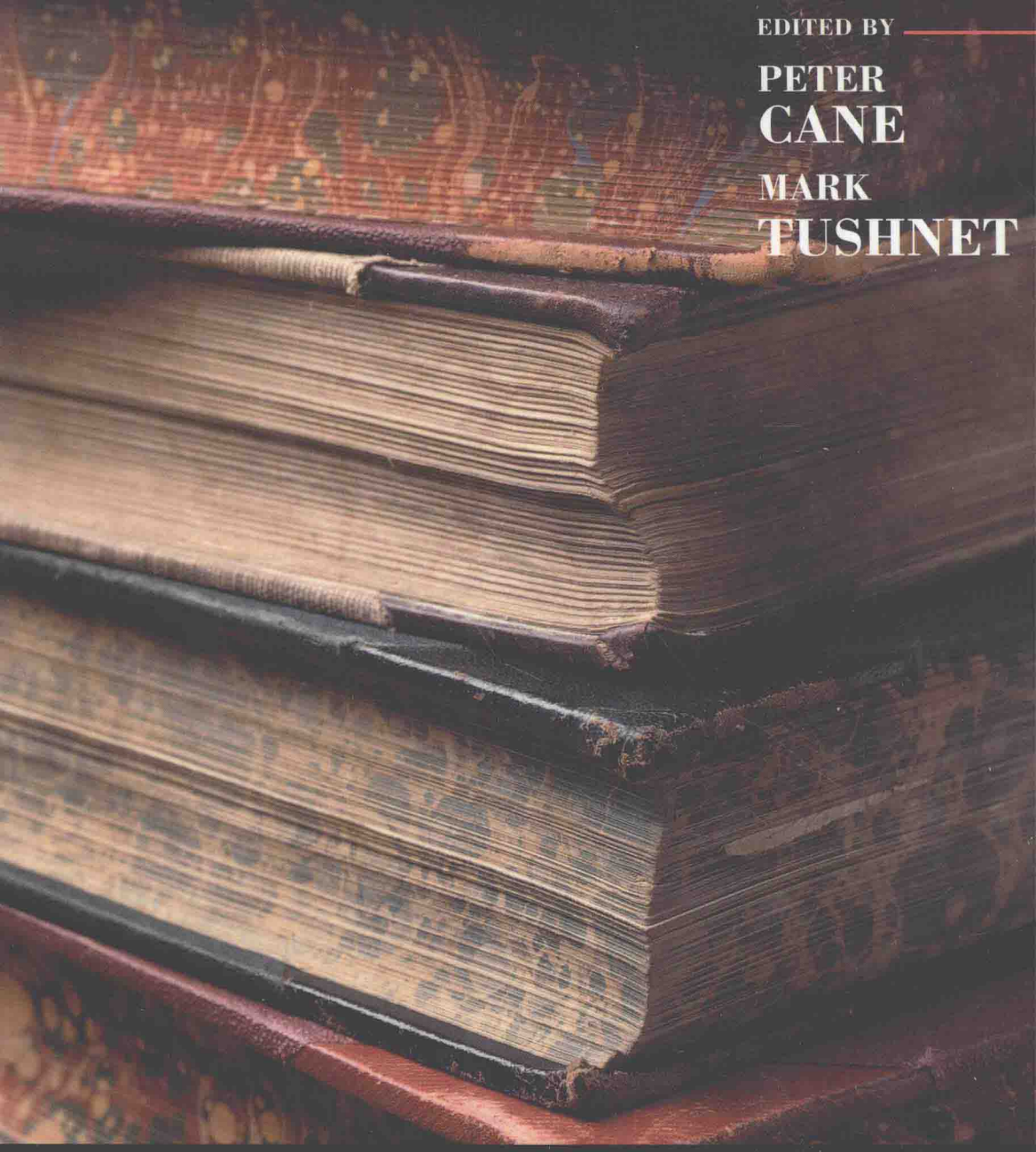

EDITED BY

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The Oxford Handbook *of* LEGAL STUDIES

THE OXFORD HANDBOOK OF

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PETER CANE

AND

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THE OXFORD HANDBOOK OF

LEGAL STUDIES

Introduction and Guide for the Reader

This volume in the series of Oxford legal handbooks is about legal scholarship. This superficially straightforward statement needs some explanation. The prime focus of the chapters in this book is not on law, legal rules, and legal institutions but on *scholarship about* law, legal rules, and legal institutions. As Upendra Baxi notes (see Ch. 22), in global terms the vast majority of published legal scholarship originates in countries of the developed 'North'; and this volume inevitably reflects that fact. More particularly, the main orientation of the essays is towards scholarly activity in what might loosely be called 'the common law world', made up of those legal systems that are more or less closely related, in terms of their conceptual and institutional structure, to the English. A corollary of this orientation is a focus on scholarship written in English. The explanation and justification for these limitations on the scope of the book are purely pragmatic. And it is, of course, our hope and expectation that this volume will prove to be accessible, and of interest and use, to lawyers both within the academy and outside it, and to people interested in legal scholarship wherever they might be within the common law world or beyond.

The basic idea for a volume of essays on scholarship about law came from John Louth, who is Senior Editor responsible for 'academic and scholarly' law publishing at Oxford University Press's 'mother house' in Oxford. Obviously, such a large idea could be developed in various ways, and we take responsibility for the shape of the project as defined by the table of contents and the brief given to the authors—of which, more later. The field of legal scholarship is as large and diverse as the social phenomena which legal scholars attempt to map and interpret; and the forms and styles of scholarly output are many and varied. This volume can make no claim to comprehensiveness either in terms of the subject-matter of legal scholarship or in terms of its forms and styles. Our aim was to cover a broad range of legal topics that seemed to us to have generated significant and important bodies of legal scholarship. No doubt, there are other topics that could profitably have been included—one that sprang to our minds rather too late was 'evidence and proof'. More importantly, perhaps, there are certainly other illuminating ways in which the field of legal scholarship could be divided up into manageable chunks. If the chosen coverage and arrangement of this volume stimulate readers to imagine other helpful ways of portraying and understanding the rich and complex doings of legal scholars, so much the better.

Each of the chapters in Parts I to VI deals with scholarship about a particular substantive area of law. Although a conscious attempt was made to avoid compiling a list of textbook titles (*The Law of Contract, Corporations Law, Environmental Law*, and so on), inevitably the scope of many of the chapters reflects the pedagogical imperatives by which the professional life of the typical legal researcher is constrained. The chapters in Part VII deal with various issues related to the activities of legal researchers (including pedagogy) but which cut across the substantive areas dealt with in the other parts of the book. It will be immediately obvious to the critically observant reader that there are no chapters on scholarly 'movements' such as legal realism or law and economics, and none on general concepts such as responsibility and precedent. Apart from the fact that no single volume of sensible length could deal with the whole range of legally related scholarship, a conscious editorial decision was made to carve out for this collection an identity and focus distinctly different from that of volumes (including the one in this series edited by Jules Coleman and Scott Shapiro) devoted to 'legal theory', 'jurisprudence', and 'philosophy of law'. Because areas covered by the various chapters in this handbook are large, the discussions they contain are typically conducted at quite a high level of abstraction from the details of particular legal provisions and the law of particular jurisdictions. However, no attempt has been made to survey scholarship that defines itself as concerned with the *theory* or *philosophy* of law as opposed to *law* and *legal institutions* as such.

The authors were given a set of guidelines which it is important that the reader understand in order to get the most out of the book and not to expect more than is on offer. Authors were asked to focus not on the law in the substantive areas respectively allocated to them, but on scholarship about the law in those areas. Concentration on scholarship published since 1960 was recommended (except in relation to Chs 38 and 42). This temporal limit was suggested partly in order to make the authors' task more manageable, but also because it seemed to us that 1960 represented a watershed of sorts in the life of the legal academy, marking the beginning of a period in which the quantity and quality of legal scholarship has increased enormously. The rate of production of scholarship seems unlikely to abate; and in surveying the past, authors were asked to keep an eye on likely trends in the preoccupations of legal scholars in the early years of the twenty-first century.

Authors were encouraged to take a comparative, or at least a multi-jurisdictional, approach. In other words, they were asked to look beyond the scholarship with which they were most familiar in their own respective jurisdictions and to find distinctive scholarly contributions to our understanding of law and legal institutions from anywhere and everywhere in the common law world. Of course, we did not expect authors to (be able to) survey the whole body of legal scholarship published in any area since 1960, nor to write accounts that were jurisdictionally neutral. We were content for authors to privilege what they knew best, while at the same time pushing out the frontiers of their knowledge. Nor did we ask or expect authors to conceal or suspend their personal intellectual commitments, or to be impartial as between

different styles or schools of scholarship or competing views about law and legal institutions. Rather, each contributing scholar was encouraged to write a personal reflection on a body of legal research and a set of legal ideas related to the area of law loosely defined by the title of the chapter for which he or she was responsible. We did not want, and we did not get, a set of substantively and structurally uniform 'reports' of various bodies of legal scholarship.

More technically, authors were instructed to eschew footnotes in order to maximize readability and the accessibility of the various contributions to a mixed audience. Each author was given a word limit, in some cases 8,000 words, in others 10,000, and in yet others 12,000. These length allocations reflect undoubtedly contestable editorial judgements about the relative significance and vibrancy of various bodies of scholarship. Somewhat to our surprise, and to our great relief, authors were generally and cheerfully punctilious in observing their personal word limits.

More controversial was the instruction to cite a maximum of thirty pieces of academic writing. We owe it to our authors to explain to readers this initially surprising constraint, which at least some of them found irksome and most found challenging—even though all managed in the end to work within or close to it. In some social-science disciplines (but not in law), the 'literature review' is a well-known and respected genre of academic writing. Literature reviews can be extremely valuable, especially when the topic addressed is relatively narrow and the time-frame quite short. The practicability and worth of a review of forty years of literature on topics as broad as those dealt with in each of the chapters of the *Handbook* are much more questionable. More importantly, what we wanted from each of the authors was his or her personal perspective on scholarship in the relevant area; and we wanted to relieve them of the burden of giving a comprehensive or 'balanced' account. One of the criteria for choosing authors was that each should be an authority in the field they were asked to write about. So we encouraged them to tell the reader not what others have said, but what they think about what others have said—to identify and comment upon themes and trends rather than to recount or focus on individual scholarly contributions. In different ways, each chapter in this book is itself an original contribution to, rather than an account of, an area of legal scholarship. Without putting too fine a point on the matter, we would say that there will almost inevitably be considerable room for disagreement about the items that should or should not have been included in the list of works referred to in the various chapters, as there will be about the authors' vision of the areas they discuss. The lists of references should not be thought of as encapsulating the author's answer to an (impossible and worthless) question such as, 'what are the thirty most significant scholarly contributions to your field in the last forty years?' Rather the references will most likely have been chosen for their aptness to support the particular argument that the author has chosen to make about scholarship in that field.

When first the outlines, and later the drafts, of chapters were submitted, we were considerably surprised by the variety of interpretations of the brief we had given to authors. As readers will find, there is considerable variation between chapters within

the volume in the way that our authors strike the balance between, on the one hand, explaining what things scholars are talking about and, on the other, what they are saying about those things. For us, this is a cause for celebration rather than regret. If the intellectual posture of this volume could be summarized, the injunction to 'let a thousand flowers bloom' would do the job well enough. We hope that the chapters presented here will provoke some readers to offer their own perspectives on the fields discussed, approaching the work of our authors in a spirit of constructive criticism.

Partly because of this diversity of approach, we have made no attempt to integrate the various chapters by adding cross-references to discussions of related topics elsewhere in the volume. Instead, the *Handbook* has been provided with a detailed index which, we hope, will enable the reader to trace themes and topics across the boundaries of particular chapters.

As is true of many other areas of life, the world of anglophone legal scholarship can, for some purposes at least, be divided between the United States and 'the rest'. In relation to most of the chapters in the *Handbook*, 'the rest' effectively refers to major jurisdictions such as England, Canada, Australia, and New Zealand. Whereas 'US legal scholarship' can be conveniently referred to as such, it is not so obvious how best to refer generically to 'the rest'. We have encouraged authors to use the term 'Commonwealth' for this purpose. When used in this way, it refers to non-US, anglophone, common-law legal scholarship with particular reference to the larger jurisdictions in the 'developed' world.

A word about Chapter 41 (The Role of Academics in the Legal System) is in order. Unfortunately, the author who had agreed to write this chapter was ultimately not able to do so. It occurred to us that we might turn the consequent logistical problem into an opportunity to ask several scholars to write about the system with which each was most familiar. This also made it possible for us to focus on the international legal system as a phenomenon of independent importance and interest. Moreover, although the *Handbook* is primarily concerned with common law systems, we seized the chance to ask a European scholar to provide insights into the role of scholars in civil law systems. We believe that although the division of this chapter into four discrete sections creates a certain discontinuity, it more than compensates by the breadth of coverage that it offers of this relatively unexamined topic.

This volume would not have come into being without John Louth's initial vision and continuing confidence that the project was both doable and worth doing, and we are very grateful to him for his support and commitment. An undertaking of this size requires a considerable investment of organizational time and energy, and it would not have been possible without the help of Chris Treadwell, the administrator of the Law Program in the Research School of Social Sciences at the Australian National University, to whom we owe a large debt of thanks.

P.C.
M.T.

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