] Researchers in this black-letter part of the world must adjudicate sources such as articles and books, the quality and usefulness of which are grounded in the quality of their analysis and the veracity of the sources they in turn quote.

The notion of *academic* legal research leading to the traditional research postgraduate[78] (RPG) degrees[79] such as PhD, SJD. and MPhil, with their universal

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[76] Desmond Manderson and Richard Mohr, "From Oxymoron to Intersection: An Epidemiology of Legal Research" (2003) 6 *Law Text Culture* 165.

[77] See, e.g., Robert J. Morris, "China's *Marbury*: Qi Yuling v. Chen Xiaoqi—The Once and Future Trial of Both Education and Constitutionalism" (2010) 2(2) *Tsinghua China Law Review* 273 (the political and legal importance of "controlling for education").

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

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

requirement that the research be measured by its objective "new contribution to knowledge," was an idea that scholars in non-law fields scoffed at. How, they asked, could the endless intellectual and verbal manipulation of legal doctrines[80]—what Derek Bok called the "pecking at legal puzzles within a narrow framework of principles and precedent"[81]—ever count as "real" research of the kind that paleontologists, historians, sociologists, chemists, anthropologists, and astronomers do—in other words, empirical research (both quantitative and qualitative) and "hard science" backed up by theory, field work, archival research, statistics, and sampling—with, perhaps, a jurisprudential underpinning?[82] Indeed, some called these changes in legal scholarship "so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution."[83] More specifically, it was argued that "legal scholars today are, in effect, seeking in philosophy and humanistic theory generally something that law cannot offer and *cannot even tolerate*: 'intellectual authority,' an external, non-legal source of scholarly legitimacy."[84]

The difference between these two *Weltanschauungen* is captured nicely in Thomas More's reply to Cromwell in *A Man for All Seasons*: "The world must construe according to its wits. This court must construe according to the law."[85] The world's wits versus

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[80] Richard A. Posner, "The Decline of Law as an Autonomous Discipline: 1962-1987" (1987) 100 *Harvard Law Review* 761, esp. 771-73.

[81] Bok *op. cit*. at 584.

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

[83] Charles W. Collier, "The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship" (1991) 41(2) *Duke Law Journal* 191, 192.

[84] *Ibid*. at 194; original emphasis.

[85] Robert Bolt, *A Man For All Seasons: A Play of Sir Thomas More* (London: Random House, 1960), p. 97, Act 2.

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

> "[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are *not to be decided by natural reason* but by the *artificial reason and judgment of law*, which law is an act which requires *long study and experience*, before that a man can attain to the cognizance of it: and that the law was the…measure to try the causes of the subjects; and which protected his Majesty in safety and peace…."[86]

The "artificial reason and judgment of law" do not match the reason and judgment of the non-law world, especially within the university. To non-lawyers, the common law often does not make common sense. Even the phrase, "artificial reason" raises alarms. That reality is transferable to RPG studies. Yale law professor Peter H. Schuck observed: "Indeed, if our colleagues in those [other non-law policy-oriented] disciplines caught on to our game, the intellectual stature of the law school in the larger university community might become even more precarious than it already is."[87] In 1981, Tony Becher

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[86] Edward Coke, "Prohibitions Del Roy" 6 Coke Rep. 280, 282 (1608); emphasis added.

[87] Peter H. Schuck, "Why Don't Law Professors Do More Empirical Research?" (1989) 39 *Journal of Legal Education* 323, 329.

described traditional legal scholarship as "unexciting, uncreative, and comprising a series of intellectual puzzles scattered among large areas of description."[88] "Lawyers," he said, were an "appendage to the academic world"[89] in "valuing professional qualifications and experience in professional practice more highly than a doctorate."[90] In 1994, William Twining described law as having become "isolated from mainstream academic life because of its peculiar history."[91] He noted: "General philosophy, political and social theory, literature, religion, and, less confidently, science, were well represented as contributing to the mainstream of the history of ideas, but law and legal theory were not."[92] Hence, there are at least two dichotomies under surveillance here. One is the dichotomy between law practice and law school—"downtown" versus the "ivory tower." Another is the dichotomy between black-letter legal research and empirical legal research within the ivory tower.[93] The apparent disjunctions among these categories, despite their all being "law," reinforces the adage that "the map is not the territory,"[94] theory does not

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

[89] Becher *ibid*.

[90] *Id*. p. 113.

[91] William L. Twining, *Blackstone's Tower: The English Law School* (London: Stevens & Sons/Sweet & Maxwell, 1994), p. xix.

[92] *Ibid*.

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

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

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

> "So if I had the power…to redirect legal scholarship, I would use it to try to promote more empirical work, institutional description, and law-in-action studies. Sometimes I think I would happily trade a whole year's worth of the doctrinal output turned out regularly by smart law review editors and law teachers for a single solid piece describing how some court, agency, enforcement process, or legal transaction actually works."[95]

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

> "Empirical social study—I include history and ethnography—is never going to yield lawlike regularities that can make law practice into some sort of exact predictive science. Social science is a value-soaked, fuzzy, messy, dispute-riddled, political enterprise like any other interpretive activity—like law for instance.[96]

Writing in a similar vein, George Priest says, "The demands of scientific theory create extraordinary conflict for the lawyer who develops an interest in social science."[97]

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

[95] Robert W. Gordon, "Lawyers, Scholars, and the 'Middle Ground'" (1993) 91 *Michigan Law Review* 2075, 2087.

[96] *Ibid*.

[97] George L. Priest, "Social Science Theory and Legal Education: The Law School as University" (1983) 33

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

> "To me the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully."[98]

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

> "But there are bound to be misgivings that the regularities discovered by the economic analyst are due to some underlying cultural uniformity, rather than to the existence of an economic structure to law itself."[99]

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

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Journal of Legal Education 437, 441.

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

[99] *Ibid*.

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

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

students are taught to ask, "What is chicken?"[100], and "who are Indians [Native Americans]?"[101], we must ask, *What is research?* The process may ultimately interrogate what "law" is and what "legal education" is. Identifying and working within three dichotomies helps us to answer these questions:

gap/new
further/higher
objective/subjective

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

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

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[100] *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (is frozen chicken "chicken"?).

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

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

Law School—Fish or Bear's Paw

The very idea of a "law school" as a co-equal department within the "larger university community" itself as a collective of scholarly departments is a fairly recent innovation—and one that is both complex and often puzzling.[102] The problem was, and is, what counts as "scholarly." As James Huffmann pointed out in 1974, "what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists."[103] He distinguished research *in* law from research *about* law. Thus, a PhD, for example, awarded by a law school for a thesis of traditional black-letter legal research ("doctrinal" research *in* law) is, *a fortiori*, "no PhD at all." But the gap between these two worlds is a bit more nuanced and more difficult to broach than Huffman's simple in/about divide, due in part to the "increasing breadth and maturity of legal scholarship."[104] As Angela Brew has stated, "There is no one thing, nor even one set of things, which research is. It is obviously a complex phenomenon. It cannot be reduced to any kind of essential quality."[105] What counts, therefore, as "research" is absolutely crucial in the early determination of a whole range of academic questions that affect RPG students and their projects. Peer review is a central example. In the United States, traditional law reviews are student-edited[106]—hence, publication in them by

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[102] Janice C. Griffith, "The Dean's Role as a Member of the University's Central Administration" (2003) 35(1) *University of Toledo Law Review* 79.

[103] James Huffmann, "Is the Law Graduate Prepared To Do Research?" (1974) 26 *Journal of Legal Education* 520.

[104] Michael Heise, "The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism" (2002) 2002 *University of Illinois Law Review* 819.

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

[106] Franklin G. Fessenden, "The Rebirth of the Harvard Law School" (1920) 33(4) *Harvard Law Review* 493; Charles W. Eliot, "Langdell and the Law School" (1920) 33(4) *Harvard Law Review* 518; John Henry Schlegel, "Langdell's Legacy Or, The Case of the Empty Envelope" (1984) 36(6) *Stanford Law Review* 1517.

anyone other than law students is not "peer reviewed."[107] Undergraduate law students are not the "peers" of law professors, lawyers, or RPG students. For non-student legal scholars who want to get their work accepted within the legal academy, the practicing bar, regulators of the legal profession, and lawyer organizations, this does not present a problem—indeed it is a kudo. What counts as "new" is what the student editors perceive as new. But for the same scholars to get their work accepted outside that special hermetic world of the law school presents a different problem. Consider, for example, the prestigious article, "The Chinese Communist Party and 'Judicial Independence': 1949-1959," by Jerome Cohen published in the *Harvard Law Review*.[108] It would be difficult to imagine a more prestigious and unimpeachable author, article, or journal. Yet the *Harvard Law Review* is, and always has been, edited by undergraduate law students, and outside the legal world it is not unthinkable that it could be impeached by scholars in a discipline that demands true peer review. In Professor Cohen's case, most of his work is incorporated in other materials, such as books and collections, that are truly peer reviewed by his peers. But many other contributors to student-edited law reviews do not enjoy his personal status. Their work, and the work of those who cite their work, can be brought into question outside the hermetic world of black-letter law. Outside the US, law journals are usually edited not by students but by the law faculty.

Unless the law school were to assume arrogantly that the rest of the non-law academic world must assimilate to *its* model of the PhD ("University *legal* education could so easily be the *paradigm* of *university* education"[109]), rather than vice versa, this

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

[108] Jerome Alan Cohen, "The Chinese Communist Party and 'Judicial Independence': 1949-1959" (1969) 82(5) *Harvard Law Review* 967.

[109] Peter Wesley-Smith, "'Neither a Trade Nor a Solemn Jugglery': Law as a Liberal Education" in Raymond Wacks (ed), *The Future of Legal Education and the Legal Profession in Hong Kong* (Hong Kong: University of Hong Kong Faculty of Law, 1989), pp. 60-76, at p. 60, quoting Philip Allott; emphasis added.

state of affairs must be interrogated. Otherwise, the standards and definitions of a law PhD are assailable by others in the non-law academic community—it might be "no PhD at all." In attempting to come to grips with the issues and problems that exist within this gap, we will discover that every substantive term under consideration—legal, research, new, contribution, knowledge, research postgraduate, and gap—is contested. The idea of the "new contribution to knowledge" is repeated endlessly, often passing without much critical examination as if everyone knows what it means but shouldn't talk about it. Like pornography, "we know it when we see it."[110] The formula is so commonplace and so glib that it conceals the difficult questions of *what* it consists of and *how* it is to be accomplished. More importantly, it conceals the fact that the definition is controlled by the institutions themselves—the law school and the university, and beyond them the global academic community and/or the legal profession. RPG students are often left to define it for themselves, and often they are wrong. The answer, of course, is that all of the contested elements of the "new contribution to knowledge" must be *taught* to them, and in being taught must be *problematized* for them. The students cannot simply be abandoned to the assumed and passive "I know it when I see it" formula. But it may be unfair and unwise to compare law RPGs with other departments because it can be argued that scholars other departments don't face the same scholarship-practice dilemma (ivory tower versus downtown) in quite the same ways—law is *almost* unique. Paul Chynoweth notes:

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

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

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

> "As legal scholars have increasingly focused on society's wider needs and concerns they have become ever more willing to adopt the methods and approaches of the social sciences. This has given birth to perhaps the greatest change in legal scholarship in recent decades: the ongoing shift from doctrinal work to socio-legal scholarship whereby the role of law in society is examined from an external viewpoint, often through the collection and analysis of empirical data."[111]

Yet even after making these celebratory remarks, Chynoweth notes that "peer-reviewed doctrinal scholarship must be distinguished from the day-to-day doctrinal analysis undertake[n] by the practicing lawyer, or the practitioner journal."[112] The dichotomy remains—as does the dilemma. In sum, then, my purpose here is not to argue that either one of the two worlds—academics or practice, black-letter or socio-legal, doctrinal or empirical—is greater or more important than the other. Indeed, the dichotomy and the dilemma may be both intractable and desirable, even productive and creative. The purpose is, rather, to suggest that the two worlds do and should exist as discrete spaces (with overlap). When the two worlds and the standards that should apply in each of them respectively become muddled and conflated, this serves neither practice nor academics.[113] Each should therefore be acknowledged and celebrated for what it is.[114] Like Robert Frost's two roads diverging in the forest, in most cases choosing the

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[111] Paul Chynoweth, Editorial, "Legal Scholarship: A Discipline in Transition" (2009) 1(1) *International Journal of Law in the Built Environment* 1.

[112] *Ibid*.

[113] I base this statement not only on the research presented here, but also on my own experience of twenty years of law-firm practice followed by fifteen years of academics.

[114] I am grateful to Professor Douglas Arner for giving me the germ of this idea in a lecture he presented to

one or the other makes "all the difference."[115] In a similar vein, the philosopher Mencius famously said, There is fish and there is bear's paw, but you probably cannot have both at the same time even though you might want to.[116] While it may be possible to have both (Mencius says, "*If* I cannot keep the two together"), each RPG student must early interrogate the issue of whether it is wise to do so. These are decisions to be made with

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my ARM class in 2008.

[115] Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth.

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

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

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

—Robert Frost, "The Road Not Taken" (1915)

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

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

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

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

Audiences

Traditionally, common-law lawyers were trained and qualified for practice not at university but by "reading law" (like John Adams) in the offices and chambers of senior practitioners—Dickens's Sidney Carton with C. J. Stryver, for example. Law school, to the extent that it existed at all, was a vocational school[117] and its professors were the "teaching branch of the legal profession."[118] Those law students and lawyers who wanted to pursue academics apart from the practicing legal profession were often relegated to residency in other departments of the university in "law-and-___" or so-called "double degree" programs. While such interdisciplinary work is viewed as valuable, this meant that they were often supervised by academics who were not trained in the law. As Bruce Kimball has shown by reviewing personal letters and human resources records, law school professors were recruited based upon narrowly defined but traditional "academic merit"—grades, class rank, school rank, law review membership—and/or professional experience and reputation in practice.[119] Eventually, law schools and law students who were interested in academics more than practice began to catch on to the fact that some kind of field work *within the legal discipline itself* was necessary to lend credibility and *gravitas* to their theses and dissertations. Eventually, this would come to mean the dichotomizing of legal research into the study of THE LAW on the one hand, and THE LEGAL SYSTEM on the other—or as Steven M. Barkan puts it, the difference between

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

[118] Donna Fossum, "Law Professors: A Profile of the Teaching Branch of the Legal Profession" (1980) 1980 *American Bar Foundation Research Journal* 501.

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

legal research and *legal scholarship*.[120] Roscoe Pound famously called it the difference between law in books and law in action.[121] As we noted earlier, it is the choices that lie between the two worlds—academics or practice, black-letter or socio-legal, doctrinal or empirical—that are the dilemma. But the dilemma seems odd because, although Barkan and Pound are absolutely correct to make the distinction, the circumstances that require it must give any non-lawyer academician pause.[122] For a long time this dichotomy did not appear—law school was all black-letter "legal research" all the time—and the emergence of the dichotomy in latter times is still somewhat tenuous. As a result, what could count for a new contribution in the law became, and still is, contested ground. The new contribution may be, we are told, incremental and not massive, but it nevertheless must be substantial and material, not make-weight—and it really must be new, and it really must be a true contribution in an objectively and globally verifiable way.[123] It can never mean that you strike off into subjects for which you have no qualification or credential—you do not become "original" by being a dilettante. Something may be genuinely new and either incremental or massive, but its contribution may be negligible or trivial—it may lack *gravitas*. Lengthy volumes of restatements of law generally fall within this

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

[121] Roscoe Pound, "Law in Books and Law in Action" (1910) 44(1) *American Law Review* 12.

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

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

category. The elements of a true contribution, therefore, are that:

> It must be a real advance in the body of knowledge;
> It must have an evident *gravitas*; and
> It may be both incremental yet paradigm-changing at the same time.[124]

As Whitehead says of science, the mere proof of an idea is not worth much unless we also "prove its worth." He says: "We do not attempt, in the strict sense, to prove or to disprove anything, unless its importance makes it worthy of that honour." This, for Whitehead, is what distinguishes true understanding from a mere collection of "inert ideas"—the avoidance of which is the "central problem of all education."[125] But different audiences consider different things to be "important." What counts as *gravitas* to the legal profession may be "no *gravitas* at all" to the academic world—and vice versa. If the law school's RPG program were to confine its research product exclusively to a parochial audience of lawyers, then this might not matter so much. But if the law school, in the context of the larger academy of which it is now a part, wishes to have its research output accepted among the global academic community generally, then it needs to provide what that global academic community—not the local community—defines as a "new contribution to knowledge." A "contribution to knowledge" is a product, just as its producer is a product. When, at the end of a long RPG program, the RPG student's (now graduand's) teachers, advisers, supervisors, deans, examiners, law school, and university finally certify her as worthy of an RPG degree, and her dissertation or thesis as worthy of acceptance, binding, and deposit in the university's archives, they are certifying both her and her academic product to a worldwide audience that is the consumer of that product. In this relationship we may borrow an image from the Uniform Commercial Code of the

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[124] J. D. Watson and F. H. C. Crick, "Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid" (April 25, 1953) 171 Nature 737.

[125] Alfred North Whitehead, "The Aims of Education" in Alfred North Whitehead, *The Aims of Education and Other Essays* (New York: The Free Press/Maxwell Macmillan, 1967), pp. 1-14, esp. pp. 1-5.

United States.

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

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

(1) [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind….

(2) Goods to be merchantable must be at least such as:

(a) pass without objection in the trade under the contract description;

(b) in the case of fungible goods, are of fair average quality within the description;

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

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

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

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

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

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

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

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

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

Many new RPG students, if they possess a traditional undergraduate law degree, have little or no background in empirical research, field work, quantitative or qualitative analysis, or statistics and sampling (with their concomitant archival research).[126] Even those new RPG students who have published in traditional law journals face this problem.[127] When President Bok of Harvard called for "generating new knowledge" in legal education, he was addressing this problem. His examples of "generating new knowledge" comprise a long list of empirical projects in the "legal system." His conclusions bear quoting at length:

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

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

[127] E.g., Richard Delgado, "How To Write a Law Review Article" (1986) 20 *University of San Francisco Law Review* 445, is a good example setting forth the traditional model.

> and 'that all the available materials of that science are contained in printed books.' More recently, a witty law professor is said to have remarked: 'All research corrupts, but empirical research corrupts absolutely.'"[128]

This crucial difference in *audiences*—that of "the law" and that of "the legal system"—makes all the difference in the whole paradigm of what qualifies as "legal research" and what qualifies as a "new contribution." The first audience deals in persuasion, the second in discovery. Suddenly, the Legal System looms as large as, if not larger than, The Law itself, and many new traditionally trained RPG students are not comfortable with this fact. They are used to acting *within* the Legal System but not studying it as an *object* of academic research. To traditionally trained lawyers, The Law is everything, and the Legal System merely its by-product. For them, the Penal Code is the central inquiry—not the operations of the prisons themselves.[129] The statutory product of the legislature is far more important than the political operation of the legislature itself. But this view has increasingly come under fire as being too narrow and unproductive. Academic lawyers have increasingly shown that law in practice, applied law, is not only important but is the key litmus test of the validity of the law itself. The pedagogical challenge, then, is how to accommodate this expanded notion of "legal research" for the training of modern RPG students in the law school so that their concept of the "new contribution to knowledge" conforms more closely to the expectations of the academy at large—the greater audience. Students whose former experience in interviewing has been only work with clients will now be asked to conduct far-ranging interviews, including the use of questionnaires, in the field. Students who may have no

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

[129] See, e.g., Frank Dikötter, *Crime, Punishment and the Prison in Modern China* (Hong Kong: Hong Kong University Press, 2002).

experience whatsoever in statistical modeling or analysis will now be asked to undertake RPG-level work in these areas. Much of this activity will likely follow the models developed in the social sciences as being the closest by analogy to studies of the legal system, but that does not exclude the "pure" sciences and technology,[130] and it does not exclude the humanities and other non-law disciplines. To list a taxonomy of the different kinds, forms, methods, and approaches to modern legal scholarship—in other words the choices available to the RPG scholar—would be inordinately long and would likely omit someone's favorite. A useful source is Philip Kissam[131] and the sources he cites. Mathias Siems discusses these as well but cautions against any kind of attempt to rank them.[132] Many of the most important of these are discussed or implicit in this Guide.

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

[131] Phillip C. Kissam, "The Evaluation of Legal Scholarship" (1988) 63(2) *Washington Law Review* 221, 230, 236-37 and accompanying citations.

[132] Mathias M. Siems, "Legal Originality" (2008) 28(1) *Oxford Journal of Legal Studies* 147.

A Case Study: *That* versus *How*

An RPG student asked me to edit his PhD thesis prior to the oral examination. The student's thesis was approximately 250 pages long, and his topic was an aspect of human rights law in Africa. It was intended, so it said, for a global academic audience, and the author told me he intended to publish it as a book. The thesis was a well-finished work according to the standards and regulations for format and content of the University and its Graduate School. It had passed all the required written and oral examinations by both internal and external examiners up to the final point. It was a substantial piece of traditional black-letter legal research in four chapters with extensive footnotes and bibliography—a law review article or court brief writ large. The first three chapters each set forth a literature review of a particular aspect of the topic, and then analyzed the collected laws, rules, regulations, statutes, articles, chapters, and books of the literature review in standard black-letter fashion, adjudicating each for its respective quality. Each of the chapters contained a bit of the history of the topic, but none was "history" or "historiography" as professional historians understand those terms.[133] It was, rather, the "history" of legal texts and doctrines. The final chapter included the author's own recommendation that the primary solution to human rights abuses in Africa was better political leadership and a more "participatory democracy" in all areas. This was its "new contribution to knowledge." The thesis contained no empirical research or analysis and no archival materials except as they were discussed in the author's primary sources by the authors of those sources. In sum, the topic, purpose, and thesis of the entire work were derived from, and were intended to augment and restate, the printed (published) body of black-letter legal knowledge. The work in this state presented rather little editorial challenge and would have required little additional work by the author.

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

[133] George Chauncey, "What Gay Studies Taught the Court: The Historians' Amicus Brief in *Lawrence v. Texas*" (2004) 10(3) *GLQ: A Journal of Lesbian and Gay Studies* 509. *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating sodomy laws as unconstitutional).

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

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

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

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

> This is the title of the book I read. It was written by this author. It is "about" this subject. This report is evidence of the fact of reading—of the fact that I read the book. That is the end of my report. Thank you.[134]

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

[134] An exercise taken to task admirably in Chris Hart, *Doing a Literature Review: Releasing the Social Science Research Imagination* (London: Sage, 1998).

a chapter called his "literature review," with a little further adjudication and analysis, he was thereby making a "new contribution to academic knowledge." This mindset is not uncommon. He was, in short, thinking more like a traditional practicing lawyer assembling case and statutory authorities for a court or a client than as an RPG academic hoping to make a new contribution to knowledge on a global bases. He was not making a new contribution to *academic* knowledge in an *academic* format with an *academic* model and methodology. He was creating further education, not higher education. Despite the academic façade of his writing, by the mere marshalling of sources, without more, he was still (in Bok's words) "pecking at legal puzzles within a narrow framework of principles and precedent" in the manner of practicing lawyers, yet all the while thinking he was doing what academicians do. He had produced nothing that would "surprise the world." As we noted earlier in the discussion of the two distinct meanings of "new," the satisfaction of the first definition (dealing with "stuff") does not necessarily imply the satisfaction of the second (providing analysis), and it certainly does not guarantee satisfaction of the second. *In fact, it may disguise absence of the second*. Indeed, my author's writing exemplified Barkan's insight that "[w]hat might initially be perceived as poor writing often is actually a manifestation of inadequate research."[135] In other words, merely working within the academy using scholarly trappings and formats does not add up to "legal scholarship" as Barkan distinguishes it from "legal research." So long as the writer's mindset is "legal research," that is what the product will be, and it will make no "new contribution to knowledge" as scholars in other disciplines worldwide understand that idea. It will be further but not higher. Its audience and purpose are still largely the practicing profession. An expansion of that "legal research" to include empirical research and archival research[136] could verify Macdonald's observation that "some of the most

[135] Barkan *op. cit.* at 407.

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

interesting legal scholarship is being undertaken by… [scholars] in departments of history, sociology, anthropology, criminology, political science, women's studies, native studies, communications, and so on."[137] Mike McConville has produced decades' worth of valuable and original empirical research in several legal systems throughout the world, focusing often on various aspects of criminal justice, and stresses the value of empirical-*cum*-archival work,[138] as well as on the topic of empirical research itself.[139] Archival research is often overlooked even more than empirical research, yet the two combined can add up to a double "new contribution to knowledge" if used in conjunction with each other and in coordination with black-letter research.[140] I suggested to my author that he consider additional work in these areas in order to substantiate and give *gravitas* to the theoretical work he had produced so far. My suggestion comes in the order of a strong impetus in current academic work toward such kinds of interdisciplinary, and especially empirical, substantiation to go along with traditional black-letter research.[141] New RPG students would do well to consider these matters at the *outset* of their RPG projects so that all kinds of research can be carried on simultaneously rather than *seriatim*.

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

[138] Mike McConville and Chester L. Mirsky, *Jury Trials and Plea Bargaining: A True History* (Oxford: Hart, 2005).

[139] Mike McConville and Wing Hong Chui (eds), *Research Methods in Law* (Edinburgh: Edinburgh University Press, 2007).

[140] Louise Craven (ed), *What Are Archives? Cultural and Theoretical Perspectives: A Reader* (Aldershot, England & Burlington, VT: Ashgate, 2008).

[141] Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-First Century* (Burlington, VT : Ashgate, 2007).

"Jack-of-All-Trades" Academicians

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

> "The move toward interdisciplinary scholarship, without the check provided by peer review [as is the case with student-edited law reviews], encourages the 'law professor as astrophysicist' model of legal academics: one can master any field in the time it takes to research and write an article."[142]

You cannot be an astrophysicist without a degree in astrophysics. Harry Edwards notes this problem: "Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it."[143] There are two cautions here. One is that the RPG

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[142] Suzanna Sherry, "Too Clever by Half: The Problem with Novelty in Constitutional Law" (2001) 95(3) *Northwestern University Law Review* 921, 929.

[143] Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 *Michigan Law Review* 34, 36; original emphasis. See the strong rebuttal to Edwards in Derrick Bell and Erin Edmonds, "Students as Teachers, Teachers as Learners" (1993) 91(8) *Michigan Law Review* 2025.

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

It is no wonder, therefore, that it is only with the greatest difficulty that new RPG students learn to grasp the necessity and skills—let alone the *duty*—to adjudicate such materials as Judge Edwards describes. Within the huge volume of legal literature that is their source material, they find a plethora of writings by authors (some of them "big name" authorities) on subjects for which they have no visible qualifications or credentials whatsoever,[144] yet these are the (sometimes peer-reviewed, sometimes not) writings of the uncredentialed "masters" whom the students are supposed to emulate. This difficulty often occurs in the "law-and-___" fields (such as law and astrophysics), but is also common in studies with names like "The History of Chinese Commercial Law" or "Ancient Greek Jurisprudence." A similar problem occurs when authors untrained in empirical research undertake to do empirical research, especially with a statistical component, on a self-taught, on-the-job-training basis, or take courses outside the law school on a random, unstructured basis. The result can only be amateurish. Socio-legal research, which encompasses all forms of empirical and archival research, is itself a

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

complex discipline that requires expert training and credentialing.[145] In any of these situations, a traditional black-letter law degree, without more, is not enough. These skills require special training to acquire. Yet, this is a common attitude among new RPG students. Just because the law itself touches and concerns something (it touches and concerns everything), *they* believe they can, too. They see others do it, so they do it. They become amateur "astrophysicists"—or paleontologists. The Harvard paleontologist Stephen Jay Gould (1941-2002) confronted this problem when he responded to a book entitled *Darwin on Trial* by Berkeley (Boalt Hall) law professor and Christian "philosophical theist" Phillip E. Johnson. The book purported to enter the science-creation debate that is rampant in the United States. Gould's criticism is pungent:

> "Now, I most emphatically do not claim that a lawyer shouldn't poke his nose into our [the scientists'] domain; nor do I hold that an attorney couldn't write a good book about evolution. A law professor might well compose a classic about the rhetoric and style of evolutionary discourse; subtlety of argument, after all, is a lawyer's business. *But, to be useful in this way, a lawyer would have to understand and use our norms and rules, or at least tell us where we err in our procedures; he cannot simply trot out some applicable criteria from his own world and falsely condemn us from a mixture of ignorance and inappropriateness*…. I see no evidence that Johnson has ever visited a scientist's laboratory, has any concept of quotidian work in the field or has read widely beyond writing for nonspecialists and the most 'newsworthy' of professional claims."[146]

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

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

To Johnson's "false and unkind accusation that scientists are being dishonest when they claim equal respect for science and religion," Gould offers the ultimate retort: "Speak for yourself, Attorney Johnson."[147] New RPG students often manifest these kinds of problems when they declare their intended subject of research, and their problems often arise out of an excess of ambition and energy. For example, a student will declare her intention to write a thesis on the comparative law of China, the European Union, Brasil, and South Korea. (A surprising number of students get admitted on the strength of such proposals.) When I eventually see her in my Advanced Research Methodology (ARM) class, I will ask her the most fundamental question of all: "Do you have command of the languages of each of the areas you intend to study (i.e., China, the European Union, Brasil, and South Korea)—and not just the language generally, but the special 'covenant language of the law' as it is inflected in each of those locales?" After all, whatever else globalization may imply for legal research, language is surely a first principle. There is no "international" anything, whether law or scholarship, merely by translation. Furthermore, "globalization" and "international" and "interdisciplinary" must not be allowed to homogenize the world. The world is multi-everything: multi-polar, multi-jurisdictional, multi-legal, multi-ethnic, multi-lateral, multi-problematic, multi-valuate, multi-cultural. Each locus in that series of "multis" is a specific point. So, RPG candidate, are you trained to think like a lawyer in each of those systems? Is your supervisor? The answer, sadly, is almost invariably no. I then ask: "If you do not have those languages and that training, how then can you make a 'new contribution to knowledge'? If you don't have the languages, you must work from translations, and the discipline of translation studies tells us that translations, like translators and interpreters,

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

[147] Gould, *ibid*. at p. 82.

are notoriously unreliable (remember Hemingway, Garnett, and Dostoyevsky?).[148] That will not be good enough for RPG work, especially if you need to conduct empirical research in each of those languages in any of those places." Any purported "new contribution to knowledge" that might come from such a project would be immediately suspect in the global scholarly community. As the Chinese proverb says, one key opens one lock; a different key opens a different lock (一把鑰匙開一把鎖). As Professor Hugh Nibley observed, you must either get all the tools, and precisely the right tools, necessary to your research project, or move on to some other project.[149]

> If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years— *or else shift to some other problem*.[150]

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

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[148] Robert J. Morris, "Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation" (2006) 51(3) *Journal of Homosexuality* 225.

[149] Robert J. Morris, "Globalizing and De-Hermeticizing Legal Education" 2005(1) *Brigham Young University Education & Law Journal* 53, discusses Nibley's ideas. We shall return to Nibley later.

[150] Hugh Nibley, "A New Look at the Pearl of Great Price, Part I: Challenge and Response (Continued)" (Feb. 1968) 71 *Improvement Era* 14 (emphasis added).

law with a specialty in Chinese commercial law and economics? If your answer is no, then a la Nibley, you must shift to some other topic. If you do plan to get the necessary qualifications so that you can proceed properly with your chosen topic, how do you plan to get them—and when?" Have you factored the time and the cost of doing so as part of your RPG timetable? Part of the problem of the Jack-of-All-Trades Syndrome arises out of the continuing conflation of the differences between legal research in practice on the one hand, and academic legal research on the other. Lawyers in practice confront a bewildering array of subjects and problems, even within their own areas of specialization. In many ways, their research for clients and the courts must be generalist in nature and must allow for the constantly shifting mix of facts and law in actual cases. They must be masters not only of substantive law but of procedure, evidence, rules of conduct, and so on. What a medical malpractice lawyer knows about medicine often rivals that of a physician. A barrister whose only language is English may be called upon to represent a Muslim client and necessarily to work through translators and interpreters. In any case, the "new contribution to knowledge" in legal practice may be the winning argument in an appeal that becomes a new case precedent. The problem arises when this model of generalism in legal practice crosses over into academic work, especially if the RPG student has a background in practice before crossing into the academic sphere. It also follows that a professor trained and working solely in black-letter law is not qualified alone to guide an empirical or archival RPG project.[151]

An example of the difficulty that arises when the two spheres get conflated can be seen in the book, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* by Michael Salter and Julie Mason,[152] written primarily for use in British-style educational and legal systems. The title contains two confusions, one

[151] Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (London: Oxford University Press, 2010), deals with the subject of qualifications.

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

explicit, the other implicit. The explicit confusion is the "writing" preceding the colon with the "research" following the colon. Writing and research are two distinct disciplines with two distinct sets of requirements and skills. The implicit confusion is between writing in the academy (dissertations) and what the bulk of the book really addresses, which is methods of writing for the courts (practice). It homogenizes the two as if they were interchangeable. They are not. Because the text itself conflates these two purposes throughout, it is necessary for readers to parse the text on a page-by-page basis in order to tease apart the materials that apply to the one or the other kind of research and writing. Although the authors pay lip-service to the conduct of socio-legal and empirical research, all of the sources they cite are *published* articles and books. They do not adduce any empirical or archival research of their own, nor do they cite any actual theses or dissertations. This might seem odd in a book on the subject of "writing law dissertations" until we recall that it is odd only within the context of the *global* academic community. It is all too common in law review writing. This is a model of the conceptual problems under review here as well as of the research structures of many law schools with both traditional black-letter degrees and RPG degrees.[153] An RPG student and supervisor trying to work with this kind of confusion would find it difficult to produce something that is truly "new."

[153] T. C. Daintith, "Postgraduate Legal Education—the EUI Example" in John P. Grant, R. Jagtenberg, and K. J. Nijkerk (eds), *Legal Education 2000* (Aldershot, Hants: Avebury, 1988), pp. 279-85

What Counts as "New"

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

> "find one new point, one new insight, one new way of looking at a piece of law, and organize *your entire article* around that. One insight from another discipline, one application of simple logic to a problem where it has never been made before *is all you need*."[154]

This is to be accomplished by reading everything that bears on your subject—"every significant idea, book, or article that is out there."[155] After you have "read everything" and documented that work so that you will be able to prepare adequate footnotes, *then* you are "ready to write."[156] There is no intervention here of empirical work "in the field," no consultation of unpublished archives, and the finished product is envisioned as a sort of lengthy literature review—a book report—in which only one single new theoretical angle need be demonstrated. This is the basic traditional model for legal research and writing for practicing lawyers, and it is the reason that (a) the adjective "legal" needs to be appended before the word "writing," and (b) other disciplines such as the sciences and social sciences do not recognize "legal research" as "research at all." Merely figuring out "one new insight" in literature that already exists does not, for them, qualify as "new." This traditional form of "thinking like a lawyer" may be sufficient for RPG work intended only for an audience strictly within the practicing legal community[157],

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[154] Delgado, *op. cit*., p. 448; emphases added.

[155] *Ibid*. p. 450.

[156] *Id*. p. 451.

[157] Robert J. Morris, "Not Thinking Like a Nonlawyer: Implications of 'Recogonization' for Legal Education" (2004) 53(2) *Journal of Legal Education* 267, explores the meanings of "thinking like a lawyer" in the traditional black-letter sense.

but as we have seen, it will not serve for any kind of interdisciplinary "law-and-___" work that in intended to be examined, read, and accepted globally by scholars in other fields.[158] The issue for RPG candidates is where their RPG program is positioned between these two choices, or along their overlap, and how they will be trained and supervised in "thinking like a lawyer who is also thinking like a ___."[159].

Computer-assisted searchable databases have revolutionized legal research. The forms and structures of published legal information, and the fact that they can be searched as a concordance, have influenced and changed how lawyers think about the law[160]—in other words, what counts as "thinking like a lawyer." The implications for both the law and the academy of this in terms of what counts as "new," as well as how something new is identified and structured, are vast. Anthropologist Allan Hanson, among others, discusses the contrasting worldviews of "classificatory" and "indexical" approaches to law and other subjects. The older classificatory approach prefers to learn or to make a "new contribution to knowledge" within structures of established knowledge—of "what is out there." On the other hand, the newer indexical approach (the concordance, the searchable database) organizes what is out there in terms of what they want to know.[161] This represents the difference between a "new contribution to

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

[159] Richard Mohr (ed), "Legal Intersections" (2002) 6 *Law Text Culture*, Special Issue, which collects a group of articles that "discuss and critically assess the diverse research methods which can be employed in law-related research from 'conventional' legal doctrinal analysis to methods of empirical data collection and analysis drawn from other disciplines."

[160] Richard A. Danner, "Legal Information and the Development of American Law: Further Thinking about the Thoughts of Robert C. Berring" (2007) 99 *Law Library Journal* 193, summarizes the literature and analyzes these ideas.

[161] F. Allan Hanson, "From Key Numbers to Key Words: How Automation Has Transformed the Law" (2002) 94 *Law Library Journal* 92; F. Allan Hanson, "From Classification to Indexing: How Automation Transforms the Way We Think" (2004) 18(4) *Social Epistemology* 333.

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

> "The person who would learn something, or make a new contribution to knowledge, must relate it to the structure of established knowledge. Established knowledge is taken to be certain, which is why proposed paradigm shifts provoke stiff resistance and why those that are ultimately successful are considered to be momentous developments. The certainty built into this view of things also means that when people encounter ways of thinking and behaving different from their own, their typical reaction is to assume that the alien ways are at best misguided, and at worst heretical and evil. Divergent notions about the structure of reality mean that many different worldviews are included within the classificatory type, and they often find themselves at odds with each other."[162]

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

[162] Hanson, "From Classification," p. 346.

exists in its own right and is out there, waiting to be discovered."[163]

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> "Legal research of any sort, be it in case law, regulatory law, or the academic literature, is being weaned away from the hierarchical categories embedded in the traditional research tools. As a result, lawyers are coming to think of the law as a collection of facts and principles that can be assembled, disassembled and reassembled in a variety of ways for different purposes This could call into question the notion that the law actually *has* an intrinsic, hierarchical organization, and that would signal a basic change in the perception of legal knowledge and of the law itself."[164]

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

[163] *Id*. at 348.

[164] *Id*. at 348-49; original emphasis.

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

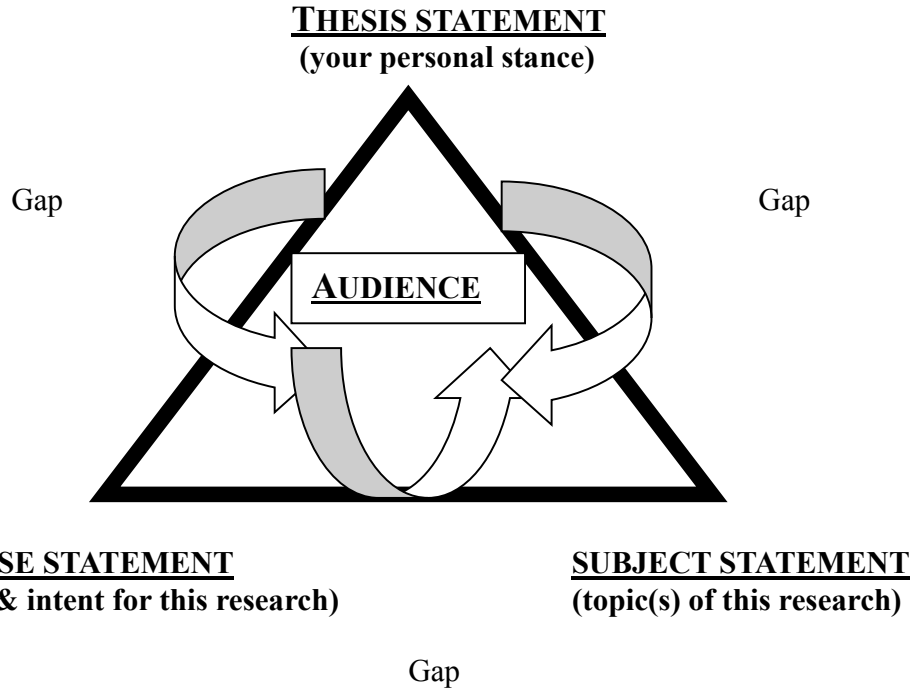
This is what I call a "distinguished scholar." As every common-law lawyer knows, "distinguish" has two distinct (i.e., distinguished!) meanings. In everyday parlance, it means outstanding, excellent, eminent, special, famous—to be set apart from others. It means this in the law, too. But lawyers also speak of "distinguishing two cases," meaning to point out (to a court, for example) the sometimes subtle differences between the case at bar and a decided case (a possible precedent).[165] Even though there are apparent similarities between the two, the principles of law and the fact may not be the same. This ability of a distinguishing thinker makes a distinguished thinker. The greater the skill with which an RPG scholar can do this, the greater will be her ability to negotiate the gap/new divide and make a truly new contribution to knowledge. This is how such research "stakes a claim."

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

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

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

Figure 4


THESIS STATEMENT
(your personal stance)
Gap
Gap
AUDIENCE
PURPOSE STATEMENT
(reason & intent for this research)
SUBJECT STATEMENT
(topic(s) of this research)
Gap

Staking a claim for yourself and your research is like getting a patent on a new invention. If you work were a mechanical invention, would it be patentable? Does it have the quality of patentability? The task begins with choosing a claim, which you should be able to state in a single sentence.[166] This is the "thesis statement" of your thesis, dissertation, research project, or article. For example:

"This law is unconstitutional because….."

"My research shows that this law….."

"Viewing this law from a Marxist perspective leads us to conclude that….."

"I will argue that…."

As you can see above, there are <u>two different meanings</u> of the word "thesis."[167] The first refers to the research project that you write for your postgraduate degree. "My PhD thesis was over 300 pages long." This document is the entire record of a process of research to be read by examiners, teachers, and supervisors.[168] It may consist of several hundreds of pages. When finished, it will be deposited in the library. The second meaning of the word "thesis" refers to the central idea of your project that reflects <u>your own</u> special viewpoint, opinion, reasoned argument, theoretical points, and contribution to your subject. "The main thesis of my paper is that this statute is unconstitutional." This thesis statement often shows the solution, answer, clarification, and way forward regarding a specific question or problem. It is usually only one or two sentences in

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

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

[168] Elizabeth Wager, Fiona Godlee, and Tom Jefferson, *How To Survive Peer Review* (London: BMJ Books, 2002).

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

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

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

INTELLIGENT
but
UNINFORMED.

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

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

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

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

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

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

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

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

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

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

www.youtube.com/watch?v=odyz0xWAWEU&feature=PlayList&p=69E561B4417065E3&playnext=1&playnext_from=PL&index=22

The image is riveting. You simply cannot watch anybody or anything else. Liberace remains the center of attention at all times, even when he is not playing and the orchestra takes over. The moment is singular. Like the model Uniform Commercial Code, he has adapted it to himself but kept the basic form. Liberace was very much his own unique, patentable brand. If we would have a counterpart visual image from the sciences, we can recall the famous paper published in 1953 by James Watson and Francis Crick that contained their simple line drawing of the famous double-helix representing DNA.[169] "This figure," they wrote, "is purely diagrammatic." It was something new that "surprised the world." They noted that the idea of DNA structure had already been proposed by several other scientists. All, they found were unsatisfactory. "We wish to put forward a radically different structure," they wrote. They went on to discuss "the

[169] J. D. Watson and F. H. C. Crick, "Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid" (April 25, 1953) *Nature* 737-38.

novel feature of the structure" which they proposed, and then discussed the limitations of their idea and how it could be tested experimentally. But it was their striking visual concept—the double-helix—that gave it flesh.[170] It was, indeed, an *annus mirabilis* for science. Their simple drawing has become the lyrical symbol for all sorts of images worldwide, and their scientific insight is the foundation for the modern science of molecular biology. This one-page article of theirs changed the world. We can think of many such moments in the sciences, the social sciences, the arts, the humanities—and the law. RPG contributions to knowledge can—and should—do the same.

[170] James D. Watson, *The Double Helix: A Personal Account of the Discovery of the Structure of DNA* (London : Weidenfeld & Nicolson, 1997.

What Counts as "Knowledge"

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

> "The twentieth century has seen, in many disciplines, the passing of the centuries-old assumption that reality could be reduced to fixed and certain knowledge, which could be explained by demonstrable laws. We now realize that the expansion of knowledge consists in continually revising and reinterpreting what we know, as new data and new explanations emerge. T*he relatively recent term 'research' means doing this purposefully: seeking better understand through the rediscovery , the reinterpretation and the revision of current knowledge*."[171]

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

[171] Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: The Council, 1983), quoted in John Henry Schlegel, "Langdell's Legacy Or, The Case of the Empty Envelope" (1984) 36(6) *Stanford Law Review* 1517, 1529; emphasis added.

inadmissible except under special circumstances. The most notable exception to this rule is the opinion of "expert" witnesses, but even that is based upon the expert's special empirical and scientific training and experience in practice, not mere textual exegesis.[172] A medical expert can give expert testimony only on her own area of personal expertise. "What do you know, and how do you know it?" is the key question—not the "grandiose reflections about political philosophy, legal history,[173] and social order" noted by Ely, written primarily for other professors and the occasional judge.[174] If an RPG student wishes to become this kind of expert, then the only way to make a real contribution of "knowledge" is to participate in substantial empirical and archival research—in other words, to become a percipient witness of something and then to "bear witness" of that something in a written thesis or dissertation. This creates something that did not exist before. There is no way around this reality. But as Peter Shuck notes, empirical work is "grunt work," costly in time and money, and it is uncertain:

> "The payoff from empirical work is substantially contingent in a way that most traditional legal scholarship is not. Until one gathers and analyzes the data, one cannot know whether one will make important new findings or 'merely' confirm what everybody (especially is retrospect) 'already knows.' In contrast, the [black-letter] articles that we typically write [for law reviews] exhibit a kind of predestination; once we have thought our ideas through, we know where we are headed."[175]

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

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

[174] Ely *op. cit.* at 491.

[175] Peter H. Shuck, "Why Don't Law Professors Do More Empirical Research?" (1989) 39 *Journal of Legal*

This somewhat unsettling reality defines the crucial difference. The audience in "the law" expects and accepts such "predestination." The audience in "the legal system" does not. This difference can arise with shocking surprise early in the career of any RPG law student who thinks about undertaking the contingency of empirical research, and it might send that student fleeing to the comforting arms of black-letter predestination. Increasingly, examinations of RPG proposals, theses, and dissertations, are seeing questions about empirical and archival research being raised in what the candidate proposed only as a black-letter subject. Conversely, some proposals that are strongly empirical or archival are challenged as to the lack of robustness in their black-letter underpinnings. What seems to be perceived as the strongest approach to many research projects is a robust combination of the two. Either way, in addition to new questions of methodology and theory, the inclusion of empirical work implicates a whole set of ethical concerns. In "predestinated" black-letter research, we usually teach the prohibition against plagiarism and its cognates as the greatest ethical problem. Plagiarism is also the greatest enemy of innovation; you cannot be "new" if you are stealing from others. In empirical research, the study of human subjects implicates an additional cluster of regulations and precautions (informed consent, privacy, invasiveness, insurance, liability) that apply only in that arena.[176] And the regulations caution:

> "***Competence*** Researchers should undertake only such research that they and their fellow researchers and research students are competent to, so that the safety of all research participants, and the ethical integrity of the research, might not be compromised for reasons of incompetence.[177]

Education 322, 331.

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

[177] The full list of requirements for such "Research Ethics" may be read at

Of course, this automatically excludes the jack-of-all-trades and the dilettante that we discussed earlier. As Nibley says, one must get "whatever it takes" to solve a research problem. But competence requires much more than that. The ensuring of "competence" is the first ethical responsibility, and lack of it is as serious as plagiarism.[178] Only such competence can generate acceptable real "knowledge." Phillips and Pugh tell RPG students that they are on their way to becoming full-fledged members of a worldwide peer group of scholars, membership in which confers upon them the status to examine other people's theses and dissertations with authority.[179] It is therefore essential for such scholars-to-be to understand fully the respective "rules of the game" that apply to that part of the club they are joining, and to understand them in the incipiency of their candidature. This combination of ethics and competence forms the essential character of a quality RPG candidate. The knowledge that such a character generates can be relied upon as genuine. The story of Charles Darwin and Alfred Russel Wallace is a story of such character.

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

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<http://web.edu.hku.hk/research/research_ethics/Policies_&_Principles.pdf>.

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

[179] Phillips and Pugh, *How To Get a PhF*, pp. 20-23.

launching the idea of evolution officially.[180] So indeed, Darwin and Wallace are the co-founders of evolutionary theory by natural selection. Their correspondence, even collaboration or competition, continued years after publication of Darwin's *Origin*.[181] Out of the tensions and competitions of their relationship, both men sharpened their ideas. The real gains in knowledge that flowed from this were and are enormous. Darwin and Wallace lived worlds apart in every way. Darwin was in England, Wallace in various parts of Asia, in a time when communications and travel were difficult. Yet independently they, and others as well, were approaching the same conclusions based upon their observations. It is lucky that these two were in communication. In a way, as they were looking after themselves, they looked after each other. In today's global world, when communications and travel are easier, it would dangerous and naïve for the RPG researcher ever to assume that s/he alone in the world is the only one working on a particular problem in a particular way. Ideas today easily spread epidemically and contagiously[182], and it is easy to get scooped by someone anywhere in the world. What is "new" right now can become second-hand in a moment.

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

[181] *Ibid*. pp. 343-47.

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

Non-Law Law

A special situation arises when a law teacher is employed in a non-law department such as business, education, architecture, building and real estate, medicine, dentistry, business, agriculture, management, and so on—even medicine and nursing. This often occurs at universities which have no law school. The primary purpose of these important programs is not to create amateur barristers but to provide both non-law undergraduates and postgraduates with a sufficient knowledge of the law in order to (1) reduce the incidence of liability due to malpractice, (2) know when a true legal problem exists, and (3) improve ability to work more effectively with lawyers when legal problems cannot be avoided. Increasingly such departments are offering and often requiring their students to take basic classes in the law that applies to their disciplines.[183] In addition to these concerns, it is obvious that the students who graduate from such programs will someday hopefully contribute to the interdisciplinary scholarship of the law in their own non-law fields published in non-law journals.[184] I taught such classes with such students in the Department of Building and Real Estate (BRE) at the Hong Kong Polytechnic University for two years. The "Poly U" does not have a law school; the BRE is a department faculty comprised of architects, surveyors, management specialists, business specialists, and the like. During that process I published several academic papers, including a "pure" law paper on a Hong Kong statute,[185] plus a conference paper regarding the pedagogy of

[183] Points noted and problematised in Roderick A. Macdonald, "Still 'Law' and Still 'Learning'? *op. cit*..

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

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

teaching law outside the law school, which included a small amount of empirical data.[186] Despite the different nature of both articles, each was addressed to a practical concern of working with the law *within the building professions* and did not target legal professionals or other law scholars or law students as its primary audience.

In such departments it is common nowadays to require all faculty members to record the data regarding their scholarly publications in some sort of uniform database that provides a weight and value to each publication which is then included as part of the professor's performance-review dossier for purposes of promotion, salary increases, ranking, and so on.[187] RPG students who co-author articles with their professors participate in the program.[188] The matrix compares all faculty members and their publications within their department, with the larger faculty or school of which it is a part, and with the university as a whole. The program is designed to evaluate publications according to the standard criteria of the disciplines based on their accepted standards and methodologies that define what "research" is for them. Among other functions, it ranks publications according to the fame and importance of the journals themselves. What, then, of the law professor who records a "pure" law paper in such a system within a non-law department where all faculty members but himself are evaluated on the basis of criteria and methods of, say, the social sciences—where "what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists."[189]—while his research and publications conform to the traditional law-school pattern of "legal research"? What of the RPG students who are his co-authors?

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

[187] See, e.g., the databases of the HKU Department of Research Services at <www.hku.hk/rss>.

[188] John Seely Brown, Allan Collins, and Paul Duguid, "Situated Cognition and the Culture of Learning" (January-February 1989) *Educational Researcher* 32.

[189] James Huffmann, *op. cit.*.

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

A recent empirical study in the Netherlands addressed some of these issues.[190] Questionnaires were distributed to scholars in "four larger Flemish universities" in order to assess general academic activities and specifically publication lists ("bibliometric indicators") as methods of evaluating the job performance of law academics ("juridical research")—what many universities call "performance review" or "performance review and development" (PRD). Two committees were involved—a peer-review committee of all research activities in law at the four universities, and a committee of deans of Flemish law departments. Among the theoretical underpinnings of the study was the acknowledgement that "[m]any scholars, particularly those in the USA, may argue that law is not a typical humanities field"[191]—an departure from the law-as-social-science model discussed earlier. It also recognized that the "main impediment to such a ranking [of law journals] was that most law journals show large variations in the quality of the papers published."[192] Furthermore, the "role of journals was found to be less prominent in communicating research results in juridical research than it is in many fields in natural and life sciences." The "role of journals" is important for several reasons. First, they count because that is where academicians publish articles and thereby accumulate a "list of publications" for their resumes. Secondly, journals are where citations are counted. The study of "cytology" counts up the number of times and places that a scholar's works

[190] Henk F. Moed, "A Case Study of Research Performance in Law" in Henk F. Moed (ed), *Citation Analysis in Research Evaluation* (Dordrecht, The Netherlands: Springer, 2005), pp. 159-66.

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

[192] Epstein and King, "The Rules of Inference" *op. cit*.

are cited by other scholars, and assesses the relative weight and importance of those other scholars and the journals in which they publish. It is a form of empirical research using statistical analysis—as assembling meta-research or "knowledge about knowledge." It is reasonable to assume that different doctrinal and ideological—and even political—visions underpin methodology in different languages and cultures whenever the definitions of words are at stake, as they almost always are.[193] But Professor Liu Lei of Suzhou University notes:

> The methodological basis of legal cytology is empirical positivism [经验实证主义], i.e., the social empirical [= positivist] investigation method [社会实证调查方法] is employed to make a quantitative analysis on legal research papers. Cytology has [several] limitation[s] in methodology, behind which a complicated "knowledge-power" structure exists. Considering the matter [that] in China's present legal citation researches [there are a large number of abuses], therefore the real quality [真正品质] of legal papers shall not be evaluated by the citation rate simply, but [by] establishing a localized [本土化的] academic evaluation system [= mechanism 机制] to scale it comprehensively.
>
> 法学引证学的方法论基础是经验实证主义, 即以社会实证调查方法对法学科研论文进行数量化分析。 引证学在方法论上有若干局限性, 其背后可能存在复杂的"知识—权力"结构。 鉴于中国目前的法学引证研究存在诸多弊端, 因此法学论文的真正品质不能简单地以引证率来衡量, 而应该通过建构本土化的学术评价机制来综合衡量。[194]

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[193] Edgar Bodenheimer, "Modern Analytical Jurisprudence and the Limits of Its Usefulness" (1956) 104(8) *University of Pennsylvania Law Review* 1080; Nicola Lacey, "Analytical Jurisprudence versus Descriptive Sociology Revisited" (2006) 84(4) *Texas Law Review* 945.

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

Liu warns that merely adopting for legal studies the "mathematic or numerical management (数目字管理)" of the sciences and social sciences (playing the "competitive game of papers (论文竞技游戏)") is the "'abstracted empiricism' of American sociology (美国社会学中的"抽象经验主义")" that creates the appearance of empirical scholarship but often masks the weakness in theoretical and introspective analysis and hinders independent thinking—emphasizing the "micro-process rather than the objective of evidence (微观的证明过程而证明目的)." Liu rightly insists that "legal scholars all have their own research domains and academic expertise (法律学人均有各自所属的研究领域与学术研究专长)"—a point paralleled by Moed in distinguishing "juridical scholars" from "practitioners."[195] This sort of inflection must surely be desirable and must surely permeate the entire empirical legal project, especially in qualitative research where cultural sensitivities and ethical concerns must above all be respected (pp. 926-40).[196] The results of the Netherlands study further problematize these issues:

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

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

[195] Henk F. Moed, *op. cit*., pp. 159-66.

[196] Lee Epstein and Charles E. Clarke, Jr., "Academic Integrity and Legal Scholarship in the Wake of *Exxon Shipping*, Footnote 17" (2010) 21(1) *Stanford Law & Policy Review* 33) (the need for reliability, validity, and transparency in law as in the sciences).

> *expert*. Academic scholars should primarily be evaluated according to their contribution to *scholarly progress, rather than to their practical activities*.
>
> ***
>
> The relationship between juridical research and practice was also addressed in a second report by a committee of Deans of Flemish Law Departments. However, this Committee stated that juridical research primarily serves the 'practice', a basic characteristic that creates difficulties in distinguishing between fundamental and applied juridical research. *It is worth noting that the two committees apparently did not have fully coinciding viewpoints*.[197]

The report concluded by noting that the peer-review Committee "stated that it would continue to work on the development of criteria for measuring research performance in the field of Law, and that it would be unfortunate if findings from the report were to be applied 'in a premature way' in university research policy."[198] If two such committees cannot agree on policy or criteria for evaluating research activities among law scholars, it might also be premature to expect that universities and their non-law departments that include a law component can do so in any kind of meaningful way? Amid the lack of "fully coinciding viewpoints" of the two committees, it is difficult to know where my own two Poly U publications might properly be located or evaluated, being as they are mixed in both law and non-law journals and addressed to both law and non-law audiences. The dichotomy between "scholarly progress" and "practical activities" is alive and well. And this dichotomy applies full-force to supervisors everywhere.

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[197] Moed *ibid*. at 160; emphasis added.

[198] *Id*. at 166.

Supervisors

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

> The ever-increasing scope of knowledge necessary to cope with the great problems of our day has led to increasing emphasis on a maxim that would have sounded very strange only a few years ago: 'There are no fields—there are only problems!'—meaning that one must bring to the discussion and solution of any given problem *whatever is required to understand it*: If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years—*or else shift to some other problem*. *Degrees and credentials are largely irrelevant where a problem calls for more information than any one department can supply or than can be packaged into any one or a dozen degrees*.[199]

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

[199] Hugh Nibley, "A New Look at the Pearl of Great Price, Part I: Challenge and Response (Continued)" (Feb. 1968) 71 *Improvement Era* 14 (emphasis added).

supervise the RPG student whose project needs empirical research in the academic mode with multiple languages and other-than-law skills?[200] Certainly it cannot be a faculty member whose sole training, orientation, and reward structure are to black-letter "legal research." If the student needs multiple languages, credentials, skills, and degrees, plus the skills for good field research and statistical analysis, *so also does the supervisor*. A supervisor adept only at doctrinal legal research in English cannot supervise an RPG student conducting a project of empirical and archival legal scholarship on comparative law between France and Bangladesh. Some individuals bridge the gap between both worlds—they not only teach doctrinal subjects and supervise RPG research in the law school, but they also serve the practicing community—the "practice professorate" we discussed earlier. But individuals who are not qualified to do both must not be pressed into service from one sphere into the other without further qualification a la Nibley. To do so would cheat the supervisor, the student, the law school, and the academic community. Ron Griffiths sums up the complexity of the situation:

> "In any department, the supervision of dissertations usually draws on a wide range of staff, often with different perspectives on what counts as a 'proper' research question and approach. Students can, therefore, find themselves caught between conflicting lines of advice, some insisting on conventional, value-neutral, exploration-oriented, 'scientific' questions and methods; others happy to accept more context-specific, problem-focused, value-engaged and methodologically eclectic projects."[201]

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

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[200] Desmond Manderson, "FAQ: Initial Questions About Thesis Supervision in Law" (1997) 8 *Legal Education Review* 121.

[201] Ron Griffiths, "Knowledge Production and the Research-Teaching Nexus: The Case of the Built Environment Disciplines" (2004) 29(6) *Studies in Higher Education* 709, 724. See also Mariana Valverde, *Law's Dream of a Common Knowledge* (Princiton, NJ: Princeton University Press, 2003).

assumes a large managerial role[202], and she and the supervisee become collaborators. They go on an intellectual journey together, working on the same projects, publishing papers sharing the same by-line along with other RPG students and other faculty colleagues. The list of co-authors on publications is truly an ensemble. This is how students learn to write and how they get their first professional publications. The professor's project is the student's project. Felix Frankfurter recognized this need for the law academy as early at 1930. He wrote:

> "The ultimate concern of the social sciences, law among them, is the conquest of knowledge leading, one hopes, eventually to new and important insights into the good life of society. [For that we need] a very small number of rigorously selected graduate students…. Graduate work implies a personal relation between two students, one of whom is a professor. If there is not common intellectual enterprise between professors and graduate students, there may be facilities for giving degrees but not graduate work in any fruitful meaning of the term."[203]

However, this is not the usual case in traditional law school "supervision," where such collaboration is the exception.[204] Law professors may have research assistants, but they are not the RPG students, and if they are credited at all, they often do not share the author's by-line. Supervisors and supervisees are generally assigned to each other because their respective projects share a common subject (i.e., commercial law), not because they will collaborate on a common project. Frankfurter would not have accepted

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[202] Tricia Vilkinas, "The PhD Process: The Supervisor as Manager" (2002) 44(3) *Education & Training* 129.

[203] Felix Frankfurter, "The Conditions for, and the Aims and Methods of, Legal Research" (1930) 15 *Iowa Law Review* 129, 139. Frankfurter (1882-1965) was a justice of the US Supreme Court from 1939 to 1962.

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

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

> "We are mostly only talking about collaboration, and have as yet hardly begun to experiment on the processes by which to integrate or coördinate or collaborate with one another. We have hardly got over the discovery that we are members of the same family; we have not yet acquired family habits with one another."[205]

That Frankfurter articulated these admonitions as early as 1930 is perhaps as astonishing as the lack of "family habits" that still remains eighty years later. One possible way to explain the apparent lack of "familiality," especially among the law and other disciplines, is to note what some writers have called the fear of "reductionism" when one discipline is "colonized" by another or wishes for the kind of certainty or methodology of another.[206] Different disciplines have different kinds of certainty, different powers and paradigms of explanation, different rules of causation and effect, and different scales of what counts as evidence and general theory—of what counts, in other words, as "new," "contribution," and "knowledge." The proximate and general explanations that lead to theory in the different disciplines may conflict and thus disrupt each other.[207] Michael Ruse argues that the fear of degrading one discipline by another's methods is a "rape,"[208] and this might be said to be true even of "the law" and "the legal

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[205] *Ibid*. at 133.

[206] See the discussion generally in Jim McKnight, *Straight Science? Homosexuality, Evolution and Adaptation* (London and New York: Routledge, 1997), pp. 173-77 *passim*.

[207] Richard D. Alexander, "The Search for A General Theory of Behavior" (1975) 20 *Behavioral Science* 77-100,

[208] Michael Ruse, "Are There Gay Genes?" (1981) 6 *Journal of Homosexuality* 5, 29.

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

> I have no great quickness of apprehension or wit which is so remarkable in some clever men…. I am therefore a poor critic: a paper or book, when first read, generally excites my admiration, and it is only after considerable reflection that I perceive the weak points.
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> * * *
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> Some of my critics have said, 'Oh, he is a good observer, but he has no power of reasoning!' I do not think that this can be true, for the 'Origin of Species' is one long argument from the beginning to the end, and it has convinced not a few able men. No one could have written it without having some power of reasoning. I have a fair share of invention, and of common sense or judgment, *such as every fairly successful lawyer or doctor must have, but not, I believe, in any higher degree*.
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> As far as I can judge, I am not apt to follow blindly the lead of other men. I have steadily endeavoured to keep my mind free so as to give up any hypothesis, however much beloved (and I cannot resist forming one on

> every subject), as soon as facts are shown to be opposed to it. Indeed, I have had no choice but to act in this manner, for with the exception of the Coral Reefs, *I cannot remember a single first-formed hypothesis which had not after a time to be given up or greatly modified*. This has naturally led me to distrust greatly deductive reasoning in the *mixed sciences*. On the other hand, I am not very skeptical,—a frame of mind which I believe to be injurious to the progress of science. A good deal of scepticism in a scientific man is advisable to avoid much loss of time, but I have met with not a few men, who, I feel sure, have often thus been deterred from experiment or observations, which would have proved directly or indirectly serviceable.[209]

The implications of these principles for RPG students and their supervisors, where assimilation to (an)other discipline(s) in "sociolegal studies" occurs, are profound. They must manage what I call the *parallax view* of interdisciplinary and comparative scholarship. As Paul Chynoweth notes, supervision, peer review, methodology, theory, research outputs, communications between disciplines, and almost every other aspect become problematized.[210] This fact can become especially poignant when the RPG project tries to join the law with another, more determinate discipline. In an informal seminar of RPG students from several disciplines at my university, a disagreement arose over the interpretation of secondary-source commentaries on religious texts regarding extramarital sex. A Hong Kong sociology student wrote this account of his exchange with a law student:

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

[210] Paul Chynoweth, "Legal Research" in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Oxford, UK: Wiley-Blackwell, 2008), pp. 28-38, esp. p. 37.

> "I noted that I put myself into *a very dangerous situation* in which I am easily criticized by researchers from Law. Meanwhile, my research would not be able to go further from sociological viewpoint. I would take [____]'s view to go back to look at how the [_____] and [_____] [primary-source texts] say about extramarital relations. This suggestion helps to avoid any confusion from some second-hand resources."[211]

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

> "In my opinion, the problem is the classic knowledge/power problem. We Chinese researchers keep learning from the west, using their terms and methodologies. But it's difficult for us to discuss with western colleagues equally, because we don't quite understand them and they don't care about us either. If they want to know about China, they have their own experts and all they want is a brief conclusion. Actually this is the same for Chinese scholars."[212]

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

[211] Personal communication on file with author; emphasis added.

[212] Personal communication on file with author.

perspective into any other social perspective:

> "The definition of a value field makes the contents of the field exportable. That is to say, if we understand a proposition in the context of its own field we can translate the proposition into language that will convey the same informational content in any other value field we understand."[213]

Yet even granting the fact that here Cohen uses "translation" here with reference to ideas rather than words, anyone familiar with modern translation theory must recognize that this states a bit too much—exact equivalence between words, fields, or ideas cannot be achieved.[214] A reduction of the indeterminacy to a minimal may be "good enough." Supervisors must be keen to guide their RPG students carefully between and around the different mindsets that exist in different disciplines. We have already discussed some of these. Ken Kress observes, "Law is indeterminate to the extent that legal questions lack single right answers."[215] This probably strikes non-lawyers as odd (the mere idea that the question, "What is chicken?"[216], can be asked at all), but black-letter practitioners and scholars within the common-law tradition are at ease with this lack of "single right answers" and with Coke's "artificial reason and judgment of law"—indeed they glory in it. Its process has been aptly compared to the growth and stability of a coral reef. The metaphor was coined by Judge Learned Hand in his review of Benjamin Cardozo's *The Nature of the Judicial Process* in the 1922 *Harvard Law Review*.[217] Hand wrote that the common law is not a "machine" that operates automatically but that its

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[213] Felix S Cohen, "Field Theory and Judicial Logic" (59 *Yale Law Journal* 238, 265.

[214] Robert J. Morris, "Translators, Traitors, and Traducers" *op. cit*.

[215] Ken Kress, "Legal Indeterminacy" (1989) 77 *California Law Review* 283.

[216] *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

[217] Learned Hand, Book Review (reviewing Benjamin Cardozo's *The Nature of the Judicial Process*) (1922) 35(4*) Harvard Law Review* 479.

whole structure "stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work." But to non-lawyer ears, this sounds more like evolution than academics: the common law moves like a "glacier," and it is, of course, judge-made law[218] As Robert Gordon noted earlier, social science is a "value-soaked, fuzzy, messy, dispute-riddled, political enterprise like any other interpretive activity—like law for instance,[219] but the respective fuzzinesses appear to differ in their characteristics.

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

> "What is considered profound innovation in one field may be regarded with skepticism, if not derision, by another, and where a field (or supervisor) lies along the continuum will naturally have a significant steering effect on the nature of the dissertation proposal."[220]

Kilbourn goes on to note that the crucial importance of the research proposal is that all these issues must be *worked out in advance* of the student's embarking on the dissertation project itself.[221] Hence, the confrontation and management (if resolution is

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[218] *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawai'i 1061), aff'd , *Chapman v. Brown*, 304 F.2d 149 (9th Cir. 1962). See the discussion of these cases and these images in Robert J. Morris, "Products Liability in Hawai'i" (1979) 14(4) *Hawai'i Bar Journal* 127, esp. n. 73 and accompanying text.

[219] Gordon, *op. cit*.

[220] Brent Kilbourn, "The Qualitative Doctoral Dissertation Proposal" (2006) 108(4) *Teachers College Record* 529, 536.

[221] *Ibid*. p. 572.

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

A Bit of Retrenchment

Up to this point we have pretty much said that your RPG research project must be new and that newness is an unalloyed good. We have said that globality is absolutely a good thing because globalization demands universal standards of quality work. It's time now to step back a bit and do what the common law wisely teaches us to do: *Audi alteram partem*. Listen to the other side. Newness for the sake of newness, globality for sake of globality, can get out of hand. They must be banked and cooled by the tug of tradition and wisdom. The Wise Man said: "Do not remove the ancient landmarks that were set up by your forebears."[222] These tensions of traditional/new and global/local are two more of our important dichotomies.[223] John Adams said that he wanted to do something "new, grand, wild, *yet regular*." The coral reef of the common law is regular; the double-helix of DNA is new, grand, and wild. Liberace was both, working flamboyantly from within the classical tradition, but RPG students cannot afford to be "too Liberace." Students who research traditional cultures—like students who come from traditional cultures—encounter the dichotomies of traditional/new and global/local all the time, not only in the subject matter they study, but in the performance expected of them in the classroom (to teach and be taught), the ways they are taught to think and to think of themselves, and the nature of the academic product they are expected to produce. Indeed, these dichotomies often define what is acceptable as "new" and "knowledge."[224] Suzanna Sherry, who deplored the dilettante "law professor as astrophysicist," also deplores "a phenomenon that has come to pervade legal scholarship: the idea that novelty

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[222] *Old Testament*, Proverbs 22:28.

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

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

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

> "It often seems today that proposing counterintuitive ideas is the fastest way up the academic ladder. As one young scholar puts it: 'It is the intellectually innovative candidate who is most likely to get hired and succeed professionally, and ingenuity is not the same as dependable judgment.' The more *radically* an article departs from conventional wisdom, the more likely it is to be published in a prestigious law review. This *perverse incentive* is likely to create exactly the sort of scholarship we now see so often in [American] constitutional law: original, creative, even brilliant, but quite obviously wrong.[225]

Sherry notes that "good arguments are seldom more than *one step* beyond existing arguments" (the coral reef image), and that scholars who reject gradual change in favor of wholesale adoption of first principles (ignoring precedent, the coral reef), operate in an academic milieu that "creates incentives to *climb out on limbs*."[226] The key to understanding this argument is that *radical* departure from the existing wisdom is usually perverse. Good arguments, good research, usually make their "new contribution to knowledge" one step at a time. Watson and Crick did this with their double-helix when the located their research within the existing body of work. *The Federalist Papers* did this by carefully couching the arguments in legal and political history. The "new, grand, wild" must be tugged back by the "regular." One way to achieve this balance is to retain the local within the global.[227] Earlier we noted that place has priority, and law is peculiar

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[225] Suzanna Sherry, "Too Clever by Half: The Problem with Novelty in Constitutional Law" (2001) 95(3) *Northwestern University Law Review* 921, 926; emphasis added, citations omitted.

[226] *Ibid*., p. 927; emphasis added, citations omitted.

[227] Alexander Loke, "Forging a New Equilibrium in Singapore Legal Education" (2006) 24(1) *Wisconsin International Law Journal* 261.

to place.[228] Each RPG student and each RPG project must be firmly grounded in the particular university, law school, culture, and locale where the project is undertaken. I call this the *sine qua non* factor. I require my RPG students to ponder this question:

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

This grounds the global in the local. It leverages the local in the same way the 50 states adapt the Model Uniform Commercial Code to the specific needs of their people. The law remains local while working toward a national standard. In the same way, RPG projects conform to the rules of their graduate schools, law departments, and universities in all respects, while at the same time working toward a "new contribution to knowledge' that is of global excellence. While standards of excellence are global, RPG programs are not fungible. Like Liberace, universities, professors, programs, and law schools usually distinguish themselves in specific and important, sometimes unique, ways. That is why their RPG credential is so valuable. You need to leverage that distinction. Even though much research can now be done by computer anywhere in the world, some research—like archives, field work, interviews, and observations—are entirely grounded in the locales where they exist. *You have to be there*. The American state of Hawai'i is a good example. For centuries the Hawaiian people had an oral culture; their language was not written. Everything linguistic about their culture, its history, religion, genealogies, and stories, were transmitted orally by memory. Only in the early 1800s was their language "reduced" to writing by foreign missionaries.[229] During all the 19th Century, many

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[228] As, indeed, Pierre Legrand argues, is everything else that is claimed to be "global." Pierre Legrand, "On the Singularity of Law" (2006) 47(2) *Harvard International Law Journal* 517.

[229] Albert J. Schütz, *The Voices of Eden: A History of Hawaiian Language Studies* (Honolulu: University of Hawai'i Press, 1994).

Hawaiians used the newly written language to record their cultural materials, although many chose to keep them in memory only. They published books and Hawaiian language newspapers, and many recorded their lore in diaries, journals, and Bibles. Except for the Hawaiian language newspapers, most of this material has remained unpublished and untranslated. It exists only in the university and museum archives in Honolulu or in the living memories of Hawaiian people—*and nowhere else in the world*. A small percentage of it has been digitized and made available to researchers online, but most of it remains in storage facilities—unphotographed, uncopied, and undigitized. So anyone wishing to conduct an RPG research project in these Hawaiian materials must, a la Nibley, do several things: get a research-level knowledge of the Hawaiian language; obtain research skills to examine archives in that language; and obtain empirical skills to interview and collate qualitative materials from living witnesses who hold the key to understanding the archive materials—and who themselves are living archives.[230] And all of this must be done—can only be done—in Honolulu. It cannot be accessed remotely. A finished global-worthy RPG product of this kind would, of course, have to meet global standards of academic excellence, but it would by definition be utterly local in its subject—and in this case, not just new but unique. This is the kind of thoroughness required of an RPG project. There is a tradition in Hawaiian culture that teaches this crucial rule: only complete knowledge ("all the bits of knowing") is worthy of graduation. It is the famous story of Kalapana:

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

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

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

* * *

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

wits.’’’[231]

This is the very definition of education itself—Nibley in another culture. The “contest of wits” is global, the “competition with each other.” You must go where the knowledge is to get it—above and below, land and sea, night and day. The global and the local stand in strong counterpoise and meet Adams’s test of being at once “new, grand, wild, *yet regular*”—the global grounded in the local. Appendix C is the teaching materials I use in the ARM class to demonstrate these research challenges with a Hawai‘i detective story.[232]

[231] Charlot, pp. 126-27.

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

Summary, Conclusions, & Recommendations

In the 1990 thriller movie *Flatliners*, there is a marvelous scene with a tough professor and her medical students in the gothic dissecting room of a medical school pathology class. They are standing about, scalpels in hand, ready to begin a hands-on examination on the cadavers laid out before them. The teacher, bless her heart, lays it out for them in plainness and truth: "Today's exam will be scaled. Three A's will be given, five B's, ten C's, and the remaining four will get D's and F's. Once again, as in life, you are not in competition with me, yourself, or this exam, but with each other."[233]

So it is. Competition with *each other*, and today that means the whole world. Does having neither fish nor bear's paw mean that you cannot have some of each? Mencius thought not ("*If* I cannot keep the two together"). The choices to be made are not based on a simplistic either-or binary nor a zero-sum game. In defining its "core competence," if the law school chooses to dichotomize itself between the professional and the academic, between legal research and legal scholarship, it should not homogenize the two but neither assume that the two are mutually exclusive. In fact, the almost-dichotomy should be widened. Both missions of the law school are important in the globalized world, each should have its own special preserve, and both should stand on equal footing.[234] There is nothing wrong with researching and writing in either mode or both modes so long as what one is doing is clearly acknowledged and exploited for its particular strengths and methods—so long, in other words, as one is not assumed naïvely to be the other. Audience is all-important. Bok's "pecking at legal puzzles within a narrow framework of principles and precedent" is precisely the value-added *desideratum* which the legal profession needs and wants—in other words, it *is* the very "new

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[233] Columbia Pictures, *Flatliners* (1990), screenplay by Peter Filardi.

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

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

> "If legal advocacy is based in argument for a foregone (or pre-financed) conclusion, then the training of the advocate *cannot be reconciled with that of the legal scholar*. No graduate program has yet acknowledged the paradoxical implications of this position. A masters or doctoral program that wishes to take the idea of legal research seriously…*must look very different* from a law degree which trains outcome-oriented advocates, either at masters' or undergraduate level."[235]

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

[235] Manderson and Mohr, *op. cit.* at 5 *passim*, emphasis added.

suffered in status."[236] Tracey E. George argues that a truly successful empirical movement in the law school must necessarily be "faculty-based as opposed to program-based" for the permanence, longevity, and funding they imply.[237] If "what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists,"[238] and if a PhD or other RPG credential awarded by a law school for traditional black-letter legal research is "no credential at all," then the gap between these two worlds should be spanned by acknowledging the unique place of each in the legal world and ensuring that each receives the support and the legitimacy it needs to recognize its own special nature in its own unique sphere. In other words, their differences should be accentuated, not homogenized—and those differences should be made known to, and understood by, all newly entering RPG candidates. It may be too extreme to suggest that a student must choose between "thinking like a lawyer" and "thinking like a scholar," but if Nibley is right, the student must understand the requirements of both worlds in order to make any choice. The coin of the realm in one sphere is of partial value in the other—and that is all right. RPG students who expect to get their research accepted within the global community of scholars must understand what they must do to compete in that larger context. These subjects should be the subject of at least annual in-house training conferences involving all the local stakeholders as well as invited guests from other jurisdictions concerned with the RPG community. And finally this must include the personal and institutional willingness on the part of faculty supervisors to co-supervise and to co-publish with members of non-law faculties and with their RPG supervisees in order to avoid the jack-of-all-trades problem. But as Professor Fortney notes:

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[236] Barkan, *op. cit.* at 407.

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

[238] Huffmann, *op. cit*.

> "Many academics work in universities housing numerous experienced empiricists. Unfortunately, law professors who want to recruit the assistance of social scientists may face *institutional barriers* to doing so, such as internal accounting and grant administration practices that complicate such collaboration. A network of empirical researchers may provide information on models of collaboration and joint ventures between law professors and researchers in different parts of the university."[239]

A way to help address these problems of barriers or impediments for RGP students is to see combinations of empirical, jurisprudential[240], and archival research as three methods to identify, supplement, and potentiate more clearly their research questions, goals, strategies, "gaps," and "new" contributions—particularly if the basic research program is black-letter law. The jurisprudential component suggests the possibility of choosing research questions that engage the moral and ethical senses beyond the purely textual problems of the canons of construction. One current example of this is the rapidly developing area of "savior siblings"—children specifically conceived in a kind of "genetic supermarket" to benefit a living sibling with a genetic disorder.[241] The choices among all these possibilities need not be binary. A properly designed research project can have both fish and bear's paw. The idea can be diagrammed thus:

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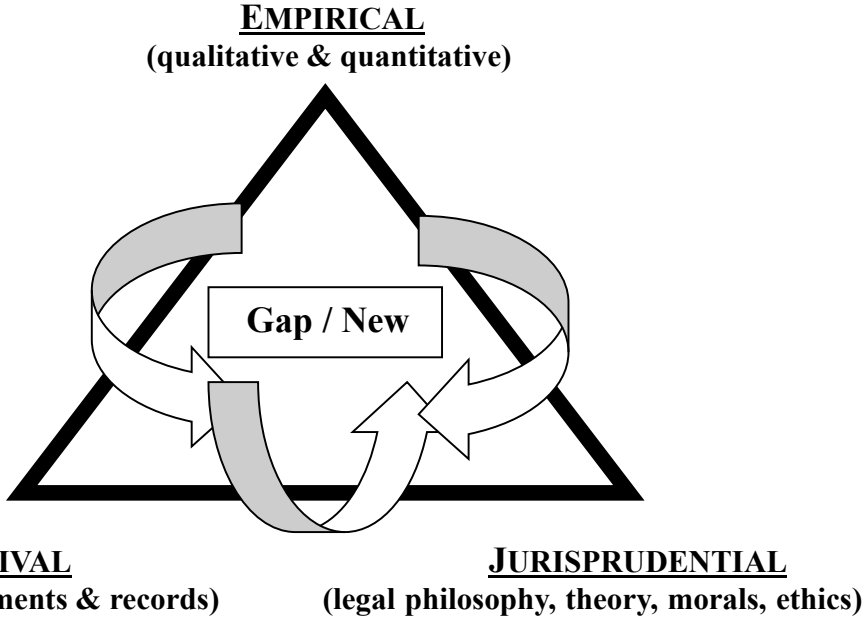
[239] Susan Saab Fortney, "Taking Empirical Research Seriously" p. 1482 (emphasis added). Daintith, *op. cit*., also addresses this question of impediments.

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

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

Figure 5


EMPIRICAL
(qualitative & quantitative)
Gap / New
ARCHIVAL
(unpublished documents & records)
JURISPRUDENTIAL
(legal philosophy, theory, morals, ethics)

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

For many legal scholars, myself included, law really is a discipline unto itself. It is not "one of" the humanities, the social sciences, the sciences, the arts, or anything else.[242] It is the sea that touches and concerns all of these islands, and many more besides. In this metaphor we see a definition of "the legal system" that is much more expansive than the courts, the prisons, the legislature, the legal profession, and so on. It includes everything that the law touches and concerns—which is everything: medicine, sex, broadcasting, shipping, football, astrophysics, hot dogs, ships, shoes, sealing wax—everything. The law is not the legal system ("the map is not the territory"), but they are related. Sir Edward Coke, who spoke of the "artificial reason and judgment of law," gave in the *Institutes of the Laws of England* this most enduring metaphor about an ideal law student: "Our student shall observe, that the knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding."[243] This

[242] Interdisciplinary work might bring the fields together in a comparison between cause and effect in tort and in science using, for example, Ernst Mayr, "Cause and Effect in Biology" (1961) 134 *Science* 1501.

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

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

> "He that reacheth deepest, he seeth the amiable and admirable secrets of the law, wherein, I assure you, the sages of the law in former times…have had the deepest reach. And as the bucket in the depth is easily drawn to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawne up but with great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, *so long as he keepe himselfe in his own proper element*."[244]

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

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

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

equal footing as we draw the buckets up. In the quest for something "new, grand, wild, yet regular," curricula and classes cannot provide everything. Ultimately, as Nibley says, each student must assume responsibility for acquiring the requisite tools and skills—"*one* must *get* them." There is a point after which they cannot be *given*. We are nowhere near that point yet. The Teacher said: "There is nothing new under the sun."[245] RPG students should never be in the position of thinking they have produced something objectively new, when in reality they have only produced something subjectively analytical.

[245] *Old Testament*, Ecclesiastes 1:9. "What has existed before will exist again, and what has been done before will be done again."

THE TEN RULES REDUX

(with notes)

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

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

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

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

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

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

The "new contribution to knowledge" may be either found or created.

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

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

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

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

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

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

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

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

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

RPG students "of law."

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

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

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

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

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

DIAGNOSTIC QUIZ

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

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

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

TRUE FALSE

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

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

A. I and II only
B. I, II, and III only
C. IV only
D. I and IV only

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

5. Regarding primary sources:

I Published material is the most important primary source for legal research.
II Archival material is the most important primary source for legal research.
III Quantitative material is the most important primary source for legal research.
IV Qualitative material is the most important primary source for legal research.

A. All of the above
B. None of the above
C. I and IV only
D. II and III only

6. What is a “thesis statement”?

7. The primary purpose(s) of a footnote is/are—

I To demonstrate your scholarship and erudition

II To impress your supervisor, editor, professor, and/or colleagues

III To help you avoid plagiarism

IV To assist others in finding your sources

A. All of the above

B. IV only

C. I only

D. I, III, and IV only

8. What is a “research gap”?

9. In doing postgraduate research work, as in your professional life generally, it is most correct to say that you are in competition with whom:

A. The professor

B. Yourself

C. The exam

D. Each other

10. Go to the law library and find the following book, which is on reserve at the

circulation counter:

Jon Meacham, *American Lion*.

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

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

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

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

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

a) Poor English

b) Poor logic and argument

c) Poor footnotes and bibliography

d) Poor format and structure

12. What is justice?

13. Do you love the law?

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

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

PERSONAL INFORMATION WORKSHEET

Name & Student Number:

Name to use in class:

Complete contact information:

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

When did you first matriculate at HKU?

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

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

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

Country of origin & native language:

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

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

Why have you chosen the HKU Law School?

What do you expect to get from this class?

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

Research Topic, Title, or Project:

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

Will your research project be—

_____ Black-letter/doctrinal

_____ Empirical (Quantitative, Qualitative)

_____ Archival

_____ Theoretical, Jurisprudential, Philosophical

_____ Other (specify)

The Research Gap to be filled:

The Thesis Statement:

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

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

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

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

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

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

ADVANCED (LEGAL) RESEARCH METHODOLOGY (LLAW 6022)

TRANSLATIONS, COPIES, MICROFILMS, & NEWSPAPERS: A TRUE RESEARCH DETECTIVE STORY FROM HAWAI'I

A few years ago, when I was still living and practicing law in Hawai'i, I was conducting some research on Hawaiian legends and stories as part of my preparation of a scholarly article.[246] In the library of the Bishop Museum in Honolulu, I had found an English translation of an ancient Hawaiian story that contained some elements which were perfect for the subject of my research. However, I first wanted to read the story in the original Hawaiian language—that, not the translation, would be the primary source. I do not trust translators. Through much sad experience, I have learned that many translators are liars. They leave things out; they change things; they add things. They have their own agendas; they often interpret instead of translate. And I don't like being lied to. Furthermore, *translations are secondary sources while the original language is the primary source*.[247] Hence, I prefer to read things in the original language.[248] In any case, for scholarly research I was obligated to read the original source. And since I read Hawaiian, going to the primary source of the story in the original language would be easy.

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

[246] Robert J. Morris, "Same-Sex Friendships in Hawaiian Lore: Constructing the Canon" in Stephen O. Murray (ed), *Oceanic Homosexualities* (New York & London: Garland Publishing, 1992), pp. 71-102.

[247] Unless, of course, the subject of your study in the translation itself or the translation process itself. In that case, it would be the primary source.

[248] Robert J. Morris, "Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation" (2006) 51(3) *Journal of Homosexuality* 225.

occurred in a Hawaiian-language newspaper in the 1860s. There were many such newspapers published in those days. However, the original copies of these newspapers are old and in very fragile condition. Many have been destroyed through neglect. The paper on which they were printed is rapidly disintegrating. They cannot be replaced. The newspapers that have survived are therefore stored in a special vault in the Bishop Museum[249] in Honolulu where the atmosphere and temperature are carefully controlled. They are not available to the general public. If they were brought out of their special vault into the open air and touched by many hands, they would quickly disintegrate and be lost forever. Only the Hawaiian translator who made the English translations had ever been permitted to work from those originals, and that was 50 years ago. She has long since died.

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

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

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

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

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

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

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

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

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

WHAT WOULD YOU DO AT THIS POINT?

As you consider these problems and your solutions to them, keep in mind this Hawaiian proverb: *Ma ka hana nō ka ʻike, a ma ka ʻike nō ka mālamalama*—Knowledge comes through hard work, and wisdom[250] comes through knowledge.

[250] *mālamalama* = the light of knowledge, clarity of thinking.

Afterword

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

> So, gentlemen, the prospect: the thicket of thorns…. Details, unnumbered, shifting, sharp, disordered, unchartable, jagged. And all of this that goes on in class but an excuse to start you on a wilderness of other matters that you need. The thicket presses in, the great hooked spikes rip clothes and hide and eyes. High sun, no path, no light, thirst and the thorns.—I fear there is no cure. No cure for law but more law. No vision save at the cost of plunging deeper. But men do say that if you stand these thousand vicious gaffs, if you fight through to the next bush, the gashing there brings sight.[251]

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

- Write a mission statement that sets out your core competence.

- Plunge deeper. "[T]he knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding."[252] The "deepe

[251] Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Dobbs Ferry, NY: Oceana, 1951), pp. 105-06.

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

well" is global. "The law is the calling of thinkers."[253] Learn all the knowledges (*nā 'ike apau*).

• Know the questions, problems, dichotomies, and pitfalls—accept them, embrace them, take them on board, and use them creatively. Understand that they are evolving. "It is as it is."[254] Do not fight it.

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

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

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

• Make certain that you know exactly what counts as "new," as a "contribution,"

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

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

and "knowledge," and as "research" with regard to the particular subject, purpose, and thesis of your RPG project, and that you stay attuned to those realities through the duration of your work. If any of the requirements change, you must adapt accordingly. Improvise, adapt, overcome.[255]

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

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

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

[255] Said to be an unofficial motto of the United States Marine Corps.

> The ever-increasing scope of knowledge necessary to cope with the great problems of our day has led to increasing emphasis on a maxim that would have sounded very strange only a few years ago: 'There are no fields—there are only problems!'—meaning that one must bring to the discussion and solution of any given problem whatever is required to understand it: If the problem calls for a special mathematics, one must get it; if it calls for three or four languages, one must get them; if it takes 20 years, one must be prepared to give it 20 years—or else shift to some other problem. Degrees and credentials are largely irrelevant where a problem calls for more information than any one department can supply or than can be packaged into any one or a dozen degrees.[256]

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

> "Learners have four shortcomings which the teacher must understand. Some err because of the multitude of their studies; some in their fewness; some in their feeling of ease; and some in the readiness with which they quit. These four shortcomings are due to the differences of their minds. When a teacher knows the character of her own mind, she can rescue the learner from his own shortcomings. Teaching should nurture the student's strengths, and correct his shortcomings."
>
> 學者有四失，教者必知之。人之學也，或失則多，或失則寡，或失則易，或失則

[256] Hugh Nibley, "A New Look at the Pearl of Great Price, Part I: Challenge and Response (Continued)" (Feb. 1968) 71 *Improvement Era* 14 (emphasis added).

止。此四者，心之莫同也。知其心，然後能救其失也。教也者，長善而救其失者也。

You may arrive at your RPG program full qualified as measured by these standards, or you may arrive, as do many—perhaps most—RPG students, in need of some preliminary remedial work. Whatever the case, you are first of all your own teacher and the creator of your research project. Take stock of yourself, teach yourself, open your eyes and lift your sights high, for the wolf is always at the door. The exam is always scaled, and "once again, as in life, you are not in competition with me, yourself, or this exam, but with each other."[257] The world market will judge you objectively to decide whether your product—and you—can " pass without objection in the trade."[258] As you cobble all of this together, you will find that your unique RPG project is both an act of creation and of self-creation. Ultimately, that is the final meaning of the "new contribution to knowledge."

[257] Columbia Pictures, *Flatliners* (1990), screenplay by Peter Filardi.

[258] Uniform Commercial Code 2-314.

About This Book

This book has grown out of a long-established traditional class in Advanced (Legal) Research Methodology (ARM) at the University of Hong Kong (HKU) Faculty of Law, Department of Law. It is a required class for all Research Postgraduate (RPG) Students in law, but it often includes undergraduates, non-law students, students from other universities, and many others who want to learn more about sophisticated legal research techniques. My first encounter with the class was as an RPG student when I started my PhD studies in 2001. The teacher was Professor Jill Cottrell, whose book, *Legal Research: A Guide for Hong Kong Students*, is still a standard work.[259] In following semesters, I had the privilege of co-teaching the class with Jill, and these pages reflect much of her influence and pedagogical philosophy. Her text is still one of the foundational sources for the ARM course, and I assign it for two reasons. First, it teaches the skills of basic legal research—black-letter, doctrinal research. Second, and just as importantly, it is jargon-free. Jill writes with simplicity and springboard lucidity—skills I want my RPGs to see and practice. I also co-taught the class with Professor Michael J. Dilena for one semester, and his counsel on "how to get a PhD" is also reflected here. As was the practice of both Jill and Michael, I invite guest lecturers to share their personal experiences and wisdom (we call them "war stories") with each class. Among our regular guests have been Fu Hualing (department head) and Albert Chen (my own PhD supervisor)—of the HKU Faculty of Law—and many others. They have all told us some tremendous (and often harrowing) war stories. I thank all of them. Their influence is present in these pages also.

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

[259] A useful follow-on text is John Bahrij, *Hong Kong Legal Research: Methods and Skills* (Hong Kong: Sweet & Maxwell Asia, 2007).

advanced research certainly, but they need something more. They need to see in their leader a role model, a coach, a mentor—someone who has been through what they are going through and succeeded. "Soldiers deserve soldiers."[260] It is very easy, sitting in a study room with a computer and a pile of books for several years, for an individual RPG student to feel alone and to start believing that the doubts and fears and discouragement that beset all RPG students are unique to him/herself. War stories dispel those bugaboos. War stories say, *I fought in the same trench you are fighting in, and I survived. Here I am, alive and kicking. If I can do it, so can you. I'll be with you all the way to the other side.* Whoever uses this book should see it as a model for this kind of approach. The book can be used by anyone studying law for research purposes, even if that study is not within the context of the law school.[261] The "counterparts" of the title means non-law students working outside the law school.

As an RPG student, I was also required to take a short course offered by the HKU Graduate School called "Introduction to Thesis Writing," for which there was a section for the sciences and another for the "humanities and related disciplines." I took the latter because I was assigned there due to the common perception that "law is one of the humanities." Shortly after I finished that class, most (but not all) of the course materials were published by the HKU Press as *Dissertation Writing in Practice: Turning Ideas Into Text* by Linda Cooley and Jo Lewkowicz. This book, also, along with the many other resources listed in the chapters that follow, is one of the foundational sources for my ARM class.[262] Both the "Introduction" class and the books are excellent, but as any law student who engages either will admit, there is something of a misfit. Law has many connections with the humanities, as with the social sciences and, indeed, the sciences,

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[260] Warner Bros. Pictures, *Soldier* (1998), screenplay by David Webb Peoples.

[261] Robert J. Morris, "Improving Curriculum Theory and Design for Teaching Law to Non-Lawyers in Built Environment Education" (2007) 25(3/4) *Structural Design* 279.

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

and the arts—but it is not any one of them. It defies being categorized in any one academic locale. Law, and therefore legal research and writing, are *sui generis*, as law students and teachers in "Introduction to Thesis Writing" themselves admit. The reason for this is not difficult to understand. There is no subject or activity of our modern lives that law does not touch and concern. If other subjects, categories, and pideonholes—sciences, social sciences, arts, humanities—are the islands, law is the sea.[263] Hence, there is a gap, and a rather large one, between what those non-law materials can teach a law student and all that a law student must know and master in order to conduct successful RPG work. But here is the irony. Law RPG students who want to expand their research beyond black-letter subjects will move into non-law areas, and there they must master exactly those materials and methods that seem to be otherwise "misfit." The fit, in fact, becomes perfect.

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

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

[263] Robert J. Morris, "Globalizing and De-Hermeticizing Legal Education" (2005) 1 *Brigham Young University Education and Law Journal* 53.

like doctors[264], and the Philosophy Department must teach its students to think like philosophers.[265] And "thinking like a lawyer" is, in many ways, different from thinking like anything or anybody else. Thus, pure legal research itself has many aspects that researchers in other fields would find strange and foreign. "Pure" research means the study of statutes, rules, regulations, cases, and constitutions—in other words, texts, "black-letter law"—and their intellectual manipulation into legal analysis. If a student undertakes to study other matters such as the prison system, the operations of government, the statistics of police arrests, the operations of the legislature or the governor's office, or the Legal Aid system, those are studies properly described as The Legal System instead of The Law.[266]

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

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[264] Although pedagogical methods may be borrowed between the two, as noted in Richard Wu, "Reform of Professional Legal Education at the University of Hong Kong" (2004) 14(2) *Legal Education Review* 153, 166 note 48 and accompanying text.

[265] Robert J. Morris, "Not Thinking Like a Non-Lawyer: Implications of 'Recogonization' for Legal Education" (2003) 53(2) *Journal of Legal Education* 267.

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

that they know entirely what they want or need—or that I know beforehand who they are or what they need.[267] Surely, I know, they need the basics, and the basics must be reinforced and taught again and again. The truth is that even for some RPG students, much of the "advanced" class is an introduction to legal research. As we then sit in a communal circle and share those documents and our personal war stories with each other, we begin to form some consensus of what the next few months must accomplish and what things will be true for all of us then which are not yet true at the inception. Only then can I begin to pick and choose from the many resources available that combination of things which will, hopefully, get us to those desired endpoints. Thus, ARM is a highly *tailored* class. Even then, the process remains extremely fluid throughout the entire semester because we constantly surprise each other. As the class unfolds, new insights, desires, and directions incessantly reveal themselves. The tailoring is a constant, ongoing process—producing as much as 1/3 new or altered materials each time. Malleability is the primary characteristic of all these materials. As Sunzi teaches in *The Art of War*, we must remain constantly open to the fluidity of the battlefield situation. It would be a rare semester that used everything from the previous year, or that did not witness the creation of new teaching materials. Like Sunzi and warfare itself, I intend much of my approach to be disruptive of complacent practices, assumptions, and methods.

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

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[267] Anthony D'Amato, "The Decline and Fall of Law Teaching in the Age of Student Consumerism" (1987) 37(4) *Journal of Legal Education* 461, 475 (deploring the fact that "students now define what it is to learn").

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

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

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

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

the students do prepare is graded solely for the evidence it presents of research. Ideally, we would undertake both research and writing in a circular feedback and re-folding into each other, as the two activities potentiate and complement each other. In this era of "outcome-based education," in which pedagogical success is measured by the students' end results, not the teacher's resume, this is what we should be doing. However, that would require two full consecutive semesters, and the time is not, as of now, available. Also, we hope that each student's supervisor will keep close tabs on the writing itself. In order to facilitate a kind of mutual assistance in this regard, I make it a point to extend a personal invitation to the supervisor of each student in the class to join our sessions as often as practicable. Some accept the invitation; some do not. In any case, we measure progress by demonstrable reported achievement in solving knotty research problems in creative ways. Thus, we try to learn both theory and practice. As Sunzi taught: "You may *know* how to win without being able to *do* it."[268]

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

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

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[268] **《孫子兵法》**勝可知，而不可為。

constitutional convention and said:

> "Mr. President, I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better Information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others."[269]

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

> "[Judge] Learned Hand said once that he would like to have posted over the door of every church and school, every courthouse and legislative hall in America, the words of Cromwell to the Scots before the battle of Dunbar, begging them to consider that they might be mistaken."[270]

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

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[269] Max Farrand (ed), *The Records of the Federal Convention of 1787* (New Haven & London: Yale University Press, rev ed, vol 2, 1966), pp. 641-42.

[270] David H. Souter, "Gerald Gunther" (2002) 55(3) *Stanford Law Review* 635.

GLOSSARY

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

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

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

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

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

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

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

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

legal analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

global standards of excellence

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