WHO DO I THINK YOU ARE?

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I WHY THIS TOPIC?

When I began to consider what I might say this evening, I first thought about the significance of longevity. On any view, for the *Monash University Law Review* ('*Review*') to have published Australian legal scholarship over 50 years is a remarkable achievement. There will have been those whose involvement was substantial and formative, like the late Professor Robert Baxt, who was one of the *Review*'s Editors during its first five years of publication, and before he went on to be the Dean of Law at Monash University. There will be others whose engagement with the journal was more transient, say by membership of the Editorial Committee for a few years. An example is Debra Mortimer, an Editor of the *Review* in 1985 and 1986 and now the Chief Justice of the Federal Court of Australia.

I also thought about the likely different perspectives on a 50th anniversary, depending upon one's own personal experience of such events. It was at that point that I confidently informed tonight's organisers of the title of my then yet to be written talk, based principally on the idea that tonight's attendees could be divided into two groups: older than 50 and younger than 50. When I started writing, however, I became more interested in the *Review* itself: how it is situated in time; and among Australian publishers of legal scholarship; and in the relationships between the *Review* and the judiciary, the academy and the broader Australian community.

I am not a legal scholar, but I am a consumer of certain kinds of legal scholarship. And so, I have some thoughts about who you are that will be more or less accurate. Perhaps they are worth sharing. If there is any single idea that I hope to convey this evening, it is that what we think about each other is worth contemplating. That is, how judges conceive the legal academy and how the academy conceives the judiciary matters to the quality both of judicial decision-making and of Australian legal scholarship, the latter particularly to the extent that that scholarship is directed to matters in issue in Australian courts. It has been said that '[l]egal scholarship in Australia is under-researched'.[1] But it is increasingly the subject of

* Justice of the High Court of Australia. This is an edited version of the speech celebrating the 50th anniversary of the *Monash University Law Review*, delivered during the Annual Dinner in Melbourne on 21 November 2024. I acknowledge the assistance of my associates, Aiden Lerch and Emma Roff, in the preparation of this address.

1 Benedict Sheehy and John Dumay, 'Examining Legal Scholarship in Australia: A Case Study' (2021) 49(1) *International Journal of Legal Information* 32, 32.

reflection by judges who are keen to acknowledge and benefit from its contributions to knowledge about the law, and to encourage further contributions.

II A TRADITION OF ARGUMENT FOR LAW REFORM

In his editorial to the first volume of the *Review*, Professor Baxt noted that Monash Law School had been established 10 years earlier, in 1964, and by 1974, had 'become the largest law school in Australia'.[2] One reason for the decision to publish the *Review* was the felt need for Monash to have 'an avenue through which its own staff and students could express their views on various issues'.[3] It was considered that there were 'inadequate opportunities for Australian lawyers (both law teachers and practitioners) to write about the increasing number of problems that face[d] the practising legal profession and the teaching legal profession'.[4] Hope was expressed that the *Review* would offer 'another avenue to teachers, practitioners, administrators and students to discuss important and current questions of law reform, and to write on subjects that will increase the knowledge and awareness of the legal profession'.[5]

Professor Baxt's editorial suggests that the initial philosophy of the *Review* was focused on law reform. One of the first articles published by the *Review* considered the High Court's 1966 decision in *Beaudesert Shire Council v Smith* ('*Beaudesert*'), which held that 'by an action for damages upon the case, a person who suffer[ed] harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another [was] entitled to recover damages from that other'.[6] The 1974 article, 'Intentionally Causing Economic Loss: Beaudesert Shire Council v Smith Revisited', written by Professor Gerald Dworkin of the University of Southampton, recognised that the principle in *Beaudesert* had already attracted criticism as a tort of strict liability inconsistent with the development of economic torts in jurisdictions including Australia.[7] Professor Dworkin proposed a more limited reformulation of the principle in *Beaudesert*, but was ultimately not satisfied with that reformulation, finding the relevant principles to be 'all open-

2 Robert Baxt, 'Monash Law School: The First Decade' (1974) 1(1) *Monash University Law Review* 1, 1.

3 Ibid 2.

4 Ibid 3.

5 Ibid.

6 (1966) 120 CLR 145, 156 (Taylor, Menzies and Owen JJ).

7 Gerald Dworkin, 'Intentionally Causing Economic Loss: Beaudesert Shire Council v Smith Revisited' (1974) 1(1) *Monash University Law Review* 4, 4–5, citing Gerald Dworkin and Abraham Harari, 'The Beaudesert Decision: Raising the Ghost of the Action upon the Case (Part I)' (1967) 40(9) *Australian Law Journal* 296 and Gerald Dworkin and Abraham Harari, 'The Beaudesert Decision: Raising the Ghost of the Action upon the Case (Part II)' (1967) 40(10) *Australian Law Journal* 347 and quoting at 348.

ended and full of potential problems'.[8] *Beaudesert* was overruled by the High Court in 1995.[9]

Another article in the first volume of the *Review* was entitled 'Silence as Evidence', written by then Professor Dyson Heydon.[10] The article considered the status of silence, in the world of common sense and in the law. Ultimately, Heydon argued that the existing statutory prohibition in New South Wales and Victoria of judicial comment on the failure of an accused to testify should be abolished. The main danger of such comments was said to be that 'they will stress the fact of the accused's silence too strongly to the jury, which will then draw the wrong inferences anyway'.[11] Heydon argued that 'if doubts of this kind are really well-founded, it may be time to devise a better tribunal of fact'.[12]

The relevant New South Wales provision was repealed[13] and replaced with s 20 of the *Evidence Act 1995* (NSW). In 2001, the High Court noted in *Azzopardi v The Queen* that the statutory prohibitions had led to the 'unfortunate and unintended consequence' that juries would query why the accused had not given sworn evidence, which trial judges could not answer.[14] The Victorian provision was repealed in 2009.[15]

A third example is one of several articles published in the *Review* by Dorothy Kovacs. Her article, 'Excessive Self-Defence in Homicide Cases: Some Fundamental Problems in Australian Law', was published in 1977, and concluded that the High Court had 'a number of problems to resolve in relation to the law of excessive self-defence'.[16] Kovacs referred to the competing statements of the common law rule of self-defence, in the High Court in *R v Howe* ('*Howe*'),[17] and in the Privy Council in *Palmer v The Queen* ('*Palmer*'),[18] and argued that the High

8 Dworkin (n 7) 33.

9 *Northern Territory v Mengel* (1995) 185 CLR 307.

10 JD Heydon, 'Silence as Evidence' (1974) 1(1) *Monash University Law Review* 53.

11 Ibid 66.

12 Ibid.

13 *Evidence (Consequential and Other Provisions) Act 1995* (NSW) sch 1 item 1.5(1), repealing *Crimes Act 1900* (NSW) s 407(2).

14 (2001) 205 CLR 50, 67–8 [44] (Gaudron, Gummow, Kirby and Hayne JJ), citing *R v Greciun-King* [1981] 2 NSWLR 469.

15 *Statute Law Amendment (Evidence Consequential Provisions) Act 2009* (Vic) s 43, repealing *Crimes Act 1958* (Vic) s 399(6).

16 Dorothy Kovacs, 'Excessive Self-Defence in Homicide Cases: Some Fundamental Problems in Australian Law' (1977) 4(1) *Monash University Law Review* 50, 66.

17 (1958) 100 CLR 448. See at 460–1 (Dixon CJ, McTiernan and Fullagar JJ agreeing at 464), 468 (Taylor J), 471 (Menzies J).

18 [1971] AC 814. See at 824, 828, 831–2 (Lord Morris of Borth-y-Gest for Lord Donovan and Lord Avonside).

Court had failed to identify criteria 'which may be readily comprehended by juries'.[19]

The following year, in *Viro v The Queen* ('*Viro*'),[20] the High Court followed *Howe* in preference to *Palmer* but nine years later, in *Zecevic v Director of Public Prosecutions (Vic)*,[21] changed tack. Chief Justice Mason wrote that he still believed the doctrine enunciated in *Howe* and *Viro* expressed a concept of self-defence which best accorded with acceptable standards of culpability but said 'in the light of experience since *Viro* … I recognize that the doctrine imposes an onerous burden on trial judges and juries. In this respect … there is a serious risk that the doctrine will not achieve its desired goal'.[22] Thus, Kovacs' argument for reform was eventually heeded.

The most recent volumes of the *Review* show that the tradition of developing arguments for law reform has continued. For example, volume 49 contains an article titled 'Climate Change and the Constitution: The Case for the Ecological Limitation', in which Costa Avgoustinos explores the doctrinal merits of a proposed new 'ecological limitation' derived by implication from the *Constitution*.[23] Avgoustinos conceives of such a limitation operating to restrain legislative or executive action that unduly risks the habitability and ecological foundations of the Australian constitutional system.[24] Avgoustinos concludes that there is a plausible argument for deriving that limitation from the text and structure of the *Constitution* which both assumes and requires a Commonwealth of Australia that comprises particular territory and is sufficiently habitable to maintain a populace.[25]

Volume 47 of the *Review* includes an article co-authored by one of my current associates, Emma Roff, with Patricia Easteal, Emeritus Professor at Canberra Law School. The title is 'Engaging with the Survivor's Reality of Domestic Violence: A Discourse Analysis of Judicial Understanding in Survivor-Perpetrated Homicides'.[26] The article analyses judicial discourse in Victoria and New South Wales in intimate partner homicide cases for its conformity with a social entrapment model of domestic violence, which recognises how the environment of isolation, fear and coercion created by an abuser constrains a victim's ability to resist the abuse.

19 Kovacs (n 16) 70.

20 (1978) 141 CLR 88, 89.

21 (1987) 162 CLR 645.

22 Ibid 653.

23 Costa Avgoustinos, 'Climate Change and the Constitution: The Case for the Ecological Limitation' (2023) 49(1) *Monash University Law Review* 267.

24 Ibid 269.

25 Ibid 298.

26 Emma Roff and Patricia Easteal, 'Engaging with the Survivor's Reality of Domestic Violence: A Discourse Analysis of Judicial Understanding in Survivor-Perpetrated Homicides' (2021) 47(1) *Monash University Law Review* 252.

Roff and Easteal found that '[t]he discourse used by Victorian judges demonstrate[d] a better understanding of the nature and dynamics of [domestic violence] than their NSW counterparts'.[27] There was also a positive relationship between the use of such discourse and reference by Victorian judges to a suite of provisions in the *Crimes Act 1958* (Vic) and *Jury Directions Act 2013* (Vic).[28] These provisions were grounded in the social entrapment model and designed to increase jury and judicial understanding of domestic violence by broadening the definition of domestic violence, encouraging the use of expert evidence and providing guidance on the dynamics of domestic violence by way of jury directions. Roff and Easteal concluded that their study provided empirical support for the adoption of similar provisions in other jurisdictions.[29]

III CONNECTIONS BETWEEN MONASH, THE *REVIEW* AND THE JUDICIARY

I have already noted some connections between the *Review* and the judiciary. Chief Justice Mortimer was a student editor. Justices of the High Court who have published in the *Review* include Michael Kirby, Dyson Heydon, Kenneth Hayne, Virginia Bell, Stephen Gageler, Michelle Gordon and James Edelman.[30] Present tonight is former High Court Justice Geoffrey Nettle, whose 2020 lecture, 'Whither the Implied Freedom of Political Communication?', was published in volume 47 of the *Review*.[31]

Nettle's piece records important observations about the role of the academy in the development of the constitutional principle of freedom of political communication. These include early academic criticism of the implied freedom, such as an article published in volume 23 of the *Review* by Professor Jeffrey Goldsworthy.[32] Nettle goes on to review the evolution of proportionality analysis, arguing that

27 Ibid 271.

28 Ibid.

29 Ibid 273.

30 See, eg, Justice Michael Kirby, 'Australia's Growing Debt to the European Court of Human Rights' (2008) 34(2) *Monash University Law Review* 239; Heydon (n 10); Justice Kenneth M Hayne, '"Concerning Judicial Method": Fifty Years On' (2006) 32(2) *Monash University Law Review* 223; Justice Virginia Bell, 'Section 80: The Great Constitutional Tautology' (2014) 40(1) *Monash University Law Review* 7; Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1; Justice Michelle Gordon, 'Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law' (2023) 49(1) *Monash University Law Review* 1; James Edelman, 'Original Constitutional Lessons: Marriage, Defence, Juries, and Aliens' (2021) 47(3) *Monash University Law Review* 1.

31 Geoffrey Nettle, 'Whither the Implied Freedom of Political Communication?' (2021) 47(1) *Monash University Law Review* 1.

32 Ibid 1–2, citing Jeffrey Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23(2) *Monash University Law Review* 362.

> over the last 20 years or so, academic lawyers and other commentators have generated a large volume of high-quality academic writing which supports the conclusion that structured proportionality analysis is productive of distinct advantages in the application and development of the implied freedom compared to ad hoc characterisation and the shibboleth of calibrated justification.[33]

Another connection of interest concerns the work of Emeritus Professor CR (Bob) Williams. Professor Baxt's editorial for the first volume of the *Review* referred to a Mr CR Williams as the first Assistant Editor of the *Review*, and a member of Monash Law School's class of 1964.[34]

In 2004, Professor Bob Austin gave an address to a dinner celebrating the 50th anniversary of the *Sydney Law Review*. Austin's speech was entitled 'Academics, Practitioners and Judges'.[35] I will deviate slightly to mention that Austin identified three kinds of academic work that he found to be particularly useful in his role as a judge of the Supreme Court of New South Wales. These were: (1) academic work that 'places the issue for determination in its wider social and economic context';[36] (2) work that 'takes up a categorically new legal development, and explores its implications and outworkings';[37] and (3) 'academic writing that brings into focus legal developments in other countries … whose judicial experience is most likely to be helpful to judges here'.[38] Pausing there, I very much agree with these examples of legal scholarship of particular interest and likely utility for the judiciary.

Austin identified the then recent introduction of civil penalty provisions into trade practices and corporations law and referred to Professor CR Williams' article in the *Sydney Law Review*, entitled 'Burdens and Standards in Civil Litigation', as a good example of the second category of useful academic work.[39] A few years later, Austin J presided over *Australian Securities and Investments Commission v Rich*,[40] in which ASIC brought proceedings for civil penalties for breach of the statutory duty of care of company directors and officers, arising out of the collapse of One.Tel Ltd.

More generally, a search brings up numerous citations of the *Review*'s articles in the High Court. Last year, in *Vanderstock v Victoria*, Gordon and Edelman JJ individually cited articles published in volume 17 of the *Review* (by Sir Anthony Mason) and volume 37 (by Augusto Zimmermann and Lorraine Finlay)

33 Nettle (n 31) 20.

34 Baxt (n 2) 1.

35 Justice RP Austin, 'Academics, Practitioners and Judges' (2004) 26(4) *Sydney Law Review* 463.

36 Ibid 471.

37 Ibid.

38 Ibid 472.

39 Ibid 471, citing CR Williams, 'Burdens and Standards in Civil Litigation' (2003) 25(2) *Sydney Law Review* 165, 167.

40 (2009) 236 FLR 1.

respectively.[41] Also last year, in *Lang v The Queen*, there were three citations of an article published in volume 48 of the *Review*, by Jason M Chin, Hayley J Cullen and Beth Clarke.[42] Important judgments which have cited articles published in the *Review* include *Secretary, Department of Health and Community Services v JWB and SMB*,[43] *Kable v Director of Public Prosecutions (NSW)*,[44] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[45] and *Momcilovic v The Queen*.[46]

IV OTHER JUDICIAL OBSERVATIONS ABOUT THE ACADEMY

Two prominent judges who have spoken about the academy in recent times are former Chief Justice Susan Kiefel, and Justice of the Supreme Court of the United Kingdom, Lord Andrew Burrows. Their observations ring true for me about the relationship between the legal academy and the judiciary.

Speaking to the Australian Academy of Law in 2019, Kiefel CJ argued that whether judge-directed academic writing is useful 'depends largely upon the understanding of an academic author of the role of a judge and how judge-made law is developed'.[47] She observed that national culture affects the relationship between legal academics and the courts. In the common law tradition, the use of academic writing by the courts is relatively recent although so too is the creation of legal academic writing in significant quantities.

41 (2023) 98 ALJR 208, 310 [404] (Gordon J), citing Sir Anthony Mason, 'Law and Economics: Monash Law School Foundation Lecture 25th March 1992' (1991) 17(2) *Monash University Law Review* 167, 174–7; 358 [618] (Edelman J), citing Augusto Zimmermann and Lorraine Finlay, 'Reforming Federalism: A Proposal for Strengthening the Australian Federation' (2011) 37(2) *Monash University Law Review* 190, 213.

42 (2023) 278 CLR 323. See at 335 [17] (Kiefel CJ and Gageler J), citing Jason M Chin, Hayley J Cullen and Beth Clarke, 'The Prejudices of Expert Evidence' (2022) 48(2) *Monash University Law Review* 59; 389 [223] (Gordon and Edelman JJ), citing Chin, Cullen and Clarke (n 42) 60; 389 [225] (Gordon and Edelman JJ), citing Chin, Cullen and Clarke (n 42) 85.

43 (1992) 175 CLR 218. See at 238 (Mason CJ, Dawson, Toohey and Gaudron JJ), citing Jenny Morgan, 'Controlling Minors' Fertility' (1986) 12(4) *Monash University Law Review* 161. The case is also popularly known as '*Marion's Case*'.

44 (1996) 189 CLR 51. See at 88 (Dawson J), citing CR Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16(2) *Monash University Law Review* 161, 165–6; 123 (McHugh J), citing Williams (n 44) 181.

45 (2001) 208 CLR 199. See at 263 [152] (Kirby J), citing Greg Taylor, 'Why Is There No Common Law Right of Privacy?' (2000) 26(2) *Monash University Law Review* 235; 283 [202] (Kirby J), citing Adrienne Stone and George Williams, 'Freedom of Speech and Defamation: Developments in the Common Law World' (2000) 26(2) *Monash University Law Review* 362, 364; 329–30 [336] (Callinan J), quoting Taylor (n 45) 235–6; 330–1 [338] (Callinan J), citing Goldsworthy (n 32) 372.

46 (2011) 245 CLR 1. See at 67 [94] (French CJ), citing Enid Campbell 'Constitutional Protection of State Courts and Judges' (1997) 23(2) *Monash University Law Review* 397, 421.

47 Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 44(1) *Melbourne University Law Review* 447, 448.

Apart from the role of constitutional and public law academics in shaping the thinking of various members of the High Court, Kiefel CJ referred to 'reflexive tort scholarship' and the work of Professor Jane Stapleton, especially on causation.[48] Professor Stapleton has pointed to the role of the legal academy in influencing the courts 'to confront tensions in judicial reasoning and doctrinal outcomes, to re-structure precedents and reassess terminology'.[49] Recently, my own consideration of the law of vicarious liability involved extensive reading of academic work on strict liability in the law of torts.[50]

The reflexive scholarship that Professor Stapleton spoke of, and which Kiefel CJ endorsed, is enabled by the freedom that scholars enjoy in their positions to voice their opinions about the law, contributing to the development of Australian law by critically analysing the decisions of the courts. One of the best examples of this is also found in tort scholarship. Around the time that I studied and first practised law, in the late 1980s and early 1990s, the High Court developed a line of authority to the effect that a duty of care in negligence would be owed where: (i) damage or loss of some kind to someone such as the plaintiff was a reasonably foreseeable consequence of the defendant's failure to take reasonable care; and (ii) there was a requisite degree of 'proximity' in the relationship between the plaintiff and the defendant.[51] This was known as the 'proximity test' for determining whether a duty of care should be owed in negligence. Australian tort law scholars were quick to criticise the test, so much so that it is not overstated to say that there was a 'revolt' in the academy.

Writing in volume 15 of the *Review*, Professor John Smillie argued that the concept of proximity was 'incapable of meaningful definition and application' and observed that 'Deane J has expended some thousands of words attempting to explain the content of the requirement of proximity but his efforts seem doomed to failure'.[52] Justice McHugh, writing extra-curially, also voiced his objection to the High Court adopting the proximity test, arguing that it obscured the reasoning of what was determinative in the imposition of a duty of care.[53] He argued '[i]n truth, the notion of proximity seems to record the result of a finding of duty rather than a criterion for determining duty'.[54] Professor John Fleming, in

48 Jane Stapleton, 'Taking the Judges Seriously' (Clarendon Law Lectures, University of Oxford, 30 April 2018) 0:03:55–0:03:58, quoted in ibid 455.

49 Stapleton, 'Taking the Judges Seriously' (n 48) 0:03:37–0:03:58, quoted in Kiefel (n 47) 455.

50 See, eg, James Goudkamp, 'Rethinking Fault Liability and Strict Liability in the Law of Torts' (2023) 139 (April) *Law Quarterly Review* 269; Carolyn Sappideen et al (eds), *Fleming's The Law of Torts* (Thomson Reuters, 11th ed, 2024).

51 See, eg, *Jaensch v Coffey* (1984) 155 CLR 549; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340; *Gala v Preston* (1991) 172 CLR 243.

52 JA Smillie, 'The Foundation of the Duty of Care in Negligence' (1989) 15(3–4) *Monash University Law Review* 302, 311.

53 Justice MH McHugh, 'Neighbourhood, Proximity and Reliance' in PD Finn (ed), *Essays on Torts* (Law Book, 1989) 5, 38.

54 Ibid 39.

characteristically colourful language, said that the proximity test 'has cast a baleful shadow over judicial ruminations on "duty". … Many … judges continue to extol "proximity" as the "self-answering" lodestar, though the term obviously lacks definition when intended to suggest that there is more to it than foreseeability'.[55]

In 1997, in *Hill v Van Erp* ('*Hill*'), a majority of the High Court recognised the limitations of the usefulness of the proximity test.[56] Consistently with the arguments made by the tort scholars who I have just mentioned, Gummow J stated that 'by itself, the notion of proximity, used as a legal norm, has the uncertainties and perils of a category of indeterminate reference, used with shifting meanings to mask no more than policy preferences'.[57] Not long afterwards, in the 1998 decision of *Pyrenees Shire Council v Day*, Kirby J observed that 'proximity's reign … has come to an end'.[58] The judgments in *Hill* include multiple citations to academic writings, including by both Stapleton and Fleming.[59]

In 2021, Lord Burrows spoke of what he labelled 'practical legal scholarship'.[60] Lord Burrows is an instance of a new phenomenon in the judiciary, the judge appointed from academia, and an example (along with others, such as Edelman J of the High Court and Sarah C Derrington J of the Federal Court) of how the academy can increase diversity of experience and thinking on the bench. For Lord Burrows, the chief contribution to be made by the academic to the appellate judge is 'the big picture of the law', that is, 'how it is that the particular case fits or may fit within the larger coherent whole that comprises the common law'.[61] Lord Burrows also acknowledged the position of the academic to explain relevant policies and to offer critiques of past decisions. Lord Burrows contended that 'the pursuit of theory should not be at the expense of traditional doctrinal scholarship which can assist the law in action in its most direct form in the courts'.[62]

55 John G Fleming, *The Law of Torts* (Law Book, 8th ed, 1992) 138 (citations omitted).

56 (1997) 188 CLR 159, 177–8 (Dawson J), 188–9 (Toohey J), 210–11 (McHugh J), 237–9 (Gummow J) ('*Hill*').

57 Ibid 238, citing McHugh (n 53) 13.

58 (1998) 192 CLR 330, 414 [238].

59 See *Hill* (n 56) 180 (Dawson J), citing John G Fleming, 'The Solicitor and the Disappointed Beneficiary' (1993) 109 (July) *Law Quarterly Review* 344, 346; 209 (McHugh J), quoting Jane Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 (April) *Law Quarterly Review* 249, 258–9, 284–5; 225 (Gummow J), quoting Jane Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 (April) *Law Quarterly Review* 301, 324 and citing John G Fleming, 'Tort in a Contractual Matrix' (1995) 33(4) *Osgoode Hall Law Journal* 661, 677; 230 (Gummow J), citing Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (n 59) 259–63, 284–8; 237 (Gummow J), quoting Fleming, 'Tort in a Contractual Matrix' (n 59) 664.

60 Lord Burrows, 'Judges and Academics, and the Endless Road to Unattainable Perfection' (Lionel Cohen Lecture, 25 October 2021) 1 <https://supremecourt.uk/uploads/lionel_cohen_lecture_2021_lord_burrows_565163b805.pdf> .

61 Ibid 5.

62 Ibid (citations omitted).

V CONCLUDING THOUGHTS

While there may be an assumption that one is only admitted to the academy once you have completed a PhD and researched in your chosen field for years, in my view, the legal academy is a broader concept. To me, the legal academy is the institutional descriptor given to those people who research, teach and write about the law for the purpose of better understanding, appreciating and developing it. That will obviously include staff of the Monash Law Faculty, as well as academics from other universities. But it also extends to barristers and other legal practitioners that contribute to or work with the *Review*, and it includes the law students here tonight. Law students benefit from the collective knowledge and wisdom of the legal academy while also contributing to the academy. For example, by working as research assistants to academics, the work you do in producing your own academic research and theses and, of course, your contribution to the *Review* as student editors.

It is often said that decisions of the High Court cannot be appealed. But that does not mean that we are entirely off the hook. As one of my associates often reminds me, the Court is accountable to leading academics in the field who are not afraid to tell us that we have erred if that is what they believe.

Apart from the capacity of the legal academy to contribute to the work of the judiciary, there is a broader vocation to be considered. That is the role of the legal academy as what Jonathan Rauch, in his book, *The Constitution of Knowledge: A Defense of Truth*, called a 'reality-based community'.[63] The raison d'être of legal scholarship is knowledge. In her 2019 paper, Kiefel CJ acknowledged the potential for legal academic commentary to assist the courts indirectly through the provision of information to journalists and to the public more generally.[64] In my view, the work of legal academics like Professor Anne Twomey and Professor Rosalind Dixon in explaining court decisions and contemporary legal issues in language appropriate to the mass media makes a powerful contribution to civic debate.[65]

63 Jonathan Rauch, *The Constitution of Knowledge: A Defense of Truth* (Brookings Institution Press, 2021).

64 Kiefel (n 47) 457–8.

65 See, eg, Anne Twomey, 'Explainer: What Is the "Palace Letters" Case and What Will the High Court Consider?', *The Conversation* (online, 4 February 2020) <https://theconversation.com/explainer-what-is-the-palace-letters-case-and-what-will-the-high-court-consider-131000>; Anne Twomey, 'Two People Want to Share the Job of MP for Higgins: Is It Constitutional?', *The Conversation* (online, 22 April 2024) <https://theconversation.com/two-people-want-to-share-the-job-of-mp-for-higgins-is-it-constitutional-228379>; Rosalind Dixon and Richard Holden, 'Should We Be Able to Refuse a Coronavirus Test?', *The Age* (online, 2 July 2020) <https://www.theage.com.au/national/victoria/should-we-be-able-to-refuse-a-coronavirus-test-20200702-p558de.html>; Rosalind Dixon and Emma Buxton-Namisnyk, 'Violence against Women Is both a Legal and Cultural Problem: What Can We Do to Address It?', *The Conversation* (online, 1 May 2024) <https://theconversation.com/violence-against-women-is-both-a-legal-and-cultural-problem-what-can-we-do-to-address-it-228889>.

High-quality judicial decision-making, applying the judicial method, demonstrates a commitment to legality and robust fact-finding in a world of false narratives and encourages tolerance for the inevitable complexity of the human condition. The same can be said of high-quality legal scholarship that is accessible to the broader community.

In conclusion, I think that you are many things: persuasive advocates for law reform; publishers of judge-directed and judge-read legal scholarship; closely connected with the judiciary; future members of a more diverse judiciary; and promoters of rigorous and reality-based dialogue. I congratulate and thank those here tonight whose contributions to the *Review* have added to the body of Australian legal scholarship and look forward with enthusiasm to the continued publication of the *Review*.