A year ago, Lord Neuberger, soon to become President of the Supreme Court, delivered a lecture entitled ‘Judges and Professors – Ships passing in the Night?’ The quotation comes from Longfellow:¹

‘Ships that pass in the night, and speak each other in passing,
Only a signal shown and a distant voice in the darkness;
So on the ocean of life we pass and speak once another,
Only a look and a voice, then darkness again and silence.’

Longfellow was discussing the relationship between two people while one of them waits for the answer to a proposal of marriage. Lord Neuberger was discussing the relationship between academics and judges and in particular the convention that judges do not cite works of legal scholarship in their judgments, at least until the author is dead – the ‘better read when dead’ convention. Of course judges are only one among the many different kinds of legal practitioners but it is fair to say that the best way to get other practitioners interested in academic writings is for the judges to get interested in them.

There are now many different kinds of academic legal writings. Lord Neuberger was talking about traditional doctrinal legal scholarship – finding out what the statutes and cases say, putting them into some sort of order, teasing out the principles, explaining

¹ HW Longfellow, ‘The Theologian’s Tale: Elizabeth’ in Tales of a Wayside Inn.
the gaps and the problems, suggesting how these should be resolved. I still think that every legal academic should be able to do this, that it is the most important and useful work that academics can do for practitioners, that at its best it is work of the greatest scholarly merit, and that (dare I say it) it has not always been given the recognition in the various research evaluation exercises that it deserves.

But then it took some time for it to receive the recognition it deserved from the judges. Lord Neuberger pointed out that only some dead authors achieved the status of authority, and these were almost always judges or eminent practitioners rather than academics: Bracton, Coke, Hale and the like. Lord Eldon’s view was that ‘One who had held no judicial situation could not regularly be mentioned as an authority’. But it also appears that exceptions were made for some living authors who fell into this category.

Among the more respectable reasons given for this reticence were the relatively late emergence of English law as an academic discipline in its own right; the tendency of English scholars to express opinions aggressively and to relish disagreement with one another; and, perhaps above all, Sir Robert Megarry’s famous words in *Cordell v Second Clanfield Properties Ltd*, when disagreeing judicially with something he had said in one of his own books:

> ‘The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of

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2 *Jones v Jones* (1814) 3 Dow 1, 15; 3 ER 969.
3 Such as Lord Redesdale, author of a *Treatise on the Pleadings in Suits in the Court of Chancery by English Bill*; and Edward Sugden, author of *A Practical Treatise on Powers* (1856).
his chosen subject as a whole . . . But . . . he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law.’

Of course he was not saying that judges should not look at academic material:

‘I would, therefore, give credit to the words of any reputable author in book or article as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print, often in apt and persuasive language. But I would do no more than that; and in particular I would expose those views to the testing and refining process of argument.’

In that spirit, the academic writings of living authors are now regularly cited to us in court, not usually as works of authority, but rather as lending weight to the argument. There can, of course, be disagreements between the academics and the judges which may even lead the judges to change their minds – the most obvious example being the famous dispute between Professor Glanville Williams and the House of Lords on the subject of attempting the impossible. In Anderton v Ryan,6 the House held that one could not be guilty of attempting to handle stolen goods, even if one intended to do just that, if the goods were not in fact stolen. Glanville Williams launched a blistering attack upon the decision in the Cambridge Law Journal:7

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7 ‘The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes’ [1986] CLJ 33.
‘... the tale I have to tell is unflattering to the higher judiciary. It is an account of how the judges invented a rule based upon conceptual misunderstanding; of their determination to use the English language so strangely that they spoke what by normal criteria would be termed untruths; of their invincible ignorance of the mess they had made of the law; and of their immobility on the subject, carried to the extent of subverting an Act of Parliament designed to out them straight.’

In *R v Shivpuri* [1987] AC 1, the Lords changed their minds and held that a man who intended to import heroin into the UK in order to sell it was guilty of attempting to do so even though the white stuff with which he was caught red-handed was ‘vegetable material akin to snuff’. Lord Bridge very graciously acknowledged that he had read the article: ‘The language in which he criticises the decision in *Anderton v Ryan* is not conspicuous for its moderation, but it would be foolish, on that account, not to recognise the force of the criticism and churlish not to acknowledge the assistance I have derived from it’.

Apparently in Germany and other civil law countries academic writings are treated with more reverence than they are here: their legal hierarchy tends to be the reverse of ours, with judges at the bottom, practitioners next and professors at the top. Lord Neuberger attributes this to the differences between our legal systems – the ‘life-blood of the civil law is principle and logic, whereas the driving force of the common law is experience and common sense’. Scholars, he says, have a far greater role to play in relation to principle and logic, as opposed to experience and common sense. Judges are empiricists whereas academics are rationalists. According to Francis Bacon,
empiricists are ‘like ants’, in that they ‘collect and put to use’, whereas rationalists are ‘like spiders; they spin threads out of themselves.’

But most legal academics these days do not confine themselves to traditional legal scholarship, perhaps because it is so wrongly undervalued. They engage in a variety of contextual approaches, setting the legal materials into their wider context, whether it be historical (as in Paul Halliday’s wonderful study of habeas corpus which won last year’s Inner Temple book prize), economic, sociological and psychological, or indeed all of these (as David Pearl and I tried to do when we first wrote The Family, Law and Society: Cases and Materials in 1982). This sort of work is enormously valuable in enabling us all to understand the context in which the law operates – the difference it may make to the lives of businessmen and consumers, employers and employees, husbands and wives. This contextual understanding lends weight to the scholar’s views about what the law is or should be. I think that we would all acknowledge, for example, the enormous contribution made by Professor Sir Roy Goode in this way but he is only one among many.

Practitioners do vary in the extent to which they take notice of this scholarship. Perhaps this is because the courts also vary in the extent to which they take notice of it. Trial judges are mostly pre-occupied with finding the facts. They rarely have a point of law to decide and some of them run a mile from doing so. The Court of Appeal is often pre-occupied in trying to reconcile and apply the mass of potentially conflicting decisions which are nevertheless binding upon them. It is only when you get to the House of Lords or the Supreme Court that the arguments can flow more

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8 Lord Neuberger does not give the source and I have so far been unable to trace it.
9 Habeas Corpus: From England to Empire (Harvard University Press, 2010).
freely and we are often interested in academic commentary of all kinds which bears upon the difficult questions we have to decide. Sometimes we wish that there were more of it. We are currently wrestling with whether a school which outsources its swimming lessons to an independent contractor owes a duty to its pupils to see that the teachers and life-guards take reasonable care for the pupils’ safety.10 There appears to be remarkably little written on the potentially far-reaching consequences of wide-spread contracting-out of services which used to be provided by public authorities. More accurately, perhaps, if there is relevant writing counsel did not put it before us.

Then, of course, there is socio-legal research – empirical studies into what courts do, what clients think about what courts do, even what clients do. This is hugely interesting on a number of levels. I find it helpful in informing me about how the real world works. So, for example, I have referred to the research of Gillian Douglas and others11 to support a statement that people tend not to have a full understanding of the legal effect of the choices they make as to property ownership;12 to the research of Anne Barlow and others on why people live together without marrying to support the view that they are not necessarily rejecting the legal consequences of marriage;13 and to the findings of Sue Arthur and others on the financial arrangements which people make after divorce or separation.14 If the research by Anne Barlow and Janet Smithson on attitudes to pre-nuptial agreements15 had been published before

10 On appeal from Woodland v Essex County Council [2012] EWCA Civ 239.
12 Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432.
Radmacher v Granatino,\textsuperscript{16} I would no doubt have referred to it in my dissenting judgment in that case.

These studies were simply background, confirming my ‘common sense’ impressions of how the world worked, but unlikely to make much difference to the result. But sometimes counsel do cite research to us because they want it to influence the result. For example, in \textit{Re W (children) (family proceedings: evidence)},\textsuperscript{17} the issue was whether there should continue to be a presumption against children giving evidence in care proceedings. Counsel cited Joyce Plotnikoff and Richard Woolfson’s work evaluating the special measures to protect child witnesses in criminal proceedings.\textsuperscript{18} Despite these, many children still find giving evidence difficult and stressful. So, the argument ran, we should not allow a procedure designed to protect children from harm to be an instrument of causing them harm. In \textit{R v H},\textsuperscript{19} counsel for the accused cited findings by the same authors that the Criminal Procedure and Investigation Act 1996 was not always being operated by the CPS as Parliament had intended.\textsuperscript{20} I find it interesting that Lord Bingham, giving the opinion of the appellate committee, merely observed that ‘it would be unduly complacent to suggest that the guiding principles are now uniformly applied as they should be’ (at [34]) and referred to the example of a previous decided case\textsuperscript{21} rather than to the research. My guess is that he was more comfortable relying upon the decided case than the research.

\textsuperscript{17} [2010] UKSC 12, [2010] 1 WLR 701.
\textsuperscript{18} \textit{Measuring up? Evaluating implementation of Government commitments to young witnesses n criminal proceedings} (Nuffield Foundation and NSPCC, 2009)
\textsuperscript{21} \textit{R v Early} [2003] 1 Cr App R 19.
Cheryl Thomas’ work on juries\textsuperscript{22} is also regularly cited. In \textit{Attorney-General v Associated Newspapers}\textsuperscript{23} the Daily Mail and the Sun were prosecuted for contempt of court in publishing a highly prejudicial photograph of the accused in their on-line (but not print) editions during his trial for murder. In assessing the risk, not only of members of the jury accessing the material but also of its influencing their verdict, the court observed rather dismissively that ‘there are those who rely on research to doubt whether juries obey the prohibition not to search the internet’ (at [54]). But, even though the courts have to trust juries to do as they are told, it was held that publishing the photo was contempt of court.

In \textit{R v Ali},\textsuperscript{24} counsel cited Cheryl’s research in support of the argument that the jury in a retrial could not be relied upon to follow the judges’ directions not to do research on the internet. 26\% of her sample in high profile cases said that they had \textit{seen} information on the internet, although only 12\% were prepared to admit that they had \textit{gone looking} for it. The answer given – which some may find less than convincing – was that for this to have any effect upon the jury would require all the other jurors to disobey their oaths.

This is a good example of the problems which such findings can pose for the legal system. On the one hand, they reveal the unsurprising fact that jurors do not always understand the judge’s directions and even if they do understand them they do not always follow them. So the courts are understandably anxious to address the problem.

On the other hand, the courts cannot risk accepting that many jurors may be deciding the case on what they have learned outside the courtroom and will not understand how

\begin{itemize}
\item \textsuperscript{22} \textit{Are Juries Fair?} Ministry of Justice Research Series 1/10 (2010).
\item \textsuperscript{23} [2011] EWHC 418 (admin), [2011]1 WLR 2097.
\item \textsuperscript{24} [2011] EWCA Crim 1260, [2011] 2 Cr App R 22.
\end{itemize}
unfair this is. The courts have to go on trusting the jury otherwise the whole system will collapse.

Socio-legal research can also be used to help to persuade the court to change the law. Hazel Genn’s research for the Law Commission, *Personal Injuries Compensation: How Much is Enough?*\(^{25}\) cropped up in two important cases. First was *Wells v Wells*,\(^{26}\) where the question was whether the lump sum damages for future financial loss should be discounted by the conventional 4 to 5% assumed return from a mixed portfolio or by the lower return from investing in index linked government securities. In the House of Lords, counsel relied on the finding that claimants preferred to put their money into banks and building societies rather than invest in equities. Two Law Lords referred to the research, another joined them in referring to the Law Commission’s report which had recommended the change,\(^{27}\) and two answered the question from first principles without relying on any of the background.

The same piece of research was also relied upon in the Court of Appeal in *Heil v Rankin*\(^{28}\) as support for the Law Commission’s later recommendation\(^{29}\) that general damages for pain, suffering and loss of amenity should be raised, especially for the more serious injuries. Hazel’s survey of victims had shown the very significant and long-lasting effects of personal injuries upon them. Added to this was a public opinion survey conducted by the Office of National Statistics, which showed that generally the public thought that the current levels of damages were too low. The Court of Appeal thought that the Law Commission had been over-influenced by the research.

\(^{25}\) Law Com No 225 (1994).
\(^{27}\) Law Com No 224, *Structured Settlements and Interim and Provisional Damages* (1994).
\(^{28}\) [2001] QB 272.
The ONS survey did not explain what else the victims would get, on top of their general damages; nor did it clearly explain that insurance premiums would rise and the NHS might have less money to spend on patient care (at [88]). The victim study ‘we regard as being of interest, but again its results are capable of being explained, at least in part, by other reasons for dissatisfaction with the level of damages than dissatisfaction with the levels of damages for PSLA’ (at [90]). So although the research had had an important effect upon the Law Commission’s thinking, the court was not prepared to accept that it had an important effect upon theirs.

Some judges are much more ready to refer to extra-judicial sources than others. I suppose that I am one of those. There are several possible reasons for this. One is my background in contextual legal scholarship. Another is the nature of family law. We are trying to devise the best solution for the future of the whole family rather than to redress or punish the wrongs done in the past. So perhaps that makes us more interested in what works and what does not work on the ground. But why are the courts so wary of relying on this sort of research?

First, of course, they have doubts about its quality and how to assess this. They can choose between competing expert opinions, but it is much harder to assess research which is deployed as part of the argument. Counsel are supposed to draw the court’s attention to any authorities which are adverse to their case, but there is no such rule in relation to empirical research. They may well be tempted to find a study which supports their case and rely upon that, rather than upon a literature review or meta-analysis which tries to draw together and analyse the sum total of data on the subject.
In *Wells v Wells* and *Heil v Rankin*, the insurance industry hired an expert to find the flaws in the research upon which the Law Commission had relied, but this is rare.

Secondly, of course, legal academics are no less prone than any other kind of scholar to disagree with one another and to point to the flaws and omissions in other people’s work. Indeed, they may have to do this in order to get their work funded or to prove its originality and distinctive intellectual contribution. A tendency to vehement disagreement within the academy is one of the reasons given by Lord Neuberger for our comparative lack of respect even for doctrinal legal scholarship. But at least we are able to assess that for ourselves by reading the cases and materials upon which it is based. We are not so well placed to assess the comparative merits of competing evidence from contextual or socio-legal scholars.30

The difficulty of assessing the validity and weight of legal research can lead to what some may think to be over-reliance on even less reliable sources. The court in *Heil v Rankin* was more impressed with the results of consultation than it was with almost anything else. The government, when deciding whether to raise the age at which a person could sponsor and be sponsored to come into this country as a spouse, not as a measure of immigration control but in order to deter forced marriages, chose to disregard the research study which it had commissioned, but then relied upon its own much less scientific consultation process. In *R (Quila and Bibi) v Secretary of State for the Home Department*,31 I commented that it was odd to criticise the study for sampling bias when those who choose to respond to consultation papers are even less

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30 See the reference to Hazel Genn’s ‘excellent’ report on *Court based ADR initiatives for non-family civil disputes: the commercial court and the Court of Appeal in Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002, at [6].

representative than the organisations, individuals and focus groups whom the researchers had chosen.

We all know that consultation cannot possibly be as objective as a representative sample of public opinion. Why do the courts regard the opinions and assertions of other lawyers and judges as more authoritative than the opinions and attitudes of ordinary people as revealed in a well-designed research study? One reason is that it is extremely difficult to give the public enough information about the present law and practice to enable them to make an informed assessment, as we found out when surveying public opinion on a possible change in the ground for divorce. Another reason is that judges respect authority. They work in a hierarchical world. So perhaps it is natural for them to defer to the extra-judicial views of those whom they respect judicially. I do not think that it was any co-incidence that in *Heil v Rankin* the Court of Appeal picked out Lord Bingham’s name amongst those who had responded positively to the Law Commission’s consultation on general damages.

So what are the morals I would draw from the judicial experience of trying to handle academic legal writings and research?

The first is to agree with Sir Robert Megarry that the activity of judging is indeed very different from the activity of authorship. Authors have the benefit of wide-ranging research, hopefully a comprehensive knowledge of the field, and time to reflect and hone and rehone their ideas. But authors do not have to decide real cases, with real people in front of them, who stand to lose their lives, their liberty, their health, their livelihood or a great deal of money if the judge gets the answer wrong. The first job of
a judge is to make up her mind.\textsuperscript{32} No more the handy resort to ‘the better view’ as so many legal authors quite properly put it. No more tentative conclusions as so many socio-legal authors quite properly put it.

The second is also to agree with Sir Robert Megarry that, just as ‘argued law is tough law’, argued – or contested – empirical evidence is tough empirical evidence. Socio-legal scholars do not often have their work subjected to the intense critical analysis to which the forensic process subjected them to in\textit{Heil v Rankin}. The dangers of judges reading round the subject and coming up with empirical material or social theories which the parties have not had the opportunity of subjecting to the same level of critical scrutiny as they would any other kind of evidence are obvious. That is why it is so much easier to take account of such material when it forms the basis of an expert’s opinions in the particular case than it is to take account of it in general.

But there are ways in which this difficulty can be overcome. One is if the academic work has contributed to the formation of policy leading to legislation – best, of course, in a Law Commission report, but also in Parliamentary or other inquiries which lead to law reform. Another is when it is deployed by interveners. This is often the best way of putting before us contextual material which the parties may not trouble to find (or may even wish to ignore if it does not suit their case). In\textit{Yemshaw v Hounslow London Borough Council},\textsuperscript{33} the Secretary of State for Communities and Local Government and Women’s Aid Federation England produced a mass of contextual and comparative material to help us decide what ‘domestic violence’ meant.

\textsuperscript{32} \textit{Re L and B} [2013] UKSC 8, [2013] 1 WLR 634.
Finally, however, I think that judges and practitioners ignore the wider context in which they do their work at their peril. I agree with Lord Neuberger that the life-blood of the common law is experience and common sense: after all, we are only agreeing with that great judge, Oliver Wendell Holmes, that ‘the life of the law has not been logic; it has been experience’. And it is therefore dangerous for the common law to rely upon the experience and common sense of a comparatively narrow section of society. We have to engage with the academy and they have to engage with us. As I was once rude enough to say publicly, one man’s common sense is another woman’s hopeless idiocy. Studying the law in its wider context is one way to counter this.

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34 *The Common Law* (1881), at p 1.