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Doctrinal Legal Science: A Science of Its Own?

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Abstract

Doctrinal legal scholarship faces persistent challenges from empirical approaches, but such criticism rarely seeks to encounter doctrine on its own terms. In this article, we seek to excavate the theoretical and methodological basis of doctrinal legal scholarship by situating the discipline in a hermeneutic continuum between theory and practice, or law's engagement with the social world. We first unfold this dynamic as an exercise in methodological interpretivism and ontological hermeneutics and then turn to explicate our analysis with examples drawn from tort law and international criminal law. We ultimately argue that law can never be strictly circumscribed as an empirical object because law cannot be disassociated from an agent's reasons, which are continuously bound up in a hermeneutic circle, and which the scholar must enter into to achieve legal understanding. Unavoidably, therefore, doctrinal legal scholarship becomes part of the very object it is investigating.

Keywords: *Doctrinal legal scholarship; legal philosophy; methodology; hermeneutics; interpretivism*

I. Introduction

William Twining once observed that in the "current intellectual climate, it is tempting to dismiss questions about the core or essence of a discipline as misguided … to be treated no more seriously than the quest for a non-existent Holy Grail."[1] Nothing much has changed since. Legal doctrinal scholarship is still regularly criticised for not having any clearly-defined scholarly identity. Doctrinal legal scholarship is routinely recognized as *useful* as a set of knowledge and skills required to research and analyse the law, and to implement these competences in legal professional work.[2] However, as an *academic discipline,* it is frequently derided for being either unscientific,[3] or being out of touch with the nature of law and its practice.[4]

1. William Twining, *Blackstone's Tower: The English Law School* (Sweet & Maxwell, 1994) at 153.
2. See e.g. Council of Australian Law Deans, "Statement on the Nature of Legal Research" (2005), online (pdf): *Council of Australian Law Deans* cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf,cited in Terry Hutchinson, "Doctrinal Research: Researching the Jury" in Dawn Watkins & Mandy Burton, eds, *Research Methods in Law*, 2d ed (Routledge, 2017) 8 at 16.
3. See e.g. Thomas S Ulen, "A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law" (2002) 4 U Ill L Rev 875.
4. This criticism somewhat ironically extends from both practitioners and critics; see e.g. David M Trubek, "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36:1 Stan L Rev 575.

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On the one hand, legal doctrinal scholarship is criticized for not being *scholarly* enough. This critique has arisen amongst new legal realists, who emphasize that doctrinal scholarship lacks empirical rigor.[5] The formal focus on the analysis of legal concepts characteristic of doctrinal scholarship should, as they suggest, be replaced with a more wholehearted embrace of empirical methodologies to the study of law.[6] This new legal realism thus claims that doctrinal scholarship is too normative, not an objective description of reality, and thus not really scholarship.

On the other hand, legal doctrinal scholarship is sometimes criticised for not being *legal* enough. This critique has received prominent exposition from neo-Kelsenian scholars who argue that Kelsen's idea of the purity of law is the only epistemologically justifiable description of law, and thus legal scholars should stick to the ideals of legal positivism, as their task is seeking to cognize rather than engage with the law.[7] In attempting to engage with—and propose legal solutions to—legal problems, they engage with reality in a way that is incompatible with the positivism that provides the foundation for legal science (as distinct from both legal practice and social science).

Yet, doctrinal approaches that are neither purely positivistic nor realistic in the above-mentioned sense continue to make up the large majority of legal research that takes place at law faculties, and moreover, the research that is used in practice, whether it be in judicial practice, governmental institutions, or throughout wider society.[8] Could this mean that doctrine is scholarly in a way that both legal realism and legal positivism fail to grasp? In this paper, we seek to explain what makes doctrinal scholarship methodologically and ontologically unique amongst the modern sciences, and what makes its specific disciplinary contribution not only *useful,* but also *integral* or *necessary* to practice, in a way that other scholarly approaches can never completely provide. Is law "really a social science,"[9] or is it "parasitic" on other disciplines?[10] Is it mere theologizing, or rather a science of its own, with not only its own field of research, but also its own unique relation to the object of inquiry?

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5. For a broad survey of the realism(s) that are connected to this movement, see Mark C Suchman & Elizabeth Mertz, "Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism" (2010) 6 Annual Rev L & Soc Science 555.

6. See Brian Leiter, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis," in Jules Coleman, ed, *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press, 2001) 355 and its Scandinavian variant, Jakob vH Holtermann, "Getting Real or Staying Positive: Legal Realism(s), Legal Positivism and the Prospects of Naturalism in Jurisprudence" (2015) 29:4 Ratio Juris 535

7. See Jörg Kammerhofer, "International Legal Positivist Research Methods" in Rossana Deplano & Nicholas Tsagourias, eds, *Research Methods in International Law: A Handbook* (Edward Elgar, 2020) 95.

8. See e.g. Mathias M Siems & Daithí Mac Síthigh, "Mapping Legal Research" (2012) 71:3 Cambridge LJ 651; Robert C Ellickson, "Trends in Legal Research: A Statistical Study," (2000) 29:S1 J Leg Stud 517.

9. Geoffrey Samuel, "Is Law Really a Social Science? A View from Comparative Law" (2008) 67:2 Cambridge LJ 288. See also Christopher McCrudden, "Legal Research and the Social Sciences" (2006) 122 Law Q Rev 632; Geoffrey Samuel, "Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?" (2009) 36:4 JL & Soc'y 431.

10. Anthony Bradney, "Law as a Parasitic Discipline" (1998) 25:1 JL & Soc'y 71.

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What is called legal scholarship, legal doctrine, *Rechtsdogmatik, la doctrine,* or *scientia iuris*, is not identical between legal systems,[11] nor is it always practiced the same way by specific doctrinal researchers,[12] but has come to be often regarded as more of a culture[13]—a social practice,[14] craft,[15] or tradition[16]—that tends to share certain core elements, but does not function as a determinate methodology from which one can derive exact knowledge.[17] Conceptual elaboration in legal doctrinal scholarship is usually explained with a familiar narrative of law as a matter of principles that can only be revealed through a form of theorizing that engages with legal reasoning as a form of normative argument.[18] In these analyses the explicit connections between legal theory, scholarship, and practice usually remain unarticulated.

Yet, the connections should be obvious. Theories of law are also a central part of legal education alongside inculcation of doctrine into a culture of law that is applied in practice through legal reasoning. Lawyers who put forward arguments in giving advice to government, business, or in a court of law often draw on doctrinal analysis to structure their arguments. Conversely, doctrinalists study legal argumentative practice and rely on this reasoning as part of their scholarship. Doctrinal scholars systematize legal reasoning in accordance with general organising principles (such as coherence, normative hierarchy, stability, comprehensibility, general acceptance etc.), which in turn form part of the abstract theories of jurisprudence. Doctrinal scholars tend to assume that this relation needs no further methodological elaboration. Rather, such work usually presents an interpreted whole to the reader, where general assumptions about what counts as law and instances of law application are folded into the analysis in such a way that it is not always easy to distinguish theoretical development from the doctrinal accounts of observed practice. Doctrinal legal scholarship is therefore rarely theorised, often leaving it with no more than implicit understanding of its own methodology.[19]

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11. See William Twining et al, “The Role of Academics in the Legal System” in Mark Tushnet & Peter Cane, eds, *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 920.

12. See Jason NE Varuhas, “Mapping Doctrinal Methods” in Paul Daly & Joe Tomlinson, eds, *Researching Public Law in Common Law Systems* (Edward Elgar, 2023) 70.

13. See Fiona Cownie, *Legal Academics: Culture and Identities* (Hart, 2004).

14. See Christian Boulanger, “The Comparative Sociology of Legal Doctrine: Thoughts on a Research Program,” (2020) 21:7 German LJ 1362.

15. See Liz Fisher, “Craft Matters: Seven Tips for Legal Scholars” (2023) 35:1 J Envtl L 11.

16. See Joshua Neoh, “Text, Doctrine and Tradition in Law and Religion” (2013) 2:1 Oxford JL & Religion 175.

17. Although it is often recognized to share core elements, which have been relatively stable for about a century. See Susan Bartie, “The Lingering Core of Legal Scholarship” (2010) 30:3 LS 345.

18. See e.g. Mátyás Bódig, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Edward Elgar, 2021); Jan M Smits, “What is Legal Doctrine?: On the Aims and Methods of Legal-Dogmatic Research” in Rob van Gestel, Hans-W Micklitz & Edward L Rubin, eds, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017) 207; Robert Post, “Legal Scholarship and the Practice of Law” (1992) 63 U Colo L Rev 615.

19. See Pauline C Westerman, “Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law” in Mark van Hoecke, ed, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011) 87.

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In the following, we attempt to make a positive and constructive argument for the theory and method of doctrinal legal scholarship by engaging with its latent basis in methodological interpretivism and ontological hermeneutics. This is a *positive* argument because it is not concerned with responding to all of doctrine's critics, but rather seeks to move past the empty binaries that have characterized these debates—between subject and object, fact and norm, structure and agency, theory and practice. We engage in a *constructive argument* because it is concerned with something that already inheres within the relation between legal doctrine, jurisprudence, and legal practice; we merely seek to reveal it. We argue for an understanding of doctrinal legal scholarship that is *thoroughly* hermeneutic in reflection of the nature of the object of investigation, and the unending dialectic between social theories and social reality. Whilst the merits of doctrinal legal scholarship continue to be debated by legal scholars, the literature tends to grapple only with parts of the puzzle, or rehearse positions in the well-worn divides between legal realism and formalism, rather than present a cohesive theory of legal doctrine.[20]

Most of the literature on doctrinal scholarship thus substantially overlaps with the minutiae of how much empirical grounding or normative bent is required on providing accounts of what the law is.[21] When Jerome Frank wrote seventy years ago that "we ought to put an end to notions of a 'legal science' or a 'science of law'" because law is unpredictable, he was right, albeit for not exactly the right reason.[22] Debates over the epistemological basis of legal scholarship tend to reflect prevailing disputes over what 'science' is,[23] and in these debates, the disciplinary integrity of doctrinal scholarship almost always wins.[24] Something deeper, we suggest, must be going on in the relation between theory and practice that explains doctrinal scholarship's immanence; its ability to trace and explicate, how law as a form of collective reasoning embedded in society can circumscribe new subjects, objects, and social relations as a recursive and dynamic experience.

Accordingly, in this article we seek to outline a new understanding of legal doctrine which can help to show how the legal discipline is a science of its own. Part II firstly unveils the theory and method of doctrinal legal scholarship as an exercise in interpretivist methodology and ontological hermeneutics.

20. These include, for instance, interventions from judges, academic articles, and sub-disciplinal theorizing. See e.g. Lord Burrows, "Judges and Academics, and the Endless Road to Unattainable Perfection" (The Lionel Cohen Annual Lecture Series delivered remotely, 25 October 2021), online (pdf): *The Supreme Court of the United Kingdom* www.supremecourt.uk/docs/lionel-cohen-lecture-2021-lord-burrows.pdf); Geoffrey Samuel, "What is the Role of a Legal Academic? A response to Lord Burrows," (2022) 3:2 Amicus Curiae (2d) 305; Jane Stapleton, *Three Essays on Torts* (Oxford University Press, 2021).

21. These discussions tend to track the debate on the role of evaluative judgments in jurisprudence. See e.g. Julie Dickson, "Methodology in Jurisprudence: A Critical Survey" (2004) 10:3 Leg Theory 117.

22. Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1949) at 190.

23. See Anne Orford, "Scientific Reason and the Discipline of International Law" (2014) 25:2 Eur J Intl L 369.

24. From a more critical perspective, see especially Christopher Tomlins, "Framing the Field of Law's Disciplinary Encounters: A Historical Narrative" (2000) 34:4 Law & Soc'y Rev 911.

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Part III moves to illustrate our argument through an exposition of the development of tort doctrine at the High Court of Australia (HCA) and the definition of 'crimes against humanity' at the International Criminal Court (ICC). Part IV concludes by reflecting on the role of doctrinal scholarship as a 'triple hermeneutic' of law that inevitably looks past some of law's causes and consequences in framing the world as 'legal'.

II. Doctrinal Legal Scholarship as *Verstehen* and Ontological Hermeneutics

We commence by taking to task the nature of doctrinal legal scholarship as an exercise in interpretivist methodology and ontological hermeneutics. Doctrinal legal scholarship is a methodology because it is a structured way of describing the world, with a specific function of providing knowledge on what the law is. Doctrinal legal scholarship is also an ontology because it inhabits its own particular world as a particular conjunction between theory and practice, or a specific doctrinal way of viewing the world through a specifically legal prism.

A. Interpretivist Methodology

Interpretivism as a paradigm for understanding human activity and social interaction has a long cross-disciplinary tradition that extends to biblical studies, literary criticism, cultural studies, anthropology, social theory, and critical theory. Legal interpretivism is usually associated with Ronald Dworkin, whose theory of law rests on the idea that legal-institutional practice must be interpreted in light of basic normative principles that animate the legal system under study.[25] Interpretivism as an approach to social science is most often attributed to the *verstehen* tradition of German social theory.[26] *Verstehen* is a methodology in this light because it refers to doctrinal scholarship's role of constructing law on the basis of shared experiences.

Verstehen literally means 'to understand' (or 'comprehend') and stands (for example, in Max Weber's sociology) in contradistinction to *erklären*, which means 'to explain' (in the sense of identifying a causal relationship between variables).[27] *Verstehen* thus designates a specific kind of understanding as an exercise of revealing the meaning and meaningfulness of social interaction amongst

25. See e.g. Ronald Dworkin, *Law's Empire* (Belknap Press, 1986). See more generally Nicos Stavropoulos, "Legal Interpretivism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2021), online: plato.stanford.edu/archives/spr2021/entries/law-interpretivist/.

26. See especially Jürgen Habermas, *The Theory of Communicative Action*, *Volume 1: Reason and the Rationalization of Society*, translated by Thomas McCarthy (Beacon Press, 1984) at ch I.4; Michael Martin, *Verstehen: The Uses of Understanding in Social Science* (Routledge, 2000).

27. The 'explanation' vs. 'understanding' debate has a longer and broader history; see Habermas, *supra* note 26 at 108ff.

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humans.[28] A *verstehen* approach attempts to convey and analyse the meaning that attaches to social interaction on the basis that human actions are inherently endowed with meaning that belongs to agency in a way that cannot be solely revealed by nomological (i.e., causal) explanation. A *verstehen* approach thus contrasts with positivist empirical approaches by insisting that an agent's meaning cannot be grasped in purely causal terms: social meaning exists beyond immediately-observable action, and must accordingly be analysed on and in its own terms. In effect, 'meaning' (which could then be thought of as a sense of purposivity and value orientation in human agency), cannot be solely explained by tracking the natural causes that gave rise to the state of mind that humans perceive as meaning. This ultimately indicates that reasons, not causes, provide the principal basis for understanding human agency.

Scholarly activity in the broad sense of the word is traditionally characterised by its ability to present generalised knowledge by organizing some natural object or social practice in a systematic manner that further allows for critical examination of the object or practice in question. The scholarly merit of legal doctrinal analysis, then, will depend on its ability to represent the practice of law from a non-committed perspective. The scholar must withdraw from the stakes in the game, as it were, and take on the role of an observer rather than siding with a specific position (interest) in that game. But is it possible to *observe* legal meaning and legal reasoning without taking a stand in regard to the persuasiveness of these observed positions? Weber thought it was possible and retained an adherence to the positivistic ideal of science, but Habermas challenged this view because he believed that it is ultimately not possible to comprehend the underlying reasons that support social action without evaluating their ability to convince, or more precisely, to 'perform' the role of reasons through action.[29]

From this understanding, it must first be emphasized that law and legal systems do not exist as empirical givens. For many individual legal *events* to be conceived as *legal* events, they must be seen as belonging to a legal system, and this is only possible by engaging in an act of interpretation.[30] This form of systemic interpretation is part of the more fundamental process of seeing a set of individual events as a *social* practice of law. This entails a view that the individual events (legislating, judging, contracting, etc.) are connected and form part of a normative system that exists through time and space. That kind of interpretation thus entails a commitment to engage with a pre-conceived structure of social

28. In a strong sense (for example, for Dilthey) *verstehen* means reliving the subjective experience of an agent. We use *verstehen* here in the weaker sense that implies reconstructing their actions; see Habermas, *supra* note 26.

29. See Edward W Gimbel, "Interpretation and Objectivity: A Gadamerian Reevaluation of Max Weber's Social Science" (2016) 69:1 Political Research Q 72; Habermas, *supra* note 26 at 191-92. Habermas distinguishes "Weber-the-methodologist" from "Weber-the-sociologist" (*ibid* at 191). This is Habermas' way of explaining the tension in Weber's approach to *verstehen*, between objectivity and interpretation, to which Gimbel also points.

30. This observation was already made by Kelsen: see Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (University of California Press, 1967); Martin P Golding, "Kelsen and the Concept of a 'Legal System'" (1961) 47:3 Archiv für Rechts- und Sozialphilosophie 355.

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normativity (pre-existing law) and to accept that structure as one which connects to, and ultimately further integrates with, the present-day circumstances of societal life (the law that exists here and now).

In this context, a legal scholar will observe these structures and their interaction with legal normativity by noting which legal utterances are successful and which utterances are rejected. However, since law is a normative *system*, the legal doctrinal scholar will have to take a longer and broader perspective than simply engaging in rule interpretation. It is necessary to observe the legal communication that flows over longer periods of time and space to build an understanding of the legal whole within the jurisdiction that is under observation. Moreover, to arrive at a deeper understanding of the practice, the scholar must rely not only on the communicative behaviour of the participants that they observe, but also on *their own* (often implicit) understanding of the institutional order (its purpose and meaning) in which it operates. It is clear, however, that the legal scholar will only be able to fully grasp this if they also understand the reasons that move participants to take up the positions that they do. The scholar must therefore build their own understanding of law by way of reconstructing the rationality of the communicative structure that characterises the legal community they are studying. Legal doctrinal scholarship is thereby an exercise in setting out the contours of this structure in some kind of organised and systematic way.

In order to perform this reconstruction, the doctrinal scholar will eventually be drawn into the process of making judgments. In order to be able to *describe* the rationality structure in generalised form, they must make decisions about how to reconstruct the many communicative events and their implied assumptions about the meaning and purpose of the legal concepts and rules applied in the field of law under study, and this can only be done by making *judgments* about how best to represent what the community as a whole accepts as law within this field.[31] To understand law and legal communication, then, is also to make judgments about how best to reconstruct the generally-accepted structure of legal normativity.

Legal doctrinal scholarship is precisely engaged in such a reconstruction. When legal doctrinal scholars publish their analysis on how best to understand the law and its practice, they present reasoned arguments as the basis for their reconstruction of the practice. An understanding of a legal practice within the terms of its own reasons can then only be reached in the nexus between an observation of the practice participant's commitment to legal norms and values and the reasons that the observer reconstructs (through their judgment) on the motivations of this commitment. To do so is to engage in an exercise in legal interpretation in the sense described above, but also and moreover to constitute the legal

31. Habermas emphasizes that: "The interpreter [e.g., a legal scholar] would not have understood what a 'reason' is if he did not reconstruct it with its claim to provide grounds. . . . The description of reasons demands *eo ipso* an evaluation. . . . One can understand reasons only to the extent one understands why they are or are not sound, or why in a given case a decision as to whether reasons are good or bad is not (yet) possible [i.e., withholding judgment]." Habermas, *supra* note 26 at 115-16 [emphasis removed].

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practice: that is, by cognizing law's engagement with facts, norms, and their interrelations as distinctly *legal* through a legal prism.

This exercise of legal interpretation thus entails a normative commitment. Habermas explains how shifts over time in the structure of observed commitment to specific values (or 'convincing ideas') can only be grasped via the social scientist's (legal scholar's) judgment:

> In this rational reconstruction of processes of cultural (and societal) [legal] rationalization, the social scientist can *not* confine himself to describing de facto views; he can understand the empirical power of convincing new ideas, and the devaluation, the loss of the power to convince, of old ideas only to the degree that he becomes aware of the *reasons or grounds* with which the new ideas established themselves. The social scientist does not have to be convinced by these reasons himself in order to understand them; but he will not understand them [and will therefore not be able to analyse and explain them] if he does not, at least implicitly, take a position regarding them (that is, know whether he shares them and, if not, why he cannot do so, or why he is leaving the matter unresolved).[32]

What Habermas speaks of here is the need to both account for, and learn from, the observed agents' own perspective of a normative practice, but also to engage axiologically with this practice. In jurisprudence, this is often referred to as 'taking the internal point of view', although it is rarely explained what 'take' means in this context.[33] Following Habermas, it can be seen that the internality of the internal point of view resides in the fact that scholarly analysis abstains from reducing legal concepts, their inter-relationships, and their use in practice to extra-legal behavioural causes. The internal point of view is simply the point of view needed to access and understand legal meaning and the reasons that support legal agency; it is to analyse those meaning structures that participate in the making of a legal system that persists through time and space. Legal doctrinal analysis, in other words, takes the form of reconstructing the organising principles around which legal reasoning revolves, and this is what makes doctrinal methodology a *verstehen* analysis, rational reconstruction, or an internal point of view.[34]

It might be objected that not all doctrinal analysis is *interpretivist* in the sense described above because not all doctrinal analysis explicitly takes up interpretivism as a method, nor for that matter would all interpretivists think they are producing *doctrinal* legal scholarship. At this point, it is necessary to recall the categorical distinction between interpretivism as a theory of legal philosophy and interpretivism as a method of social sciences; the former of which is a

32. *Ibid* at 192 [emphasis in original].

33. For an exposition of what Hart meant by this see Scott J Shapiro, "What Is the Internal Point of View?" (2006) 75:3 Fordham L Rev 1157.

34. Rational reconstruction as a method dates back to antiquity, and has taken on different connotations in light of contemporary understandings of what 'science' is. See Golding, *supra* note 30. See also Bódig, *supra* note 18 at 235-37; Matthias Goldmann, "Principles in International Law as Rational Reconstructions. A Taxonomy" (13 November 2013), online (pdf): *Social Science Research Network* papers.ssrn.com/sol3/papers.cfm?abstract_id=2442027.

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"thesis" about the "grounds of law,"[35] and the latter a position that the researcher must take to identify shared cultural understandings that define meanings and values in a given communicative community.[36] Interpretivism in the latter sense, then, is not a theory about law, but about how social phenomena, meaning, and value in general can be accommodated in our understanding. Furthermore, whilst it is true that doctrinalists partake in different *methods*, such as describing, deriving, and systematizing legal principles or more specifically interrogating normative justifications, each approach, whether explicitly or implicitly, will necessarily rely on some interpretation of what it is that is being observed through the method of study that is applied as an instrument of observation. In other words, interpretivism is the part that defines *methodological foundation* of doctrine and not just a specific technique of theorizing or argumentation.[37] To put it briefly: there simply is no doctrine without interpretation.

This implicit normativity further does not undermine doctrinal method as a form of scholarship. This is because the aim of doctrinal scholarship is *not to prescribe* what agents ought to do; it is to *describe what the law, correctly understood*, *is*. For Habermas, rational reconstruction takes the form of "a systematic reconstruction of competent subjects' intuitive knowledge" that arises inherently from our use of language.[38] Legal doctrinal scholarship functions quite similarly—it describes a relation between legal materials that is reflected in the collective understanding of legal practitioners. Doctrinal scholarship therefore exists in a dynamic relationship between theory and practice that does not recite judicial decisions verbatim, but examines them immanently and in light of law's own logical and functional criteria. In order to do so it must engage in the practice by default, because the process of rational reconstruction reproduces law's normativity but also entails a process of criticizing it from within by making judgments about what reasons are truly representative of the structure of legal normativity. In this way, legal scholarship and practice collectively contribute to a doctrinal understanding of what the law really is.

B. Hermeneutical Ontology

We have seen how interpretivism projects that the process of understanding some social phenomenon (here, law) requires understanding of the web of meaning that surrounds it. For doctrinal scholarship, this forms a practice of interpretation that assigns meaning to agency and elaborates an understanding of events, objects,

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35. Stavropoulos, *supra* note 25 at §1 [emphasis removed].

36. On the nature of *verstehen* in social sciences, see especially Martin, *supra* note 26. *Cf* Dworkin, *supra* note 25 and his import of Gadamer's and Habermas hermeneutics into his theory, which has been rightly criticized for not appreciating the full scope of law's hermeneutic capacity as a cultural system; see Francis J Mootz III, "Interpretation" in Austin Sarat, Matthew Anderson & Cathrine O Frank, eds, *Law and the Humanities: An Introduction* (Cambridge University Press, 2010) 339.

37. See Varuhas, *supra* note 12.

38. Jørgen Pedersen, "Habermas' Method: Rational Reconstruction" (2008) 38:4 Philosophy Soc Science 457 at 458.

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and social relations. Interpretivism necessarily assumes that a kind of hermeneutic circle will be present in the exercise of the methodology, as individual legal events are made comprehensible in light of the overall legal system and the legal system is made comprehensible in light of the individual legal events. However, as a methodology, interpretivism is necessarily orientated toward the object, in the sense that the interpreter that adopts a procedure for interpretation ideally remains unaffected by the process of interpretation.[39] In contrast, hermeneutical philosophy contends that interpretation is not merely an instrument to achieve knowledge; it is the ontological condition of humankind.[40]

Hermeneutical philosophy has been extensively studied for its value in understanding legal interpretation, but it is often neglected for the contribution that it can make to our understanding of the ontology of legal doctrinal scholarship.[41] As Paulus rightly notes, hermeneutics can be both profound and alienating: "Although, or perhaps *because*, law is largely a hermeneutical enterprise, the insights of philosophical hermeneutics have had only a limited impact on legal theory."[42] Relatedly, hermeneutics is often wrongly taken as the proposition that it is concerned with finding the inherent meaning of things, i.e., as a kind of essentialism or the search for one true meaning.[43] Yet, if that were the case, there would be no need for philosophical hermeneutics, because it is fundamentally concerned with raising the significance of the nature of understanding as a dialogue between unity and difference.[44]

Heidegger's philosophy had an enormous influence on the shift of hermeneutics from the task of exegesis of texts (as found in disciplines such as biblical studies) to a philosophical practice concerned with how we understand the world around us. This stemmed from his central claim that philosophy is by essence hermeneutics, contrary to the transcendental (and largely neo-Kantian) philosophies of his time that heavily influenced figures such as Kelsen.[45] Heidegger shifted the fundamental question of hermeneutics from epistemology ('what can we know') to ontology ('what things are there in the world') by emphasizing that interpretation is embedded in *all* social relationships; it is, in fact, the

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39. On the distinctions between interpretivism (method) and hermeneutics (ontology), see Thomas A Schwandt, "Three epistemological stances for qualitative inquiry: Interpretivism, hermeneutics, and social constructivism" in Norman K Denzin & Yvonna S Lincoln, eds, *Handbook of Qualitative Research*, 2d ed (Sage, 2000) 189 at 195.

40. See Josef Bleicher, *Contemporary hermeneutics: Hermeneutics as method, philosophy and critique* (Routledge & Kegan Paul, 1980) on the distinctions between the different kinds of hermeneutics used in scholarly practice.

41. See e.g. Francis J Mootz III, ed, *Gadamer and Law* (Routledge, 2016).

42. Andreas Paulus, Book Review of *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* by Outi Korhonen, (2001) 12:5 Eur J Intl L 1027 at 1027 [emphasis added; footnotes omitted].

43. For an instructive analysis of this, see Dworkin's discussion of conversational (Hermes) vs. constructive (Hercules) interpretation in Dworkin, *supra* note 25 at ch 2.

44. See Donatella di Cesare, "Hermeneutics and Deconstruction" in Niall Keane & Chris Lawn, eds, *The Blackwell Companion to Hermeneutics* (Wiley, 2016) 471 at 472.

45. See especially Stanley L Paulson "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law" (1992) 12:3 Oxford J Leg Stud 311.

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pre-condition for *social* existence.[46] Interpretation is thus not an instrument used to derive knowledge of the world: the social world already *is* interpretation; "to be human is not primarily to be a rational animal, but first and foremost to be a self-interpreting animal."[47] Heidegger thus brings hermeneutics to social practice: the social world is symbolically structured, so everything we encounter is already understood as something,[48] and thus "one's own concrete practices are themselves set up and made meaningful within this wider background system of intelligibility."[49] Heidegger's theory suggests that law and its practice always take place within a broader scheme of social meaning. There is no observational space outside this pre-configured social reality; we are always already absorbed by it.

Gadamer extended Heidegger's approach by proposing that all interpretative acts are dialogical and that the observer and observed are *equal partners* in a dialogue.[50] Gadamer's philosophy specifically focused on the interpretation of texts (primarily literary and historical) and proposed that understanding, interpretation, and application are one unified process, so that a person seeking to understand a text becomes part of the meaning they comprehend during the process of seeking comprehension. The interpreter, in other words, is ultimately absorbed by the text, and to understand a text is to participate in the creation and sustaining of its meaning. Concretely, this is represented as a dialogical exchange whereby meaning is brought into the present through a 'fusion of horizon' between the text and the interpreter. This stands in contrast to theories of interpretation that seek to discover the author's original intent or to find a more pure scientific meaning.

For the legal interpreter, a discovery of textual meaning is not possible in isolation from a larger understanding of the context in which the text was produced. In other words, the author's text cannot be neatly separated from the broader social and historical circumstances of law, which cannot be inferred from the wording of the text alone. Moreover, since the meaning of a text is closely associated with its use, and since this use takes place in a different context from the context in which the text was produced, the meaning of the text must be negotiated between the past and the present. Gadamer thus argued that legal interpretation was the paradigm case of hermeneutics;[51] "law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted."[52] He further thought this demonstrated why any pretensions of scientific objectivity were unrealistic:

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46. See Norman Blaikie, *Approaches to Social Enquiry: Advancing Knowledge*, 2d ed (Polity, 2007) at 123.

47. Cristina Lafont, "Heidegger's hermeneutics" in Simone Glanert & Fabien Girard, eds, *Law's Hermeneutics: Other Investigations* (Routledge, 2017) 11 at 11.

48. *Ibid* at 12.

49. Davide Nicolini, *Practice Theory, Work, and Organization: An Introduction* (Oxford University Press, 2013) at 35.

50. See Jon Nixon, *Hans-Georg Gadamer: The Hermeneutical Imagination* (Springer, 2017) at 44.

51. See Jean Grondin, "Gadamer's interest for legal hermeneutics" in Glanert & Girard, *supra* note 47, 48 at 54.

52. Hans-Georg Gadamer, *Truth and Method*, translated by Joel Weinsheimer & Donald G Marshall (Bloomsbury, 2013) at 319.

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> [J]urisprudence is a normative discipline and performs the necessary dogmatic function of supplementing the law. As such, it performs an indispensable task, because it bridges the unavoidable gap between the universality of settled law and the concreteness of the individual case.... [I]f we think back on the history of this concept, we find that the problem of an understanding exegesis ... of the law is indissolubly linked with application.[53]

Where does this leave legal doctrinal scholarship? As mentioned, Gadamer's *Truth and Method* is not about method but a description of ontology. As in our previous discussion, we can again see how legal meaning cannot be wholly captured by empirical methods because it must normatively engage with the object of interpretation, as finding legal meaning requires a systematic interpretation that continuously reproduces the institution of law. Yet, hermeneutics further casts doctrinal scholarship as a mediating discipline in the sense that "the rhetorical and hermeneutical aspects of human linguisticality completely interpenetrate each other."[54] As a scholarly practice, therefore, legal doctrinal scholarship relates the whole of law to its individual parts reciprocally in a sustained 'fusion of horizon' between the practice of law, and the historically affected consciousness of legal doctrine.

General legal theory, doctrinal scholarship, and legal practice are thus brought into one and the same world. This connection between theory and practice was made more explicit in Gadamer's later work, where he suggested that theory is "'not so much the individual momentary act as a way of comporting oneself, a position and condition' of openness."[55] In effect, both the legal practitioner and the doctrinal scholar are always saturated in pre-existing interpretations of the (legal) world as part of the hermeneutical condition; "application is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but co-determines it as a whole from the beginning."[56] Theory and practice do not occur in an observer-observed relationship where the observer is isolated from the observed. Rather, theory and practice comprise a single hermeneutical unit of understanding. This mutual conjunction is ultimately what sustains the legal theory/practice dynamic as a transformative experience.[57]

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53. Hans-Georg Gadamer, "Classical and Philosophical Hermeneutics" in *The Gadamer Reader: A Bouquet of the Later Writings*, ed & translated by Richard E Palmer (Northwestern University Press, 2007) 44 at 59-60 [footnote omitted].

54. Hans-Georg Gadamer, "On the Scope and Function of Hermeneutical Reflection" in *Philosophical Hermeneutics*, ed & translated by David E Linge (University of California Press, 1976) 18 at 25.

55. Francis J Mootz III, "A Future Foretold: Neo-Aristotelian Praise of Postmodern Legal Theory" (2003) 68:3 Brook L Rev 683 at 696, citing Hans-Georg Gadamer, *Praise of Theory*, translated by Chris Dawson (Yale University Press, 1998) at 31.

56. Gadamer, *supra* note 52 at 333.

57. In the strong sense, without theory, there is no room for practical judgment; see e.g. Walter A Brogan, "Gadamer's Praise of Theory: Aristotle's Friend and the Reciprocity Between Theory and Practice" (2002) 32:1 Research in Phenomenology 141.

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III. Legal Knowledge and the Construction of Doctrine: Two Examples

We now turn to illustrate our construction of the theory and methodology of doctrinal legal scholarship through two examples: the development of modern tort doctrine at the HCA, and the definition of 'crimes against humanity' at the ICC. Our examples thus derive from two courts deciding cases in very different circumstances—firstly, a domestic court charged with appellate authority over Australian law, and secondly, an international court that must decide whether an accused is guilty or innocent of international crimes. While we maintain that our theoretical outline holds true for all modern legal systems, it is nevertheless worth underlining how the role of doctrinal legal scholarship is often understood to differ in international and domestic contexts.

In domestic law, a distinction is often drawn between common and civil law, with the general notion that doctrinal scholarship is more influential in civil law systems.[58] Yet, decades of scholarship has shown that this distinction is rather thin. For instance, legal scholarship has been integral to the development of concepts in the American common law.[59] British judges often use legal scholarship but refrain from citing it out of tradition.[60] Case notes are very influential in France,[61] whilst in Germany the relation is stark due to the formal roles of statutory codes.[62] The role of doctrinal legal scholarship within specific legal traditions thus seems to have less to do with the nature of the legal system than it does with cultural traditions.[63] In other words, there may be historical and sociological links which make the academic-practitioner relationship more visible, but an absence of visibility should not be taken to imply legal scholarship is somehow irrelevant to practice and the legal system.[64]

International law is nevertheless exemplary on this part because its doctrine of sources treats legal scholarship as a "subsidiary" source of law;[65] not a formal source as such but a 'material' or 'evidential' source which gives content to legal

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58. See generally Twining et al, *supra* note 11.

59. See Edward Rubin, "Seduction, Integration and Conceptual Frameworks: The Influence of Legal Scholarship on Judges" (2010) 29:1 UQLJ 101. There is also a classic study by Merryman showing how US courts cite scholarship: see John Henry Merryman, "The Authority of Authority: What the California Supreme Court Cited in 1950" (1954) 6:4 Stan L Rev 613.

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

61. On the French tradition doctrinal scholarship, see especially Philippe Jestaz & Christophe Jamin, *La Doctrine* (Dalloz, 2004).

62. See Stefan Vogenauer, "An Empire of Light? II: Learning and Lawmaking in Germany Today" (2006) 26:4 Oxford J Leg Stud 627.

63. For an exposition of the similarities of the science of the common and civil law, see Alexander Somek, *The Legal Relation: Legal Theory After Legal Positivism* (Cambridge University Press, 2017) at 57-78. For broad surveys on the distinctions between these cultures, see e.g. Rob van Gestel, Hans-W Micklitz & Edward L Rubin, eds, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017); Rob van Gestel & Andreas Lienhard, eds, *Evaluating Academic Legal Research in Europe: The Advantage of Lagging Behind* (Edward Elgar, 2019).

64. For a historical overview, see RC van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge University Press, 1987).

65. *Statute of the International Court of Justice*, 26 June 1945, XV UNCIO 355 at art 38(1)(d).

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provisions.[66] There are historical reasons for this, as the foundations of public international law are commonly attributed to the work of great "publicists," such as Grotius and Vattel.[67] Whilst it is often argued that this influence has declined as state practice and judicial precedent have developed,[68] research has shown that legal scholarship continues to be influential in both state-driven[69] and institutional law-making processes[70] and scholars have proposed that citation of scholarship by international courts shows signs of "scholarly-judicial dialogue,"[71] or of "push-pull forces between scholarship and practice."[72] Whilst some bodies appear to cite legal scholarship more often than others, this again seems like it should not distract from its wide and prevalent use by legal actors.[73]

In effect, there are good indications to support the belief that some continuum between doctrinal legal scholarship and legal practice is universal among contemporary legal systems. Yet, what generally remains missing from these conversations—in both the international and domestic law contexts—is a qualitative exposition of what this function means for the theory and methodology of doctrinal legal scholarship. In the following examples, we attempt to show how judicial decisions cite legal scholarship to develop their legal reasoning and how legal scholars in turn fit case law into a theory of what the law is as a system, illustrating the hermeneutic interdependence of legal practice and legal doctrinal scholarship.

A. The Birth of a Modern Tort Doctrine in the High Court of Australia

The first example that we draw is from the development of the Australian common law of torts. This process of legal development has occurred under the jurisdiction of the HCA, which has formal authority to decide on the terms of the Australian common law through appeals from federal and state courts.[74]

66. For a recent affirmation of this doctrine, see Charles C Jalloh, "Subsidiary means for the determination of rules of international law" in *Report of the International Law Commission, 72nd session (26 April-4 June and 5 July-6 August 2021)*, UNGAOR, 76th sess, Supp No 10, UN Doc A/76/10 (2021) 186 at §§V-VII.

67. Sandesh Sivakumaran, "The Influence of Teachings of Publicists on the Development of International Law" (2017) 66:1 ICLQ 1 at 1.

68. See e.g. Manfred Lachs, *The Teacher of International Law*: *Teachings and Teaching*, 2d ed (Martinus Nijhoff, 1987) at 159ff, 216.

69. See David Hughes & Yahli Shereshevsky, "State Academic Lawmaking" (2023) 64:2 Harv Intl LJ 253.

70. See Sandesh Sivakumaran, "Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law" (2017) 55:2 Colum J Transnat'l L 343.

71. Sondre Torp Helmersen, "Scholarly-Judicial Dialogue in International Law" (2017) 16:3 Law & Prac Intl Cts & Trib 464 at 464.

72. Penelope Jane Ridings, "The Influence of Scholarship on the Shaping and Making of the Law of the Sea" (2023) 38:1 Intl J Mar & Coast L 11 at 11.

73. See William Hamilton Byrne, "The influence of legal scholars on the development of international investment law" (2024) 27:2 J Int Econ Law 1, on the methodological problems for identifying this widespread influence. *Cf* Sondre Torp Helmersen, *The Application of Teachings by the International Court of Justice* (Cambridge University Press, 2021) (finding only limited uses on the basis of a citation analysis alone).

74. See *Commonwealth of Australia Constitution Act 1900*, s 74.

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The rise of the HCA to the apex of the Australian legal system has been drawn out due to the preservation of continuing links to the British legal system through appeals to the Privy Council. This period, which began in earnest in 1986 with the joint passage of the *Australia Acts* (in Australia and the UK) is often taken as the time which marked the final stages in the birth of a distinctly Australian common law.[75] Perhaps not coincidentally, this is also often regarded as the stage when Australia's first professional, scholarly, legal academic community began to emerge as influential on Australian law in their own right.[76]

Previous research has shown that the HCA cites legal scholarship in as much as 40% of its decisions, comprising roughly 8% of all citations in recent decades.[77] One influential study revealed "a steady rise" in the Court's citation to scholarship between 1960 and 1990, and then a significant increase between 1990 and 1996 (with a total increase of over 350%).[78] These studies show that the HCA most often refers to legal scholarship in cases involving constitutional law and tort law.[79] Tort law presents a particularly interesting case study for our discussion as the body of legal doctrine was "transplanted to a country whose geography, demography and cultural make-up have at all times differed greatly from England."[80] However, since the 1960s the HCA has developed a unique body of Australian tort law by attuning legal principles to be more directly in line with the circumstances of Australian society.[81]

The first sign of this change arose in *Uren v John Fairfax & Sons Pty Ltd*,[82] where the Court decided that the categories for awarding exemplary damages for defamation were wider than in the UK. McTiernan J, writing in the majority, turned to a British textbook on damages to interpolate then-current UK law, before deciding that Australian courts had permitted much broader bases for damages.[83] The Privy Council's subsequent approval of this reasoning opened the way for divergence in the common law between Australia and the UK.[84] The HCA further departed from UK Courts in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad,"*[85] where a number of Justices referred to legal scholarship to ascertain policy considerations apart from foreseeability that may limit

75. See *Australia Act 1986* (Cth), 1985/142; *Australia Act 1986* (UK), c 2. See also Sonali Walpola, "After the Australia Acts: the High Court's attitude to changing the common law (1987-2016)" (2021) 21:1 OUCLJ 31.

76. Career legal academics only began to emerge in Australia in the 1960s: see e.g. Susan Bartie, "A Full Day's Work: A Study of Australia's First Legal Scholarly Community" (2010) 29:1 UQLJ 67.

77. For a review of the literature, see Rachel Klesch, Guzyal Hill & David Price, "The Academy and the Courts: Citation Practices" (2023) 42:1 UQLJ 103.

78. Russell Smyth, "Other than 'Accepted Sources of Law'?: A Quantitative Study of Secondary Source Citations in the High Court" (1999) 22:1 UNSWLJ 19 at 29.

79. *Ibid* at 42.

80. Michael Chesterman & David Weisbrot, "Legal Scholarship in Australia" (1987) 50:6 Mod L Rev 709 at 709.

81. See Francis A Trindade, "Towards an Australian Law of Torts" (1993) 23:1 UWA L Rev 74.

82. [1966] HCA 40.

83. See *ibid* at paras 11, 14, 22, McTiernan J.

84. See *Australian Consolidated Press Ltd v Uren*, [1967] UKPCHCA 2.

85. [1976] HCA 65.

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liability for negligence causing pursuant economic loss.[86] In each of these decisions, legal scholarship did not provide the reasons for deciding but it provided crucial support for HCA judges to carve out a new law of torts.

The most significant impetus in this direction came from the Mason bench of the HCA from 1986.[87] *Burnie Port Authority v General Jones Pty Ltd*[88] was seminal in this regard as the Court abolished the rule for strict liability arising under the UK precedent *Rylands v Fletcher*,[89] citing journal articles to posit that the ascendance of the tort of negligence had "deprived [the *Rylands* rule] of much of its practical significance," and that it was "doubtful whether there is much left of the rationale of strict liability as originally contemplated in 1866."[90] In *Northern Territory v Mengel*,[91] which followed shortly after, the majority drew on a vast body of scholarship to overrule HCA authority providing for liability in an "action of a case" for harm arising from forms of malice, because this principle was "widely criticized [as] neither supported by the authorities … nor in harmony with [developments in] the law relating to tortious liability."[92] These judgments helped to transform the conceptual framework of torts law in Australia towards a more negligence-based legal philosophy.

The Brennan and Gleeson courts that followed are often regarded as more conservative than their predecessor.[93] However, the jurisprudence shows that these benches continued to refer to legal scholarship to adapt general principles of tort law to changing social circumstances. In *Kars v Kars*[94] the majority of Justices drew from a debate between Australian tort law academics Fleming and Luntz to decide whether a claim to damages could arise from voluntary services provided by the tortfeasor.[95] In *Pyrenees Shire Council v Day*,[96] Kirby J in particular drew on journal articles to ascertain the state of academic opinion on the scope of the duty of care owed by public authorities.[97] In *Romeo v Conservation Commission of the Northern Territory*,[98] a number of Judges referred to legal scholarship in a split of judicial opinion which showed that this was "an area of the law which has been much criticised as unsatisfactory and unsettled."[99] In these circumstances, legal scholarship manifested conflict which was further reflected in competing judicial philosophies.

86. See *ibid* at paras 17 (Mason J), 50 (Stephen J).
87. See Walpola, *supra* note 75.
88. [1994] HCA 13 [*Burnie Port Authority*].
89. (1866), LR 1 Ex 265.
90. *Burnie Port Authority*, *supra* note 88 at para 29.
91. [1995] HCA 65.
92. *Ibid* at para 36, Mason CJ, Deane, Dawson, Toohey & Gaudron JJ.
93. On tort law, see especially Harold Luntz, "Torts Turnaround Downunder" (2001) 1:1 OUCLJ 95.
94. [1996] HCA 37.
95. See *ibid* at nn 86-89 and accompanying text, Toohey, McHugh, Gummow & Kirby JJ.
96. [1998] HCA 3.
97. See *ibid* at para 186ff. See especially *ibid* at n 296.
98. [1998] HCA 5.
99. *Ibid* at para 85, Kirby J.

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The HCA extensively referred to legal scholarship in a number of medical negligence cases that followed. In *Rosenberg v Percival*,[100] a case concerning the duty of a doctor to warn of medical risks, Kirby J again quoted extensively from scholarship to canvass the ethical and medical aspects of the problem.[101] A similar pattern emerged in *Cattanach v Melchior*,[102] where the HCA decided that a plaintiff could recover costs for raising a child born from wrongful birth. Here, Gleeson CJ cited Blackstone's *Commentaries* alongside newer tort textbooks to trace the evolution of the law on parent child-relations;[103] Gummow and McHugh JJ referred to recent journal articles to demarcate the moral conundrums of the law on wrongful birth;[104] and Hayne J referred to legal philosophy to outline the problem as one of judicial method.[105] Shortly after, in *Harriton v Stephens*,[106] the HCA denied a similar basis of recovery, with some judges referring to commentary on *Cattanach* to develop their arguments.[107] Crennan J here drew on legal philosopher Finnis to outline the issues of justice underlying the court's decision.[108] In each of these cases, legal scholarship shed light on a difficult social issue that divided the Justices.

However, the HCA continued to carve out general principles of tort law adapted to contemporary social problems of a more general nature with reference to scholarship in cases that followed.[109] Australian legal scholarship has in turn synthesized judicial decisions as a consistent body of doctrine, and at times with explicit interaction between specific judges and Australian professors of tort law.[110] It is important to note that the open use of scholarship by the HCA has been criticized as "signif[ying] a judiciary that is forsaking the common law tradition in favour of an openly instrumentalist style of judging."[111] These criticisms point to important limitations on national law judges, because they are not just deciding on the law, they are also deciding on governance within a separation of powers in a determinate polity.

However, and perhaps contrary to expectations, this process of developing law from legal scholarship is not necessarily associated with either more 'activist' or 'conservative' judges (although its open use by some judges certainly makes it

100. [2001] HCA 18.
101. See *ibid* at paras 100-168.
102. [2003] HCA 38 [*Cattanach*].
103. See *ibid* at paras 6, 34, citing William Blackstone, *Commentaries on the Laws of England, Bk I* (Clarendon, 1765) at 125, 441.
104. See *Cattanach, supra* note 102 at paras 78, 114-20.
105. See *ibid* at paras 227-28.
106. [2006] HCA 15.
107. See e.g. *ibid* at paras 257-62, 274-77.
108. See *ibid* at para 274, citing John Finnis, *Natural Law and Natural Rights* (Clarendon, 1980) at 178-79.
109. See e.g. *Cole v Sth Tweed Heads Rugby Club* (2004), 217 CLR 469 (HCA) (on the liability imposed on a server of alcohol); *Leichhardt Municipal Council v Montgomery*, [2007] HCA 6 (on whether the public roads authority could be deemed an independent contractor).
110. See The Hon Justice Michael Kirby, "Harold Luntz: Doyen of the Australian Law of Torts" (2003) 27:3 Melbourne UL Rev 635.
111. John Gava, "Law Reviews: Good for Judges, Bad for Law Schools?" (2002) 26:3 Melbourne UL Rev 560 at 560.

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more prominent for some). Indeed, empirical research has shown that "[t]here were higher citations to secondary sources in the more conservative Gleeson and French eras than in the more 'activist' Mason era."[112] Legal doctrinal scholarship could thus serve as a source of both creativity and restraint: on the one hand, it may provide inspiration for normative development, but on the other, the weight of doctrine might also constrain what is possible in promoting legal change. There is no specific ideology attached to its use, but not all scholarship is equally influential, and judges have differing views about what scholarship is helpful and what is not. The 'fusion of horizon' thus goes both ways: doctrinal scholarship not only partakes in a rational reconstruction, but judges also assess the worth of scholarship for its contribution to the law and the legal system.

B. Crimes Against Humanity at the International Criminal Court

The second example we bring to illustrate the constitutive effect of doctrinal scholarship arises in the development of 'crimes against humanity' at the International Criminal Court ('ICC'). The ICC is the first permanent court with the authority to prosecute individuals for international crimes and its establishment is often taken to mark the consolidation of customary international criminal law into a criminal code under the *Rome Statute*.[113] However, it is apparent that codification of the law has not stemmed the creative impulse of ICC judges to develop the law from the *Rome Statute's* tightly-worded prescriptions.[114] A number of scholars have further argued that legal scholarship has been integral to this development as the second most-cited source after legal precedent,[115] potentially effecting a reconfiguration in its sources doctrine.[116]

The *Rome Statute* defines "a crime against humanity" as an act from a list of enumerated acts (such as murder, rape, and slavery) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[117] The *Statute* proceeds with a detailed exposition of the meaning of the requisite elements and acts; nevertheless, the ICC has at

112. Russell Smyth & Ingrid Nielsen, "The Citation Practices of the High Court of Australia, 1905-2015" (2019) 47:4 Federal L Rev 655 at 675.

113. See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force on 1 July 2002) [*Rome Statute*]; Joseph Powderly, "The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique" in Carsten Stahn, ed, *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 444.

114. Indeed, its crimes against humanity jurisprudence is often regarded as more conservative in this context: see e.g. Leila Nadya Sadat, "Crimes Against Humanity in the Modern Age" (2013) 107:2 Am J Intl L 334.

115. See e.g. Nora Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals" (2018) 31:4 Leiden J Intl L 963; Stewart Manley, "Referencing Patterns at the International Criminal Court" (2016) 27:1 Eur J Intl L 191.

116. See Neha Jain, "Teachings of Publicists and the Reinvention of the Sources Doctrine in International Criminal Law," in Kevin Jon Heller et al, eds, *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 106.

117. *Rome Statute*, *supra* note 113 at art 7(1).

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times continued to question its interpretation.[118] The ICC first considered the definition of 'crimes against humanity' in one of its earliest cases, the *Katanga* Confirmation of Charges Decision.[119] Here, a Trial Chamber of the Court found that although key terms of the legal provision were statutorily defined, it was relevant to draw on past practice to clarify them. The Chamber cited from a textbook by Gerhard Werle[120] and its discussion of international criminal law jurisprudence to hold that "'widespread' means directed against a large number of civilians" regardless of the person's nationality, ethnicity, or other such features.[121] This was taken to mark crimes against humanity distinct from other international crimes, which thus gave effect to its normative operation within a contemporary international criminal law framework.

The ICC further developed these principles in the *Gombo* Confirmation of Charges Decision.[122] It again sought clarification of the law in legal scholarship, this time from a collection edited by Otto Triffterer,[123] to hold that "'multiple commission of acts'" means "more than a few isolated incidents or acts,"[124] but that "[t]he perpetrator must be aware that a widespread attack directed against a civilian population is taking place and that his action is part of the attack."[125] It then cited the same text by Werle to hold that "['widespread'] entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians."[126] The ICC explicitly sought to underline the interdependent relation between law and scholarship as giving rise to legal meaning in this context by stating that, "jurisprudence and legal doctrine are consistent about the fact that" an individual could be responsible even if the individual perpetrates only one offence as long as it is part of the same "attack."[127] In these first cases, it is evident that doctrinal scholarship provided a crucial source for finding the legal meaning in these broadly-defined legal terms.

However, members of the Court subsequently split over what had been one of the most contested aspects of the crime in legal scholarship, the definition of a "state or organizational policy."[128] The essence of the problem concerned the

118. See *ibid* at art 7(2), art 9: Elements of Crimes.

119. See *Prosecutor v Germain Katanga*, ICC-01/04-01/07, Decision on the confirmation of charges (Public redacted) (30 September 2008) (International Criminal Court, Pre-Trial Chamber I), online (pdf): *International Criminal Court* www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF. [*Katanga*]

120. See Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press, 2005) at 225, para 656.

121. *Katanga*, *supra* note 119 at para 395.

122. See *Prosecutor v Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Public) (15 June 2009) (International Criminal Court, Pre-Trial Chamber II), online (pdf): *International Criminal Court* www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF [*Gombo*].

123. See Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, 2d ed (Nomos, 2008).

124. *Gombo*, *supra* note 122 at para 81.

125. *Ibid* at para 88, citing Werle, *supra* note 120 at ch 4.

126. *Gombo*, *supra* note 122 at para 83.

127. *Ibid* at para 151.

128. *Rome Statute, supra* note 113 at art 7(2).

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nature of the conflicts giving rise to a crime against humanity, and whether it can be committed by a state, organized armed group, or some other entity. In the *Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya*, the Court noted that whilst key textbooks—such as that of William Schabas[129]—proposed that "only State-like organizations may qualify,"[130] a number of other scholars had argued that this did not adequately capture the role of non-state actors in contemporary armed conflicts.[131] The Court held that the more appropriate test should instead be "whether a group has the capability to perform acts which infringe on basic human values" and drew from a number of journal articles to outline factors that would be relevant to this assessment.[132]

However, Judge Hans-Peter Kaul in dissent objected to this interpretation, and after surveying the relevant academic debate, found that the scholarship generally accepted that only states or state-like entities qualify, and that there were no good policy reasons for extending the scope of the crime.[133] This position was reaffirmed in some ICC Trial judgments[134] but in the *Ruto* case, Judge Carbuccia proposed that the debate remained open, and cited recent scholarship that had re-interpreted the court's crimes-against-humanity jurisprudence to support the extension of international criminal liability to a wider group of non-state actors.[135]

What can we take from this path of legal development at the ICC? It is firstly apparent that doctrinal scholarship provided a key source of normative guidance even in the situation of a more elaborate codification than what we saw in the development of tort law in the HCA. The existence of extensively circumscribed legal terms arising under the *Rome Statute* did not stop judges from turning to scholarship to understand the content of the law. Indeed, on the contrary, the decisions seem to show that the judges found the enacted law of crimes against humanity simply unintelligible in the absence of the wider scheme of meaning— a meaning that is endowed by legal doctrinal scholarship as a way

129. See William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010).
130. *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Public) (31 March 2010) at para 90 (International Criminal Court, Pre-Trial Chamber II), online (pdf): *International Criminal Court* www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF.
131. See *ibid*. The Court cited a large body of scholarship in support of this in the same paragraph.
132. *Ibid* at para 90.
133. *Ibid* at para 51-53, Hans-Peter Kaul J, dissenting
134. See e.g. *Prosecutor v Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute (Public) (7 March 2014) at para 1800 (International Criminal Court, Trial Chamber II), online (pdf): *International Criminal Court* www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF; *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (Public) (21 March 2016) at para 160 (International Criminal Court, Trial Chamber III), online (pdf): *International Criminal Court* www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF. [
135. See *Prosecutor v William Samoei Ruto*, ICC-01/09-01/11, Decision on Defence Applications for Judgments of Acquittal (Public redacted) (5 April 2016), Olga Herrera Carbuccia J (International Criminal Court, Trial Chamber V(a)), online (pdf): *International Criminal Court* www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_04384.PDF. [*Ruto*].

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to feed legal reasoning and ultimately undertake a process of conversion of facts into *legal* activities. A pattern similar to that of our previous example thus arises here: doctrinal legal scholarship provides a foundation for communicating a *theory* of law, which in turn becomes constituted into the legal system through its reproduction in legal practice.

However, this incident also reveals some of the key limitations of legal doctrine. The legal question here has not been resolved, as scholars have continued to debate the proper scope of the law of crimes against humanity. For instance, the work of Cryer et al. favours the broader approach and suggests that the debate is incommensurable because it reflects a fundamental theoretical divide on the purpose to be assigned to international criminal law.[136] Meanwhile, Stahn considers the law in a wider social and historical context and notes that judges have been reluctant to extend the scope of the crime to "an almost indefinite range of organizations" because otherwise the law would face a floodgate problem and thereby cease to function.[137] This discussion sheds light on a key difference between international and domestic law in the relation between legal practice and doctrine. The absence of a centralized mechanism for legislation and enforcement in the international legal order means that its social and cultural conditions are less cohesive than national spheres.[138] This not only elevates the role of legal decision-makers and scholars in defining the law, but requires them to do so in the context of greater indeterminacy, more pluralized normativity, and an added burden of legitimacy.

Doctrinal legal scholarship works closely alongside practice to preserve the conceptual edifice of law, a dynamic closely related to law's function of stabilizing normative expectations in society.[139] In both of our examples taken from domestic and international law, judges have faced contentious social issues (or a wider hermeneutic conflict) and have attempted to resolve these issues through a legal theory. However, judges must work to confer not only legal certainty but also social acceptability to judicial decisions.[140] Doctrinal legal scholarship can promote social change, but it must do so within the framework of the legal system. Doctrinal legal scholarship thereby further preserves constellations of

136. See Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, 3d ed (Cambridge University Press, 2014) at 355.

137. Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 2018) at 56.

138. Gleider I Hernández argues similarly: "International law, given its multifaceted and diffuse law-creating methods and its relative lack of normative hierarchy, is the archetype of a relatively indeterminate system leaving much room for contestation." Gleider I Hernández, "The Activist Academic in International Legal Scholarship" (16 December 2013) at 3, online (pdf): *European Society of International Law* esil-sedi.eu/wp-content/uploads/2013/12/Hernandez-ESIL-Reflections.pdf.

139. For Habermas, this is a move between facticity and normativity, while for Luhmann, it is a process of structural coupling. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (MIT Press, 1996) at 198; Niklas Luhmann, *Law as a Social System* (Oxford University Press, 2004).

140. See Habermas, *supra* note 26.

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power on a sociological level, and ultimately faces difficulties in cognizing this as a reason for critique of its presuppositions.

IV. Towards a Conclusion: Critique Through Doctrinal Legal Scholarship

In section II, we explained how legal doctrinal scholarship systematically reconstructs the normative rationality that binds some fields of legal practice together across space and time. In section III, we showed how these reconstructions can have an impact on practice because the scholarly systematisation and elaboration of legal normativity are fed back into the practice of legal understanding and applied to new cases. Doctrinal scholarship in this way contributes to the ever-continuing shaping and reshaping of how the social institution of law is understood. This relationship between doctrinal legal scholarship and legal practice is a special case of the more general phenomenon that Habermas captured in his theory about societal rationalization:

> The problematic of societal rationalization arises from the fact that "ideas of the validity of norms" are supported with reasons and can thus also be influenced by the intellectual treatment of *internal* relations of meaning, by what Weber calls "intellectualization." The stability of legitimate orders depends on, among other things, the fact of recognition of normative validity claims. And as this social [empirical] validity stands in internal relation to reasons, (in general to the potential for justification inherent in interpretive systems, worldviews, and cultural traditions), the systematization and elaboration of worldviews carried on by intellectuals has empirical consequences. Intellectual engagement with cultural interpretive systems leads as a rule to learning processes that the social scientist can *recapitulate and appraise* if he adopts the same performative attitude as the intellectuals who are influential in the object domain.[141]

What Habermas here calls "intellectual engagement with cultural interpretive systems" is a general way of characterising the activity of critically engaging with social normativity—or what is also known as 'the internal point of view'—within legal philosophy. As Habermas explains here, the scholar engaged in rational reconstruction is involved in the same world as the practitioner: both actors construe a historical practice of legislation or case law from an existing theory in the form of texts which distil it into a coherent and manageable conceptual structure. Whilst both actors have differing aims, in neither case will it be possible to sharply distinguish *observation* and *judgment*, as observation is aimed at judgment, but judgment is also used to identify and qualify what it is we observe.

Our analysis has revealed how doctrinal analysis imposes theoretical structure onto a flowing practice, as a means to 'see' law as a consistent and enduring conceptual and normative framework. Doctrinal scholarship thus provides a legal ontology that is in constant engagement with the nature of the social world. In sociological terms, we could understand this as a double hermeneutic. The

141. *Ibid* at 191-92 [first emphasis added, second emphasis in original].

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observer engages in hermeneutics in order to reach an understanding of the social phenomenon under observation. This results in descriptions of the social phenomenon, which in turn are used by the observed agents to further their own self-understanding. This self-understanding now becomes part of the observed social phenomenon and must therefore enter the observer's hermeneutic.[142]

Legal systems are in this sense inherited social structures, which continue to exist by virtue of the continued enacting of this normativity by those who engage in legal agency. As Giddens notes, "participants make use of their knowledge of the institutional order in which they are involved in such a way as to render their interchange 'meaningful,'" and that "by invoking the institutional order in this way ... they thereby contribute to reproducing it. Moreover ... in reproducing it they also reproduce its 'facticity' as a source of structural constraint (upon themselves and upon others)."[143] The legal agency of doctrine is then both an acting out of the pre-existing social structures within which legal normativity ultimately lives, and at the same time, an act of building those structures by affirming and renewing their place in society. In this way, legal doctrinal scholarship is both a structured and structuring social activity that participates in the creation of human society.

However, these insights on the nature of legal doctrine as a sociological formation point to a key limitation of doctrine: because it works to sustain a specific vision of social order, it must in some way stifle others. Put simply, doctrinal legal scholarship cannot be critical in the same sense as external critique, or present a more fundamental challenge to the legal system, without ceasing to be doctrine, for to do so would be to abandon its sense of 'being'. However, doctrinal scholarship can be critical in the sense of immanent critique because it works with law's internal contradictions and contrasts its rules to a teleology that is found within the law itself.[144] In this way, doctrinal legal scholarship's systematization of law follows the internal logic of practice which itself operates on a legal horizon that is to some extent constituted by the collective observations that comprise legal doctrinal theory.

What enables doctrinal scholarship's critique and moves it beyond simple reproduction of judicial decisions is that it can perform different degrees of abstraction and attention to the 'stuff' of law and its practice, or undertake different forms of conceptual analysis. Indeed, the ability of doctrinal scholarship to move from facticity to normativity—such as law's representation in a textbook, which provides the general 'doctrine' to a journal article that tackles the limitations of law and/or new social issues; and which moreover connects the past with the present and manages their relationship simultaneously—is precisely what

142. See Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press, 1984) at 284.

143. *Ibid* at 331.

144. We refer here to 'immanent critique' as a flexible notion rather than that exclusively associated with the Frankfurt school. On the relationship between doctrine and critique as conceived in critical theory and critical legal studies, see further William Hamilton Byrne, "Is Critique Part of the Practice of International Law?" (2024) 12:1 London Rev Intl L 65.

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gives such scholarship its strength as a source of reasons.[145] The legal knowledge of doctrinal legal scholarship is a form of collectively shared knowledge that can also reshape understandings of what the law is, but in the end it must work within law's fundamental framework as a kind of "reality check" on what is possible within the legal system.[146]

This sociological cue points to another broader implication of our analysis: the way in which theory and practice come together in a *praxis.* When agents act out the law in public, they participate in constituting a collective object—the law—which forms an integral part of human society.[147] This interaction of legal theory with legal practice, and legal practice with societal practice, leads to the further realization that what is *really* going on is a triple hermeneutic. Doctrinal scholarship does not just comment on case law, it also (explicitly or implicitly) analyses wider social issues, and what is interpreted is not just the law, but reality and reason itself.

Not coincidentally, this is precisely where Habermas and Gadamer split. In Gadamer's Aristotelian thinking, the triple hermeneutic suggests a significant role for praxis in maintaining law as a 'system'—not by virtue of some *a priori* truth, but as a series of productive activities tied together in a historical continuity.[148] Yet for Habermas, Gadamer's philosophical position necessarily implied a surrender to tradition,[149] and thus he argued that hermeneutics must always be accompanied by an "emancipatory interest" that is specifically targeted towards exposing domination in a cultural system.[150] This critique should not be taken lightly. In producing reconstructions, an inevitable gap between theory and practice will always emerge. This is because the interpretivist cannot actually see what the interpreted see, they can only reconstruct what they think those agents see.[151] By failing to reflect on their normative presuppositions, the researcher themself may fall into what Bourdieu calls an "intellectualist bias" of reproducing what they *want* to see.[152] However, this also shows why doctrinal scholarship needs insights from other disciplines, just as much as they need legal doctrine.

145. Compare the long debate on whether law really is a social science (which often relies on a rather binary view of what science is, and the role of norms within it). See generally *supra* note 9.

146. Anne Peters, "Realizing Utopia as a Scholarly Endeavour" (2013) 24:2 Eur J Intl L 533 at 543. Peters contends that legal practice provides the 'reality check' for international legal scholars.

147. On the broader lineage of Aristotelian notions of praxis here, see Joseph Dunne, *Back to the Rough Ground: Practical Judgment and the Lure of Technique* (University of Notre Dame Press, 1993).

148. See further Nicholas Davey, "A Hermeneutics of Practice: Philosophical Hermeneutics and the Epistemology of Participation" [2015] J Applied Hermeneutics, online (pdf): *University of Calgary* journalhosting.ucalgary.ca/index.php/jah/article/view/53266/pdf (excavating this from Gadamer).

149. See further Jack Mendelson, "The Habermas-Gadamer Debate" (1979) 18 New German Critique 44.

150. Jürgen Habermas, *Knowledge and Human Interests*, translated by Jeremy J Shapiro (Beacon Press, 1971) at 211.

151. See Maren Hofius, "Towards a 'theory of the gap': Addressing the relationship between practice and theory" (2020) 9:1 Global Constitutionalism 169.

152. Pierre Bourdieu & Loïc JD Wacquant, *An Invitation to Reflexive Sociology* (Polity Press, 1992) at 69.

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With this, we have reached an endpoint. Our aim in this article has been to convince the reader that legal practitioners and doctrinal legal scholars depend on each other for an understanding of the law. In order to make our argument, we have relied on post-positivistic social and human science, drawing mainly on Habermas and Gadamer. We have tried to show that legal scholarship like all human and social sciences relies on an understanding—implicitly or explicitly—of how theoretical descriptions (legal scholarship) relate to the object of study (legal practice) and that this relationship impacts how the object is ultimately conceptualized. In legal doctrinal scholarship, the object of study is the textual representation of legal norms. Doctrinal legal scholarship does not consider whether these norms causally determine legal agency, but seeks to understand those texts by elaborating on their legal and social meaning, i.e., by continuously (re)constructing the structure of legal reasoning that prevails as accepted by the legal community. Legal normativity and knowledge of the law are then produced precisely at the *intersection* between theory and practice, in that doctrinal legal scholarship synthesizes a unified description of the legal order that is under study.

Legal doctrinal scholarship is thus both real and unreal, practical and theoretical, historical and contemporaneous. Legal doctrinal scholarship is real because it makes the world around us within the purview of legal normativity; it is unreal because as a specific form of hermeneutic, there are certain things it cannot see. Legal doctrinal scholarship is practical because it collects and connects with legal practice; it is theoretical because it is an abstract systematisation of legal knowledge. Legal doctrinal scholarship is historical because it is built on past application of the law; it is contemporaneous because it seeks to unite history to the present in presenting law as it is here and now. Legal doctrinal scholarship is the *only* discipline that is able to perform this and that is what makes it unique; a science of its own.

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