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Reflections on the Nature of Legal Scholarship in the Post-Realist Era

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REFLECTIONS ON THE NATURE OF LEGAL SCHOLARSHIP IN THE POST-REALIST ERA

Marin Roger Scordato*

I. INTRODUCTION

With formal apprenticeships having largely become a relic of the past, the passing of legal culture to the next generation of lawyers, at least in the first few critical years of their assimilation into the profession, now takes place overwhelmingly at graduate schools of law. While the culture of law schools may not exert a continuing influence on mature practitioners, it does have a profound effect on the way that nearly every practicing attorney initially understands the nature and function of law. In at least this

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1. Felix Frankfurter, a former professor at Harvard Law School, wrote, "[i]n the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them." RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 156 (1989) (quoting Letter from Professor Felix Frankfurter to Julius Rosenwald (May 13, 1927); see generally Marie A. Monahan, Towards a Theory of Assimilating Law Students into the Culture of the Legal Profession, 51 CATH. U. L. REV. 215 (2001) (identifying the legal skills taught in legal writing and judicial externship courses and discussing different teaching approaches with a focus on the social perspective).

2. See ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 109 (1993) ("However diverse their professional experiences may be in other respects, . . . lawyers still share at least one thing in common: [T]hey have all been law students at one time or another, and it is as students that their professional habits first take shape."); Gregory A. Kalscheur, Law School as a Culture of Conversation: Re-imagining Legal Education as a Process
way, the concepts of law and the legal system that are in vogue among legal academics at any given time exert a powerful influence on the evolution of legal culture and on the way in which nearly every practicing attorney initially understands the nature and function of law.3

When I began the full-time teaching of law some twenty years ago in the mid-1980s, one of the prevalent values among law school faculty was the desire to demonstrate to students that law could not be understood in a satisfying way as a system of definite rules that could be mechanistically applied to factual situations and thereby yield definitive results.4 It was thought to be important to make sure students understood that legally operative language was rarely self-defining, that ambiguity was frequently present and that value-laden choices could not be avoided in the process of interpreting and applying legal standards.5

3. See Philip C. Kissam, The Ideology of the Case Method/Final Examination Law School, 70 U. CIN. L. REV. 137, 152 (2001) ("[In the hands of master teachers who are working with exceptionally bright and committed students, the case method may teach much about the nature of complex legal arguments, legal problem solving and legal imagination."); Eric A. DeGroff & Kathleen A. McKee, Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles, 2006 B.Y.U. EDUC. & L.J. 499, 500 (2006) ("Law schools have stressed to generations of students the importance of learning to 'think like lawyers.'").

4. See Addison Mueller & Murray L. Schwartz, The Principle of Neutral Principles, 7 UCLA L. REV. 571, 586 (1960) ("The difficulty . . . is that there will always be a point at which an extension of the logic of any constitutional principle of decision will run into the similarly extended logic of competing principles."); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 41-42 (1995) ("Even if one were to accept the existence of 'reasoned elaboration,' 'neutral principles,' or 'objective interpretation,' judges would still need guidelines to know how to choose between any number of possible competing principles ascertainable from different interpretations of the constitution, legislation and prior court decisions.").

5. See Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 810-12 (1935) (examining how the New York Court of Appeals decided case in terms of "transcendental nonsense"); Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The
The mark of a sophisticated approach to legal analysis, either in print or in the classroom, was the eagerness with which one looked behind the surface of legal doctrine and sought to understand its deeper meaning by reference to the social purposes that it was intended to serve. The telltale sign of a naive and outdated approach was a preoccupation with formal precedent and an insistence on deriving general principles from prior decisions that were then applied in a logically deductive fashion to resolve new problems. The most respected scholars and teachers were those whose primary focus was on the social purposes underlying the doctrine and who taught their students to habitually answer the question, "what does this doctrine mean?" by asking the question, "what set of social policies does this doctrine seek to advance?"

The law school environment that I experienced as a student, and then a few years later as a faculty member, was intellectually lively and exciting. It was very satisfying to guide students away from the innocent faith in an objective, mechanistic notion of law and to help them develop an ability to identify plausible policy concerns and to use them to craft persuasive legal arguments. It was fascinating to watch the

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6. See Jerry Elmer, Legal Realism, Legal Formalism and the D'Onch Duhme Doctrine: A Perspective on R.I. Depositors Econ. Prot. Corp. v. NFD, 53 R.I. B.J. 9, 11 (2004) (“Today, we are all Legal Realists. Being Realists, we understand two things: that judges do make law, not just find it, and that public policy considerations may properly enter into a judge’s deliberations.”).

7. Erwin Chemerinsky, Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters, 54 OKLA. L. REV. 1, 1 (2001) (“A belief in formalism dominated jurisprudence during the nineteenth century. Principles of law were seen as existing as part of the natural law and the role of judges was to discover them. Judging was conceived as a relatively mechanical act of applying law to the facts of the particular case.”).

8. See James G. Wilson, The Morality of Formalism, 33 UCLA L. REV. 431, 460 (1985) (“By focusing on the policy effects and on the diverse resolutions of similar cases, the realists demonstrated how judges made law according to their underlying beliefs. The process was inherently political.”).

9. Owen M. Fiss, The Death of the Law?, 72 CORNELL L. REV. 1, 1 (1986) ("The 1970s were an exciting and unusual time for legal education in America. The period was marked by the emergence of two jurisprudential movements which filled classrooms and law reviews with a remarkable spirit and energy. Today everyone is talking about theory.”).

development in the literature of ever more elaborate and subtle accounts of the social purposes and consequences of various areas of jurisprudence.

This was a time when both Critical Legal Studies and Law & Economics were vibrant and ascendant, and there nevertheless remained enough stalwart traditionalists to decry both movements.\(^\text{11}\) Different law schools were prominently aligned with one approach or the other.\(^\text{12}\) Passionate arguments frequently flared among adherents of different movements and among writers within a given movement.\(^\text{13}\) Eminent members of the legal academy publicly

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\(^{12}\) See Fiss, *supra* note 9, at 1 ("Critical legal studies is deeply entrenched in two of the most prestigious law schools in the country, Harvard and Stanford."); Laura Kalman, *Yale Law School and the Sixties* 281, 287 (2005) ("Critical Legal Studies could not have happened without Harvard . . . . Yale, which celebrated its association with legal realism, became known for its alleged intolerance to Critical Legal Studies."); Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 159 (2006) ("The University of Chicago is considered the home of law and economics.").

suggested that faculty members who embraced certain ideas about the nature of law did not belong in a law school classroom.\(^\text{14}\)

The feeling was everywhere in the air that big ideas were in play.\(^\text{15}\) The stakes were thought to be high.\(^\text{16}\) A newly published article by a prominent member of one movement or another was quickly sought out and examined to see in what way the analysis, and the debate, had been advanced.\(^\text{17}\) It

the underlying social and political premises of the market, it would be particularly ironic if the Law and Economics movement should succeed in reestablishing Classical Legal Thought's reified picture of the market as neutral, natural and necessary.\(^\text{,}\) IAN WARD, KANTIANISM, POSTMODERNISM AND CRITICAL LEGAL THOUGHT 114, 119-22 (1997) (discussing the debate between critical legal studies scholars Duncan Kennedy and Peter Gabel).


16. See Fiss, *supra* note 9. Owen Fiss has argued that both law and economics and critical legal studies were dangerous movements. *Id.* Fiss wrote:

\[\text{[L]aw will exist even if the two jurisprudential movements of which I have spoken are victorious, in the limited sense that there will be people who wear black robes and decide cases, but it will be a very different kind of law. For (Judge) Kennedy, adjudication will be entirely particularistic; for Judge Posner it will be wholly instrumental. In neither case will it be capable of sustaining or generating a public morality. It will be law without inspiration. This will mean the death of the law, as we have known it throughout history, and as we have come to admire it.} \]

*Id.*, at 15-16.

17. In addition to law and economics and critical legal studies, it was during this same period that the law and society movement began to flourish. See Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986) (commenting on the history and nature of the law and society
was in many ways a flat out fun time to be a law professor.\textsuperscript{18}

In the years since, things have settled down considerably. Critical Legal Studies, as a separate school of thought, has all but vanished.\textsuperscript{19} Today, employing some of the concepts of economics to explain the operation and effect of legal doctrine hardly serves as an announcement of your allegiance to a distinct intellectual movement.\textsuperscript{20} Law schools appear to be far more concerned with their annual ranking in U.S. News and World Report, and with the growth of their endowments, than in doing intellectual battle over the proper understanding of the nature of law.\textsuperscript{21} Unconcealed and unapologetic careerism, both at the individual faculty and the larger institutional level, feels pervasive.\textsuperscript{22}

\textsuperscript{18} See, e.g., David Shapiro's parody of critical legal studies, David L. Shapiro, The Death of the Up-Down Distinction, 36 STAN. L. REV. 465 (1984) (writing casual and comedic article with such headings as "Pretending-the-problem-isn't-there-icism" and "Poopification").

\textsuperscript{19} See BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 121 (2006) ("CLS no longer exists as a concrete movement and has had no evident impact on legal doctrine . . . ."); Seidman, supra note 11, at 583-84 (observing that critical legal studies "now has less influence than at any time since its emergence . . . . Its proponents have grown older and lost energy, and a new generation has different interests and priorities.").

\textsuperscript{20} See TAMANAHA, supra note 19, at 132 ("Many law professors teach and incorporate into their scholarship aspects of law and economics without endorsing its more elaborate claims."); Lawrence Lessig, The Prolific Iconoclast: To Appeals Court Judge Richard Posner, A Founder of the Law and Economics Movement, the Greatest Sin is that of Conformism, 21 AM. LAWYER 105, 105 (Dec. 1999) ("We are all law-and-economists now.").

\textsuperscript{21} See Kim Economides, Cynical Legal Studies, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION 26 (Jeremy Cooper & Louise G. Trubek eds., 1997) ("[T]he modern law school itself is besieged by market values, external audit and managerialism which increasingly pull it away from its historic mission of independent intellectual inquiry and public service."); see also Amanda Bronstad, Funding the Future: As State Funds Wilt, Public Law Schools Step Up Fundraising, NAT'L L.J., July 23, 2007, at 1.

\textsuperscript{22} See Patrick J. Schiltz, Legal Ethics in Decline: The Elite Law Firm, The Elite Law School, and The Moral Formation of the Novice Attorney, 82 MINN. L. REV. 705, 752 (1998) ("In sum, the academy appears to be in the grip of a materialism that is as pervasive as the materialism gripping the practicing bar. Although the academy's materialism is of a different nature--it focuses on the pursuit of prestige rather than wealth, and it is measured by publications rather than billings--the academy's materialism, no less than the profession's, is claiming mentoring and, in a larger sense, the ethical practice of law as its victims.").
Looking back, it seems to me that an important part of what animated that period was its relative proximity to a seismic shift in the conventional understanding of the nature of the common law and appellate legal processes.\textsuperscript{23} During the middle third of the twentieth century the conventional wisdom, at least in law school culture, regarding the nature of appellate court analysis and judicial review experienced a fundamental paradigm shift.\textsuperscript{24} Convinced by the critique of the legal realists, most legal scholars lost faith in the traditional formalist account of the common law and began to understand the nature of appellate court adjudication from an instrumentalist perspective.\textsuperscript{25}

I believe that many features of our current legal environment can be understood as either reactions to, logical consequences flowing from, or partial denials of the shift from formalism to instrumentalism.\textsuperscript{26} Among the more confusing aspects of our contemporary period is that different segments of the legal community, and the broader culture beyond, have acknowledged, accepted and adjusted to this essential conceptual shift to widely varying degrees. In a very real sense, different communities within the legal culture are currently approaching the practice of law and of law making, at least at the level of explicit expression, from fundamentally different conceptual frameworks.\textsuperscript{27}


\textsuperscript{25} See G. Edward White, \textit{From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America}, 58 VA. L. REV. 999, 1000-02 (1972) (discussing the "rise of Progressivism as a critique of late nineteenth-century social thought and the emergence of Sociological Jurisprudence as a protest against the 'mechanical jurisprudence' of the last quarter of the nineteenth century"); see generally Paul L. Rosen, \textit{The Supreme Court and Social Science} (1972) (discussing the use of social science by the courts and the response to such use).

\textsuperscript{26} See Scordato, \textit{supra} note 23, at 266-85.

\textsuperscript{27} See Tamana, \textit{supra} note 19, at 232-33 ("This mix of judicial philosophies among judges exists at all levels of the judiciary. Individual judges sometimes shift from one philosophy to another . . . . The result of this mish-mash of contrasting orientations is a system of judging suspended in uncertain and shifting space, with some judges freed of the shackles of being rigidly rule-bound, yet not entirely comfortable with this freedom, and other judges..."
It is the purpose of this article to consider some of the consequences for legal scholarship of this shift from formalism to instrumentalism. As an activity that seeks to understand the nature and operation of law, and to communicate that understanding to others, legal scholarship can be expected to be profoundly affected by this paradigm shift. It is also an activity that is engaged in by a segment of the legal community, namely law professors, who have been among the most receptive to the shift and who have most eagerly pursued the paths that the new paradigm has offered.\(^{28}\) Moreover, as mentioned above, it is an activity that takes place primarily in law schools, and as such it exerts an important influence on the view of law first encountered by the next generation of attorneys.\(^{29}\)

Following this introduction, Section II of this article very briefly describes the fundamental shift from formalism through legal realism to modern instrumentalism that has characterized much of the last century in American jurisprudence. The next Section identifies the traditional functions of legal scholarship and discusses how the shift from formalism to instrumentalism has importantly changed the relationship of legal scholarship to the work of the courts, especially the appellate courts. Section IV deals with the nature of descriptive legal scholarship in the post-realist period, identifying and analyzing what is termed first-order and second-order descriptive scholarship, and further distinguishing between two importantly different kinds of second-order descriptive scholarship. In Section V, the nature of normative legal scholarship within an instrumentalist paradigm is discussed. After describing normative scholarship under formalism and the ways in which scholars have tried to retain some of its virtues in the post-realist period, the section focuses on the fundamental insisting on being rule-bound (though not every time).\(^{28}\)

\(^{28}\) See MINDA, supra note 4, at 32 ("Most law teachers today regard themselves as legal realists.").

\(^{29}\) See TAMANAH, supra note 19, at 117 ("Since the 1970s, when the instrumental view of law infused the legal academy, law students have been trained to see law as purely an instrument. These are the lawyers of today, who permeate society and its structures of power, corporate lawyers, cause lawyers, law professors, judges, legally trained legislators and their staffs, administrative agency officials, executive branch officials, and lawyer-lobbyists.").
challenge that instrumentalism poses for normative legal scholarship and discusses various problems posed by the two currently prevailing responses to that challenge. Section VI concludes the article.

II. FROM FORMALISM TO INSTRUMENTALISM

Starting not long after the turn of the century and engaged in most vigorously during the 1930s and thereafter, legal realists aggressively critiqued the long-standing formalist model of an ever-improving common law seeking the ideal, maintained and implemented by technician judges who predominately employed the tools of formal logic and objective legal analysis to reach inevitable results in specific cases. In its place, the realists suggested a legal system that developed and employed rules in an effort to solve specific social problems or to achieve particular social goals.

The function of a judge in such a system, especially at the appellate level, was to insure that the application of discrete doctrine in specific cases advanced the intended social purposes behind that doctrine, to monitor the overall effectiveness of existing common law in achieving the desired social consequences and to alter the existing law as needed to better serve the underlying social goals. Far from operating as the detached analytical technician envisioned by the

30. See Michael D.A. Freeman, Lloyd's Introduction to Jurisprudence 90 (7th ed. 2001) (1959) ("[T]he essence of natural law may be said to lie in the constant assertion that there are objective moral principles which depend upon the nature of the universe. An appropriate analogy are mathematical axioms which hold good even when misunderstood or undiscovered."); Henry Mather, Natural Law and Liberalism, 52 S.C. L. Rev. 331, 332 (2001) ("Natural law theories assert that positive, man-made law should be formulated and evaluated according to a higher moral law (the natural law) that is not made by humans, but is inherent in the nature of the universe.").

31. An excellent description of the realist critique of formalism can be found at Horwitz, supra note 24, at 183-230.

32. See Morton J. Horwitz, The Transformation of American Law: 1780-1860, at 30 (1977) ("Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change.").
formalists, judges in a realist world were thought to be enmeshed in value-laden choices regarding the identification of important social goals and the best means of achieving them.

Under traditional formalism, law was seen as the painstaking articulation of first principles, a journey of constant elaboration and refinement on the way to an ideal set of doctrines—a true reflection of the natural law. To the legal realists, law was a tool that society employed at a given time to solve perceived problems or to achieve desired goals. A change in law was typically necessitated not by a desire to move it closer to some abstract ideal, but to better respond to new social challenges or to changes in the regulated environment.

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33. See Walter W. Cook, Scientific Method and the Law, 13 A.B.A. J. 303 (1927), reprinted in American Legal Realism 242, 247-48 (William W. Fisher et al. eds., 1993) (expressing surprise that “eminent members of the bar . . . assert that all a court does in deciding doubtful cases is to deduce conclusions from fixed premises.” and quoting one such “eminent” member of the bar, and “well known student of legal history and jurisprudence,” as saying, “[e]very judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts . . . and the application of the rule is a logical necessity.”).

34. See, e.g., Jerome Frank, Law and the Modern Mind (1930) (examining the judicial thinking process); Cohen, supra note 5, at 810-12; John Dewey, Logical Method and Law, 10 Cornell L.Q. 17 (1924) (discussing the logical method in legal reasoning and judicial decisions); Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 605 (1908) (“Being scientific as a means towards an end, [the law] must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.”).


As with any single label for a broad and sophisticated body of thought, “formalism” is not always taken as having a clear and univocal meaning. See Frederick Schauer, Formalism, 97 Yale L.J. 509, 509-10 (1988); Cass R. Sunstein, Must Formalism Be Defended Empirically?, 66 U. Chi. L. Rev. 636, 638 (1999); Brian Leiter, Positivism, Formalism, Realism, 99 Colum. L. Rev. 1138, 1144 (1999) (reviewing Anthony Sebok, Legal Positivism in American Jurisprudence (1998)).


For the realists, the reasons why a legal doctrine should embrace any one of a number of logically possible versions had everything to do with the relative desirability of the practical social consequences likely to be generated by each possible version of the doctrine. Thus, for example, tort law’s decision to adopt or to not adopt an affirmative duty to reasonably rescue a stranger in peril should not be made on the basis of which version of the rule best articulates abstract notions of social obligation or best conforms, as a logical matter, to the existing pattern of affirmative duties. Instead, the decision should be made based on the relative desirability of the likely practical consequences of either adopting an affirmative duty to aid or refraining to do so.

The shift from formalism to what could, for convenience, be labeled instrumentalism was very much like the kind of profound paradigm shift in the natural and social sciences that has been famously described by Thomas Kuhn. By the mid-1980s, less than fifty years had passed since the serious start of the realist movement. The initial intellectual excitement occasioned by the shift in the conventional paradigm of how law was understood to operate was still evident. Energy naturally flowed to projects designed to new settings gave powerful judges law-making opportunities equivalent to those of the legislatures themselves. The classical common law theory of law as immemorial custom was a shallow fiction. Judges... boldly used judicial opinions to create a law for a new America. This was the point of "instrumentalism.".

38. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (Gaunt, Inc. 1998) (1921) ("The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.").

39. It arguably does neither. See Lombardo v. Hoag, 566 A.2d 1185, 1189 (N.J. Super. Ct. 1989) ("An enlightened society should no longer excuse the immoral and outrageous conduct of a person who allows another to drown, simply because he doesn’t wish to get his feet wet."); Philip W. Romohr, A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule, 55 DUKE L.J. 1025, 1027 (2006) (concluding that "most, if not all, of these theories [of political and moral philosophy] support some form of duty to rescue.").


42. The first self-conscious statement of legal realism is said to be Karl Llewellyn, A Realistic Jurisprudence – The Next Step, 30 COLUM. L. REV. 431 (1930), followed shortly thereafter by Karl Llewellyn, Some Realism about Realism – Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931).

43. See BRIAN LEITER, NATURALIZING JURISPRUDENCE 1 (2007) ("American
apply this new perspective across the broad spectrum of legal doctrine. Scholars eagerly worked at developing the fundamental instrumentalist rationale for each substantive area. Contract law stopped being about identifying meetings of the mind and defining the abstract obligation to make good on a promise and began focusing on maximizing socially beneficial reliance and efficiently allocating the risks of promissory transactions.\(^4\)

In retrospect, from this perspective, the heated debates among the Critical Legal Theorists, the devotees of Law and Economics, and other competing schools of thought were primarily intramural battles.\(^5\) Despite their many differences, most all of these intellectual movements shared a thoroughly modern instrumentalist conception of the law, especially the common law.\(^6\) The arguments were overwhelmingly over the accurate identification of the underlying social purposes and the practical social consequences of legal doctrine.\(^7\) The only clear losers

Legal Realism was, quite justifiably, the major intellectual event in 20th century American legal practice and scholarship.\(^44\).

44. See Charles J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 YALE L.J. 1261, 1263-64 (1980) (focusing on the principles of bargain, detrimental reliance and unjust enrichment and examining promissory liability in terms welfare effects); SUMMERS, supra note 35, at 151.

45. See TAMANAH,

46. See Fiss, supra note 9, at 2 (“Both law and economics and critical legal studies are united in their rejection of the notion of law as public ideal. One school proclaims ‘law is efficient,’ the other that ‘law is politics.’ But neither is willing to take law on its own terms, and to accept adjudication as an institutional arrangement in which public officials seek to elaborate and protect the values that we hold in common.”).

47. It should be said that there existed a more radical element of critical legal studies that challenged, on both practical and philosophical grounds, the classical liberal notion of a rule of law that could constrain the power of the state and protect individual liberties. For an excellent analysis of these critiques and possible liberal responses to them, see ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990).
emerging from this period were those who sought to defend and maintain a dominantly formalist concept of law. 48

Certainly by the decade of the 1990s, law schools were overwhelmingly instrumentalist in their understanding and presentation of the law. 49 No longer was it particularly noteworthy to include considerations of policy and social purpose in your presentation of a course, it was more or less expected. 50 Standard casebooks, and even popular commercial outlines, by this time included a very significant amount of policy rationale. Rare was the article published by a prestigious law review that did not delve deeply into the social goals and consequences of the legal doctrine under consideration. At least within the world of graduate law schools, we were pretty much all realists now. 51

Even though instrumentalism has become the dominant perspective within law schools and in the academic literature of law, it is still, as a newly emerging paradigm, relatively young. 52 While it may not be quite the revelatory journey that it seemed fifteen or twenty years ago, many students still come into first-year law school courses harboring expectations about the determinacy and the mechanistic nature of legal rules. 53 Much of the popular culture, especially in depictions of the operation of the criminal law, conveys at least an implicit message of objectivity and traditional formalism.

48. See Paul N. Cox, An Interpretation and (Partial) Defense of Legal Formalism, 36 IND. L. REV. 57, 93-94 (2003) ("The law of torts, of contract, of property are now largely conceptualized in these instrumental terms both within academia and within the profession.").

49. See David B. Wilkins, Legal Realism for Lawyers, 104 HARV. L. REV. 469, 469 (1991) ("Legal realism has dominated American legal education for over half a century.").

50. See TAMANAH, supra note 19, at 101 ("An instrumental view of law is so taken for granted today that it rarely evokes comment, but in the 1960s and 1970s its novelty in legal education was recognized and prompted expressions of concern.").

51. See Joseph William Singer, Legal Realism Now, 76 CAL. L. REV. 467, 467 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)) ("All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.").

52. See TAMANAH, supra note 19, at 118 (identifying the 1960s and 1970s as the period during which instrumentalism came to have its full impact on legal theory).

53. See TAMANAH, supra note 19, at 145 ("Students entering law school often think that law consists of ‘black letter’ rules.").
More significantly, political actors at the highest levels of government continue to espouse the most deterministic version of formalism. These kinds of pronouncements typically take center stage during the nomination and confirmation of federal judges, particularly United States Supreme Court justices. For example, in 2005, when nominating Samuel Alito to be an Associate Justice of the Supreme Court, President George Bush said, "He has a deep understanding of the proper role of judges in our society. He understands that judges are to interpret the laws, not to impose their preferences or priorities on the people."

Chief Justice John Roberts in the opening statement of his confirmation hearing before the Senate Committee on the Judiciary said, "Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make rules; they apply them."

As recently as last year, Erwin Chemerinsky, chaired Professor of Law and Political Science at Duke University, made reference to this when he spoke at a symposium entitled, The Role of the Judge in the Twenty-First Century. Professor Chemerinsky decried the continued persistence of formalist rhetoric to describe the nature of judging and the process of judicial review. He concluded his presentation by saying, "we should abandon the misleading rhetoric of discretion-free judging and talk about judging as it actually


57. Id.
occurs."

Perhaps one reason for the dominance of instrumentalism in law schools and among legal academics is that for a certain generation of legal academics the shift away from formalism is still clearly remembered. Or it was tacitly absorbed in the mix of instrumentalist and traditional formalist professors that they encountered in law school.

For these individuals, the energy of the realist critique may still be vivid, and the notion of turning a critical eye on instrumentalism itself seems somehow retrograde, an expression of a possible yearning for, or defense of, a now discredited and old fashioned formalist past.

Younger faculty members were most likely schooled by professors who were themselves nearly all enthusiastic instrumentalists and who, outside of a possible jurisprudence elective, may not have wished to spend class time self-consciously identifying and justifying their instrumentalist approach to the material. The dominant, if implicit, message to these students was that the only meaningful way to understand legal doctrine was through an appreciation of how that doctrine advanced certain social values and disfavored others.

III. THE TRADITIONAL FUNCTIONS OF LEGAL SCHOLARSHIP

What is it that legal scholarship attempts to do? What work does it perform? For the purposes of this article, three distinct functions of legal scholarship can be identified. The

58. Id.
59. See Calvin Woodard, The Limits of Legal Realism: An Historical Perspective, 54 VA. L. REV. 689, 732 (1968) ("At least in the better law schools, 'functionalists' and 'realists' are no longer lonely aliens in a hostile world. In truth they probably outweigh in influence, if not in numbers, the Langdellians.").
60. See Roger C. Cramton, The Ordinary Religion of the Law School Classroom, 29 J. LEGAL EDUC. 247, 247-48 (1978). In 1978, the Dean of the Cornell Law School wrote that instrumentalism had become, "the ordinary religion of the law school classroom." Id.
61. See BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 471 (1993) ("Both legislators and courts are told that their work is essentially a process of balancing interests. [Roscoe] Pound's social interests are statements of objectives; decision turns on choice from among competing grounds of policy. The wise judge or legislator will try to shape the system of rights, duties, and remedies to attain the maximum satisfaction of social interests.").
first is to describe the history and the current state, and to monitor the future development of, legal doctrine. This could be called a primarily descriptive function. The second is to evaluate the degree to which existing doctrine, and proposed new doctrine, expresses and advances the optimal set of legal principles in a given area and to suggest possible improvements. This can be called a primarily normative function. The third is to serve the needs of the practicing bar and the legal academic profession. This can be called a primarily service function.

In a formalist environment, these three functions operate in close harmony. The classic legal analytical skill of inducing general principles of law from the resolution of discrete cases, and the deductive application of general principles to the resolution of new cases, is the fundamental unifying intellectual competence. It is thought to be principally practiced by the courts, especially the appellate courts, and it is generally described and explained in descriptive legal scholarship. It is critiqued and refined in normative scholarship. It is modeled for the practicing bar in publications and it is taught to law students in law school courses.

One of the defining conceptions of the formalist paradigm is the central role occupied by traditional legal analysis.

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63. See Wilson, supra note 8, at 460 (“To support the prevailing image that judges did not make law, but only applied law, lawyers combined Langdell’s two beliefs that law was a science and that principles, once discovered, were perpetually valid, with Holmes’ theory that liability should be limited to objective injury . . . . Judges believed they were scientists who objectively discovered the right decision by applying the proper underlying principles to the objective facts of harm.”).


65. Leiter, supra note 35, at 1145-46 (“[W]e may characterize formalism as the descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required.”).
Given this centrality, the role of law professor is characterized in large part by an expertise in this distinctively legal analytical skill. This expertise is brought to bear in understanding and describing the work of appellate courts, in critiquing that work and in offering suggestions for improvement, and in conveying this essential skill to succeeding generations of lawyers.

Under this conception, the professional role of law professor is largely coherent and consistent. She has developed a level of expertise and a facility in fundamental legal analysis that is brought to bear and expressed in her scholarship, in her teaching and in her service to the practicing bar. Her authority to credibly engage in each of these activities arises from her possession of this essential expertise.

While the standard portfolio of professional activities engaged in by professors of law has changed very little over the last 100 years, the understanding of the nature of these various activities has undergone profound transformation in the shift from formalism to instrumentalism. At the core of these changes is the deep loss of faith in the independence and determinacy of legal analysis occasioned by the success of the legal realist critique. This was accompanied by a

66. See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 38 (George Edward White ed.,1983) ("A teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law." (quoting Christopher Columbus Langdell)).

67. See TAMANAHA, supra note 19, at 57-58 ("The legal elite - leaders of the bar, judges, and academics - shared a confluence of interests that contributed to a united front: Collectively they resisted the growth of legislation in the late nineteenth century and they distanced themselves from instrumentalism in legal practice, while promoting the view of law as science . . . . Legislation threatened the autonomy of the common law and the power of judges who controlled it, and disrupted the domain of legal academics as the leading expositors and rationalizers of legal science . . . . All three agendas were thus served simultaneously by maintaining the non-instrumentalist portrayals of law as a matter of principle, reason, immemorial customs of the community, a body of specialized knowledge and a science. The prestige and autonomy of one was the prestige and autonomy for all.").

68. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 78 (2004) ("The Realists argued that there were gaps and contradictions in the law, that rules often had exceptions which allowed for
consequent decline in the previously held consensus that
general rules of law, and many of the specific results in
discrete cases generated by the application of those general
rules, were the logically mandated product of largely objective
legal analysis. 69

This essential change in the perception of the nature of
legal analysis, and thus also the status of its products, has
been occasionally reflected, but by no means widely publicly
acknowledged, by the courts. 70 Despite the realist revolution
and its full acceptance by most law professors, the
overwhelming majority of published trial court memoranda
and appellate court opinions in this country continue to
present themselves in traditional formalist terms. While
perhaps not as aggressively deterministic in tone as fifty or
seventy-five years ago, the written published products of our
courts, with relatively few exceptions, continue to offer their
holdings as the result of a distinctive legal analysis and not
an explicit balancing of social costs and benefits. 71 This fact
can easily be lost on modern law students, and some faculty
as well, because the relatively small number of published
appellate court opinions that do engage in open
instrumentalist analysis are often widely noted, frequently
celebrated and become perennial inclusions in law school
casebooks. 72

contrary outcomes, that there was flexibility when judges formulated the rule
purportedly laid down in a previously decided case, that many rules were
ambiguous, that when going from a general rule to application in a particular
case there could be more than one reasonable alternative, in sum, that the
interpretation of rules was often indeterminate, anything but mechanical, and
open to choices and subject to influence from the values of the judge.").

69. See id.

70. See ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 99
(1975) ("[T]he courts ... are caught between two roles with conflicting demands:
the role of the traditional formalist judge, who asks what the correct
interpretation of rules of law is, and the role of the calculator of efficiencies, who
seeks to determine what course of action will most effectively serve a given
goal.").

71. See Martin Stone, Formalism, in THE OXFORD HANDBOOK OF
JURISPRUDENCE AND PHILOSOPHY OF LAW 193 (Jules Coleman & Scott Shapiro
eds., 2002) ("It is true that judges sometimes cast their deliberations into
something resembling this form [a deductive syllogism], and that they thereby
(sometimes) exhibit their decision as deducible from a legal rule along with
another fact-stating premise. But this is an irrelevancy which should have
fooled no one into thinking that judges purport to access their judgments
deductively.").

72. As a long time teacher of tort law, my favorite example is Tarasoff v.
Of course, judges issuing binding and authoritative judgments in actual cases face powerful practical incentives to present their decisions in largely formalist terms. They may be justifiably concerned that an explicitly instrumentalist presentation of their analysis and conclusions would risk a lessening in the respect granted to their decisions by the parties in the instant case. Moreover, they may fear that an explicit and widespread embrace by the courts of the instrumentalist paradigm would eventually result in a serious questioning of, and ultimate challenge to, the legitimacy of their authority.

On the other hand law professors, at least as legal scholars, face no such practical impediments to embracing the greater accuracy of the realist account and the instrumentalist paradigm that flows from it, and they have done so with vigor. This, however, has created an interesting and potentially troublesome situation for legal scholarship. Now legal scholars are addressing, as both realists and instrumentalists, legal texts, at least those produced by courts, which offer a predominately formalist perspective. A critical distance, a breach, now exists between the approach to legal issues adopted by the legal

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Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976); see also Peter F. Lake, Revisiting Tarasoff, 58 ALB. L. REV. 97, 97 (1994) ("Tarasoff" is one of the single most celebrated cases in the recent history of American tort law. Virtually every lawyer who has taken a basic course in torts since the late 1970s knows of the case.); see generally Scordato, supra note 23.

73. SUMMERS, supra note 35, at 149-50 (describing the use of legal fiction by formalist judges to maintain the appearance of adherence to existing precedent).

74. Regarding the legal reasoning set forth in most appellate opinions, John Dewey had this to say more than eighty years ago:

It is at this point that the chief stimulus and temptation to mechanical logic and abstract use of formal concepts come in. Just because the personal element cannot be wholly excluded, while at the same time the decision must assume as nearly as possible an impersonal, objective, rational form, the temptation is to surrender the vital logic which has actually yielded the conclusion and to substitute for it forms of speech which are rigorous in appearance and which give an illusion of certitude.

Dewey, supra note 34, at 24.


76. See DUXBURY, supra note 35, at 410 ("Owing to the fact that judicial opinions are frequently suffused with rhetoric, it is invariably very difficult to figure out what types of concerns lead judges to reach the decisions that they do.")
scholar and the approach presented by the courts—a distance that did not exist under the formalist paradigm, even when the scholar may have disagreed with the specific conclusion reached by a particular court.\textsuperscript{77}

IV. DESCRIPTIVE LEGAL SCHOLARSHIP IN THE POST-REALIST PERIOD

A. First-Order Descriptive Legal Scholarship

What, then, becomes of descriptive legal scholarship in this post-realist world? One type of descriptive legal scholarship that remains largely unaffected by this change is a kind of first-order, or primary, descriptive scholarship that attempts to more or less uncritically report on the results of appellate court cases and the substance of statutes and regulations.\textsuperscript{78} This kind of descriptive scholarship typically sets forth the facts, the holdings, and the court's analysis of a case, or of a series of cases in a given subject area, without attempting to offer an independent explanation of why the courts decided the cases as they did.\textsuperscript{79}

This kind of first-order descriptive legal scholarship can be conducted largely in the same way under either a formalist or an instrumentalist paradigm. One important difference, however, is in the degree of relative prestige that it is likely to be accorded. In a formalist world, such scholarship is thought to not only be recording the published public rationale that a court provides for its decision, but also to be describing the critical chain of analysis and reasoning that was employed by the court and that is likely to be a powerful

\textsuperscript{77} See Gary Ahrens, Book Review, 21 JURIMETRICS J. 437, 438 (1981) (reviewing PHILIP SHUCHMAN, PROBLEMS OF KNOWLEDGE IN LEGAL SCHOLARSHIP (1980)) ("The effects of laws and legal institutions on society can be neither deduced nor induced from an analysis based exclusively on the statements of the legal system's operatives; in other words, legal scholars who devote their attentions solely to case opinions, statutes, and administrative rules cannot reliably know the underlying facts and circumstances that the cases, statutes, and rules purport to reflect.").

\textsuperscript{78} Richard A. Epstein, Let "The Fundamental Things Apply": Necessary and Contingent Truths in Legal Scholarship, 115 HARV. L. REV. 1288 (2002) ("Huge portions of legal scholarship as practiced in the academy are devoted to the routine tasks of lawyers. Nothing that we say or write here will, or should, alter the brute fact that much academic scholarship services the internal operations of the legal profession.").

\textsuperscript{79} Id.
guide to predicting the court’s decisions in this area in the future.  

In a post-realist world, however, the formalistic analysis that a court provides for its holding is understood to frequently be an inadequate explanation for the court’s decision to embrace one logically possible conclusion over others. At the heart of realism lies the belief that many, if not most, interesting cases cannot be definitively resolved through the purely logical application of existing precedent and generally accepted legal principle. Therefore, a class of descriptive legal scholarship that primarily summarizes—and perhaps even attempts to systematize—the courts’ own justifications for their holdings in a particular area almost necessarily fails to provide a satisfying account of the underlying jurisprudential dynamics.

Thus we have the inexorable logic of the sharp decline in prestige accorded to this kind of first-order descriptive

80. Richard A. Posner, Legal Scholarship Today, 115 HARV. L. REV. 1314, 1316 (2002) ("The task of the legal scholar was seen as being to extract a doctrine from a line of cases or from statutory text and history, restate it, perhaps criticize it or seek to extend it, all the while striving for 'sensible' results in light of legal principles and common sense. Logic, analogy, judicial decisions, a handful of principles such as stare decisis, and common sense were the tools of analysis.").

81. FELIX S. COHEN, The Problems of a Functional Jurisprudence, in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 77, 81-82 (Lucy Kramer Cohen ed., 1960) ("Judicial opinions have been viewed as no more and no less reliable than the statements in which octogenarians, golf champions, or successful bankers explain their achievements.").

82. See MINDA, supra note 4, at 26 ("The only foundational belief shared by the realists was their common skepticism about the claims of legal formalists. What united and defined the legal realist movement was the criticism it raised about the formal style of modern jurisprudence."); ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 75 (1998) ("Antiformalism in law is at the foundation of legal realism."); see also Leiter, supra note 35, at 1147 n.30 ("Realists were certainly antiformalists, but this way of describing Realism obscures the fact that Realists shared a positive view about what goes on in adjudication.").

83. See Schauer, supra note 35, at 513-14 ("Thus, one view of the vice of formalism takes that vice to be one of deception, either of oneself or of others. To disguise a choice in the language of definitional inexorability obscures that choice and thus obstructs questions of how it was made and whether it could have been made differently."); Harold D. Lasswell & Myers S. McDougal, Criteria for a Theory about Law, 44 S. CAL. L. REV. 362, 368 (1971) (suggesting that traditional legal scholarship, "is exhausted by the description of patterns in authoritative myth, without systematic investigation of the degree to which they are in fact controlling.").
scholarship in the current post-realist environment. Just twenty years ago when I began teaching law full-time the authors of the major treatises in the great areas of common law—Prosser, Corbin, Williston, Wigmore—were still venerated. No longer. Now most anyone who tries their hand at serious legal scholarship knows that, short of "incompetent," the worst thing that can be said of their work is that it is "merely descriptive."

B. Second-Order Descriptive Scholarship

Thus descriptive legal scholarship in the post-realist era is pushed to engage in what could be called second-order descriptive scholarship. Here the scholar may begin with a first-order description of the cases in a given area, but then

85. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941).
86. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS (1963).
89. See TAMANAH, supra note 19, at 151 ("Writing a treatise was the peak achievement of a legal academic.").
90. See George L. Priest, Social Science Theory and Legal Education: The Law School as University, 33 J. LEGAL EDUC. 437, 437 (1983) ("Today, authorship of the legal treatise has been cast off to practitioners. The treatise is no longer even a credit to those competing on the leading edge of legal thought."); Christopher D. Stone, From a Language Perspective, 90 YALE L.J. 1149, 1151 (1981) ("The aspiration that drove the traditional treatise – to locate the quintessential legal rules and principles – was, at the least, deflated by the realist attack.").
91. See generally KARL LLEWELLYN, THE BRAMBLE BUSH (1930) ("[F]inding out what the judges say is but the beginning of your task. You will have to take what they say and compare it with what they do. You will have to see whether what they say matches with what they do. You will have to be distrustful of whether they themselves know (any better than other men) the ways of their own doing, and of whether they describe it accurately, even if they know it."); see also Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. PA. J. CONST. L. 155, 166 (2006) ("If there was any uncontroversial advice for an ambitious young law professor, it was to stay away from doctrinal scholarship that is 'merely descriptive.'"). In his book of advice on writing law review articles and notes, aimed primarily at law students, Prof. Eugene Volokh includes among the list of "Topics and Structures You Should Generally Avoid . . . Articles that just explain what the law is." EUGENE VOLOKH, ACADEMIC LEGAL WRITING 28-29 (2003).
she must go on to try to provide an account of what is really motivating the design and development of doctrine in this area.92

1. Exposing the Indeterminacy of Formalist Presentations

However, legal scholarship that does little more than demonstrate that a court’s formalist explanation for its holdings in a given case fails to provide an adequate account of its actual decisions and pronouncements can expect a rather cool reception in the current environment.93 Such scholarship, while consistent with the prevailing instrumentalist paradigm, simply lacks a receptive audience.94

For legal academics, the basic realist critique of traditional formalism is well accepted and well known.95 The majority of active law professors have been exposed to repeated demonstrations of the critique on formalist texts in a variety of subject areas while in law school.96 To publish yet another illustration of the point in the context of a newly

93. See VOLOKH, supra note 91, at 28 (listing first among “Topics and Structures You Should Generally Avoid” in designing a law review article, “Articles that show there’s a problem but don’t give a solution.”).
94. DUXBURY, supra note 35, at 468 (observing that by the decade of the 1990s, “critical legal studies seemed rather moribund”).
95. Karl Llewellyn and Jerome Frank are frequently identified as the two central figures in the emergence of legal realism. White, supra note 25, at 1017. Other prominent realists include Felix Cohen, Walter Wheeler Cook, Leon Green, Joseph Hutchinson, Underhill Moore, Herman Oliphant, Max Radin and Hessel Yntema. See, e.g., Cohen, supra note 5; Cook, supra note 33; LEON GREEN, JUDGE AND JURY (1930); Joseph C. Hutchinson, Jr., The Judgment Intuitive: The Function of the “Hunch” in Judicial Decisions, 14 CORNELL L.Q. 275 (1928); John Henry Schlegel, American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore, 29 BUFF. L. REV. 195 (1980); Herman Oliphant, A Return to Stare Decisis, 14 A.B.A. J. 71 (1928); Max Radin, LAW AS LOGIC AND EXPERIENCE (1940); Hessel E. Yntema, The Rational Basis of Legal Science, 31 COLUM. L. REV. 925 (1931).
96. Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 396 (1950). Karl Llewellyn’s classic statement of common law indeterminacy, published in 1950, demonstrates that some, perhaps many, of the maxims contained within the common law were potentially in direct contradiction with one another. Id.
issued opinion, or a series of opinions, is hardly revelatory, and is unlikely to be enthusiastically received. After all, how many times can a legal scholar perform essentially the same realist critique on case after case in a given substantive area of law before the work becomes stale?

Even in the law school classroom, the repeated demonstration of the underlying indeterminacy of formalist explanations for court decisions brings rapidly diminishing returns, and for an interesting reason. In her role as a teacher and in her work with the practicing bar, a law professor faces very real pressure to maintain and to reinforce a legitimizing attitude towards the law.97 After all, law is an active professional discipline that continues to be conducted in traditional formalist terms, despite the larger intellectual revolution produced by the realists.98 This is especially true in trial and appellate court practice.

A perusal of briefs submitted to appellate courts quickly makes it clear that the current dominant presentation to appellate courts, both state and federal, continues to involve invocation of statute or case precedent using more or less traditional legal analysis and standard logic to persuade the court to adopt the party’s preferred outcome.99 Again, the tone of these presentations may be less severely deterministic than they were half a century ago, and more of them may explicitly advance instrumentalist arguments, however the great majority of them are unmistakably rooted in an implicitly formalistic conception of appellate process.100

97. See Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2111 (1993) (“The scholars are still walking the tightrope between frankly speaking truth to the powerful and adopting enough of the discourse and conventions of the powerful to have some influence in their world.”).

98. See William H. Simon, *Fear and Loathing of Politics in the Legal Academy,* 51 J. LEGAL EDUC. 175, 181 (2001) (“It has always been part of the mission of American universities, and especially law schools, to prepare people for worldly roles. These roles are entrenched in politics.”).

99. Copies of thousands of appellate court briefs, filed in both state and federal court, can be found in the Westlaw research service in the Briefs Multibase and in the LexisNexis research service in the Briefs, Motions, Pleadings and Verdicts database.

100. See, e.g., Cox, supra note 48, at 84 (“The pretense of decision compelled by reference to principle may be a necessary pretense in such [difficult appellate] cases, but it is, I think, absurd to believe, as our legal culture asserts and purports to believe, that there are correct answers in hard cases, discoverable through reason.”).
Because the practice of law, especially before courts and other tribunals, is an active practical discipline that continues in large part to operate, at least on the surface, in a traditional formalist mode, and because law schools are involved in expensive professional education that promises students preparation to successfully engage in that professional practice, enormous implicit pressure exists to present the substance of legal doctrine to students, especially in core law school courses, from a largely formalist perspective. Thus, while a law professor would certainly want to expose her students to the realist perspective and to illustrate it on one or two actual cases, it is simply not, in this environment, a very effective presentation to students learning a legal subject for the first time to continue time after time to subject the appellate cases in the casebook to one variation or another of the standard realist critique.

Once the point is made and illustrated a time or two that courts are frequently disingenuous in the deterministic manner in which they explicitly justify their holdings, there is not much more to say. One can introduce and explicate what is obviously the professor's own understanding of the social

101. See Vijay Sekhon, The Over-Education of American Lawyers: An Economic and Ethical Analysis of the Requirements for Practicing Law in the United States, 14 GEO. MASON L. REV. 769, 778 (2007) (“[T]he average tuition at private law schools in 2003 was $25,584. The average tuition for public law schools was $20,171 for non-residents and $10,820 for residents. Assuming graduation from law school in three years, the average cost of a law degree for a private law student in 2003 was approximately $76,752; for a non-resident public law student, $60,513; and for a resident public law student, $32,460.” (citing John A. Sebert, Cost and Financing of Legal Education, 35 SYLLABUS 4 (2004)); LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE, FINAL REPORT OF THE ABA COMMISSION ON LOAN REPAYMENT AND FORGIVENESS 9-11 (2003) (reporting that tuition increased at private law schools by 76% between 1992 and 2002 and by 134% at public law schools), available at http://www.abanet.org/legalservices/sclaid/lrap/downloads/lrapfinalreport.pdf.

102. See Marin Roger Scordato, The Dualist Model of Legal Teaching and Scholarship, 40 AM. U. L. REV. 367, 389 (1990) (“In the classroom, law professors face powerful incentives to present legal doctrine and legal processes as being fundamentally rational, coherent, and consistent with current notions of sound public policy.”).

103. See Carrington, supra note 14, at 227 (“The professionalism and intellectual courage of lawyers does not require rejection of Legal Realism and its lesson that who decides also matters. What it cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic. Persons espousing the latter view, however honestly held, have a substantial ethical problem as teachers of professional law students.”).
choices presented in the field, and then compare and contrast competing views while marching through existing legal doctrine announced by appellate court decisions that have already been exposed as somewhat disingenuous.\textsuperscript{104} This is hardly an uplifting intellectual experience for students encountering the study of law for the first time.\textsuperscript{105}

For example, let's assume that a scholar of corporate law was convinced from her years of study that the mechanisms that generate legal doctrine in that area had been substantially captured by corporate management interests and that nearly all of the current rules, from the business judgment rule to the waivability of the duty of loyalty, to the regulation of executive compensation, reflect a grossly unfair favoring of management interests over the interests of every other corporate constituency. While it would certainly be appropriate for the scholar to introduce this idea to the students in her introductory corporation law course, it would be tedious indeed for all of the doctrinal material to be presented exclusively from this perspective.\textsuperscript{106}

It would be not only tedious but ineffective, since one of the obligations of the professor teaching such a course within the context of professional education is to prepare the students to operate effectively in the current legal environment.\textsuperscript{107} This includes helping law students to become

\textsuperscript{104} In the field of literature, this is sometimes referred to as the problem of the unreliable narrator. See Wayne C. Booth, The Rhetoric of Fiction 158-59 (1961).

\textsuperscript{105} Carrington, supra note 14, at 227. ("The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgment as they may have acquired. Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation. In an honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals.").

\textsuperscript{106} No corporation law or business associations casebook of which I am aware comes close to doing this, though they may include some occasional references to such a perspective.

\textsuperscript{107} Ass'n of Am. Law Sch., Bylaws and Executive Committee Regulations Pertaining to the Requirements of Membership, in 2005-2006 Handbook, §§ 6-7, available at http://www.aals.org/about_handbook_requirements.php ("A member school shall maintain as its central academic feature a program of resident study and instruction leading to a Juris Doctor degree, the first professional degree in law. The school shall have a program of appropriate duration and rigor to assure its graduates have a comprehensive understanding of legal institutions and an appreciation for the role of law and lawyers in society, and that they are academically qualified to participate effectively and responsibly in the legal profession.").
conversant with the conventional wisdom and the body of generally accepted principles and arguments currently at play in the field, even if the professor is personally convinced that much of it serves as a kind of legitimizing myth.¹⁰⁸

This would be somewhat analogous to a professor of medicine in a traditional university medical school who became persuaded over time that a combination of unorthodox alternative therapies, such as homeopathy, herbal treatments and massage, was a far more effective response to a variety of illnesses than those offered by traditional scientific medicine.¹⁰⁹ This faculty member might pursue these beliefs in her research and her writing, and she could well turn out to be objectively correct in many respects, but she should not be featuring these alternative theories in her course in internal medicine to medical students.¹¹⁰ She need not pretend to her students that she has full faith in the current conventional understanding and techniques of internal medicine, but she is nevertheless obliged to competently and thoroughly expose her students to them.¹¹¹ This is part of the nature of professional education and the role of a teacher in a professional school.¹¹²

¹⁰⁹. See Jennifer Huget, Earning a Spot in the Curriculum, WASH. POST, July 17, 2007, at F1 (reporting on the degree to which medical schools have been incorporating into their curriculum information on complementary and alternative medicine).
¹¹⁰. See Janet Weinstein & Linda Morton, Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education, 9 CLINICAL L. REV. 835, 868-69 n.96 (2003) ("Technical rationality' was Donald Schon's term for 'substantive' knowledge, the body of scientific work or doctrinal knowledge on which a profession is supposedly based. In medicine, that is what the medical school curriculum calls basic science.").
¹¹¹. See Daniel B. Hinshaw, Remarks at Erasing Lines: Integrating the Law School Curriculum (July 27, 2001), in Models from Other Disciplines: What Can We Learn from Them?, 1 J. ASS'N LEGAL WRITING DIRECTORS 165, 175-76 (2002) (transcript of afternoon session available at http://www.alwd.org/publications/pdf/ErasingLines_Plenary2.pdf) ("What is the shape of the medical school curriculum? .... Standardization is extremely important. Every practitioner should come from a common educational foundation. .... The medical curriculum is filled with many required courses, both in the basic sciences and the clinical clerkships. There are relatively few electives .... By the end of the second year of the medical curriculum, medical students are required to pass the U.S. Medical Licensure Exam Step I, which covers the basic sciences, before they can progress into the clinical years.").
¹¹². See Alan A. Stone, Legal Education on the Couch, 85 HARV. L. REV. 392, 421 (1971) ("Most of professional training, by its very nature, demands the
It can be seen, then, that when legal scholars engage in the act of describing legal processes and the substance of legal doctrine, which activity takes place primarily when they teach law students in law school, they do so within a context of professional education that more or less compels them to present the procedures and the doctrine as coherent, rational and largely aligned with the conventionally understood public good (or at least seeking in good faith to achieve a reasonable version of that public good). \(^{113}\) They face this pressure year after year, semester after semester, in every core law school course that they teach. Moreover, as noted above, continued repetitions of the basic realist critique in their scholarship, or repeated illustrations of it on newly produced cases and statutes, is unlikely to generate much positive response.\(^ {114}\) This powerful dynamic exists completely irrespective of whether or not such a view of the law and legal processes is an accurate and true account.

Thus one can come to appreciate that the shift from a generally accepted formalist paradigm to the current post-realist instrumentalist paradigm has created a subtle but profound separation between the law professor’s role as a legal scholar and her role as a law school instructor and service provider to the bar.\(^ {115}\) In the former role, the scholar seeks to understand the nature of law and legal processes and to state what is true as she sees it.\(^ {116}\) In the latter two roles, she is often obliged to abandon the more cynical or radical aspects of her understanding in an effort to help students and practitioners work effectively within the existing faiths and conventional understandings of the current system.

This tension comes most clearly to bear in the case of first-order descriptive legal scholarship. While not much

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\(^{113}\) See Simon, supra note 98, at 176 (“Since the advent of the modern legal academy, it has been an article of faith among its leaders that law is fundamentally different from politics. At points, a virtual loyalty oath to this effect was required.”).

\(^{114}\) See supra text accompanying notes 92-93; infra text accompanying note 170.

\(^{115}\) See generally Scordato, supra note 102, at 376-79.

\(^{116}\) See Robert B. McKay, Ethical Standards for Law Teachers, 25 Ark. L. Rev. 44, 47 (1971) (“A teacher should, in his own scholarship or other public statements, maintain the highest standard of dispassionate search for truth ...”).
respected by other legal scholars who have absorbed the realist critique and thus do not see a summary of courts' own words as adequately explanatory, this kind of formalist work is still quite valuable to students and to practicing members of the profession who must, regardless of their personal views, successfully navigate in these waters.  

2. Accurate, but Cynical, Explanations for the Substance of Legal Doctrine

This tension is also prevalent in another particular kind of second-order descriptive legal scholarship. This is the kind of descriptive scholarship that seeks to accurately describe what it is that is motivating the choice of legal doctrine without the uncritical reliance on the published words of the decision makers, and without necessarily accepting that the motivating factors are tied to the furtherance of public values and the public good. Take for example a legal scholar who is interested in finding out why a certain provision exists as it does in the Internal Revenue Code. After substantial research, she is convinced that the provision in question was included in the Act by its sponsors in large part because it would generate substantial benefits for the timber industry and that the senator from a large timber producing state absolutely insisted on its inclusion as a condition of her critically needed support for the bill. Is this the kind of descriptive analysis of the provision that would be highly valued if offered by the legal scholar in a published article? Most likely not. Such an explanation for the existence of the provision, even if entirely realistic and accurate, is simply not particularly relevant to, nor very useful in, the practice of the profession of law.


119. And not, apparently, in the academic study of tax law either. Should you doubt this, simply spend thirty minutes perusing the shelves of the tax alcove in the nearest law school library. I did this at four different law school libraries located in Washington, DC, each associated with a major research university. Overwhelmingly, and unsurprisingly, the shelves are full of
To further illustrate this point, imagine an entire treatise on tax law that painstakingly traces similar practical political reasons for the existence of the various provisions in the Internal Revenue Code. Such a book might make for interesting background reading but it would be of very little sustained usefulness to a practicing attorney, a law student or even a legal scholar. It is certainly not what most persons seeking out a treatise on tax law would be looking for.\textsuperscript{120}

As these examples illustrate, it should be understood that legal scholarship, even predominately descriptive legal scholarship, is not seeking the kind of disinterested objective description of reality that one might associate with a natural science like physics or chemistry. I do not mean by this that there are sociological forces within the community of legal scholars that influence the award of benefits and the allocation of grant funding so that at a given time some ideas and theories may be advantaged over others, as might well occur in the fields of physics or chemistry.\textsuperscript{121} I mean instead volumes designed to aid in the actual practice of tax law. I observed not a single title that in any way suggested that the book included explanations of the presence of various provisions of the tax code of the sort suggested here.\textsuperscript{120} See generally BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 9-27 (9th ed. 2007) (discussing the policy and philosophy underlying tax law treatise). Again, a perusal of the table of contents and the introductory chapter of most any current tax law treatise, or a popular law treatise in any substantive doctrinal area for that matter, will make the point. See e.g., id. at ix-xxxiii. Hopkins identifies six basic rationales for qualification of tax-exempt status, including a political philosophy rationale that occupies an entire section of the book. \textit{Id.} at 12-21. However, the very first rationale that he identifies is that, “a nonprofit entity is exempt because Congress wrote a provision in the Internal Revenue Code according exemption to it. Thus, some organizations are exempt for no more engaging reason than that Congress said so.” \textit{Id.} at 10. There is little doubt that there exists some specific reason, a possibly quite interesting story, of why and how each of these provisions came to achieve the status of federal law. There is also, however, equally little doubt that Mr. Hopkins, the author or coauthor of twenty books in this area, is correct in his judgment that such explanations are not an important part of the reason that readers seek out this treatise. \textit{Id.} at ix.

\textsuperscript{121} See John Raisian & William O'Keefe, \textit{Foreword} to POLITICIZING SCIENCE: THE ALCHEMY OF POLICYMAKING, at vii –ix (Michael Gough ed., 2003) (“Scientists, eager to continue their research, are influenced to propose research that they judge is most likely to obtain government funding. Others elect to pursue funding from regulatory agencies, possibly thinking that results and conclusions that support instituting or expanding of regulations may be more likely to be rewarded with continued funding. Political-scientific interactions are part of the modern world.”); see also ALAN FRANCIS CHALMERS, WHAT IS THIS THING CALLED SCIENCE? 104 (1976) (“In many respects, the production and appraisal of scientific knowledge is a complex social activity.”); JEROME R.
that broad vistas of accurate description of the making of law and its implementation are simply of little value within the realm of legal scholarship, such as the tax treatise illustration above.

Legal scholarship operates within the context of an active and practical complex of social systems in which authoritative law is created, maintained and applied to discrete cases with outcomes that have serious consequences for individuals. There are, as with any such complex social system, important conventions and shared understandings that play an important role in making the system operate reasonably well: Existing law is largely coherent and rational; on the whole, it seeks to further important social values; those who administer the law and make critical decisions are, overwhelmingly, striving to be fair and impartial and are competent at performing the function. Descriptive legal scholarship, no matter how accurate and true, that constantly challenges and contests these working assumptions is simply not very useful, and it is, as a practical matter, not much valued in our current environment.

As a final illustration of this point, imagine that a series of newspaper articles reveal convincingly that a large percentage of the trial and appellate judges currently working in a given city regularly accept bribes from lawyers practicing before them and regularly respond to the receipt of these

RAVETZ, SCIENTIFIC KNOWLEDGE AND ITS SOCIAL PROBLEMS 81 (1971) (stating that scientific knowledge is "achieved by a complex social endeavor").

122. See HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS 1378 (William Eskridge & Philip Frickey eds., 1994) (1958) (arguing that the legislative purpose behind a statute should be determined by, "a court trying to put itself in imagination in the position of the legislature which enacted the measure. . . . The court, however, should not do this in the mood of a cynical political observer, taking account of the short-run currents of political expediency that swirl around any legislative session. . . . It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably. . . . It should presume conclusively that these persons, whether or not entertaining concepts of reasonableness shared by the court, were trying responsibly and in good faith to discharge their constitutional powers and duties.").

123. See Gordon, supra note 97, at 2105 ("[T]he dominant tone of scholarship is one of earnest high-mindedness about the legal system, a sustained and rather mystifying optimism. If anything, in my view, it is all much too soft-edged and sunny, far too sparing of the dark and bitter realities of legal institutions and the social worlds in which they work.").
bribes by ruling in these lawyers' favor. What could reasonably be done with this in the realm of legal scholarship? An article detailing the various ways in which attorneys who are so inclined are able to identify judges who may be receptive to bribes and the methods by which the bribes can be successfully covertly transferred and the corresponding benefits assured? An article suggesting ways in which opposing counsel might come to suspect that the judge in her case is being bribed by opposing counsel? A scrupulous review of the existing precedent in that jurisdiction that could be the product of this tainted process? Not likely. The only plausible bit of legal scholarship that is likely to emerge from such revelations is an article outlining the various rules of judicial conduct and criminal law that are likely to have been violated by this conduct and

124. While the hypothetical is intentionally exaggerated to make a larger point, a recent article in the Los Angeles Times, on judicial corruption in Las Vegas, suggests that it may not be as much of an exaggeration as we might hope. See Michael J. Goodman & William C. Rempel, In Las Vegas, They're Playing with a Stacked Judicial Deck, L.A. TIMES, June 8, 2006, available at http://www.latimes.com/news/politics/la-na-vegas8jun08,1,7420641.story. In any case, instances of individual judges accepting bribes in exchange for influencing the outcome of litigation is hardly unknown. See, e.g., Michael Brick, Brooklyn: Ex-Judge Ordered to Prison, N.Y. TIMES, June 21, 2007, at B6 (reporting on the conviction of a former State Supreme Court Judge, Gerald Garson, who was convicted of accepting bribes to manipulate the outcome of matrimonial cases in his Brooklyn court). Very recently, a well known and successful personal injury attorney was indicted on federal conspiracy and bribery charges for allegedly offering a judge $50,000 to influence the outcome of a fee dispute. Nelson D. Schwartz, Court Intrigue for the King of Torts, N.Y. TIMES, Dec. 9, 2007, at C1.

125. A search conducted on the Westlaw research service on July 30, 2007, revealed only eleven law review articles with any of the words "judge," "judiciary" or "judicial" and either of the words "bribe" or "corruption" in the title. Four of these articles are not concerned with the possible bribing of judges at all and simply happen to have the target terms in their title. Four of the articles appear in international law journals and are not focused on the United States. One is a very short synopsis of a book that contains the target terms in its title. This means that among the vast number of law review articles currently available on Westlaw, only two, by the evidence of their titles, deal directly with the possibility or the fact of judicial corruption in this country. See Thomas M. DiBiagio, Judicial Corruption, The Right to a Fair Trial, and the Application of Plain Error Review: Requiring Clear and Convincing Evidence of Actual Prejudice or Should We Settle for Justice in the Dark?, 25 AM. J. CRIM. L. 595 (1998); Ian Ayres, The Twin Faces of Judicial Corruption: Extortion and Bribery, 74 DENV. U. L. REV. 1231 (1997). As it turns out, these two articles were published in consecutive years and both are reactions to the same incident of judicial misconduct. See id.
the professional disciplinary and criminal procedures that will come into play in their enforcement.\textsuperscript{126}

This same response by legal scholars could be expected, and can been observed, to reports of significant misconduct by legislators in the crafting of statutory law.\textsuperscript{127} One can read a great deal of legal scholarship focused on statutory acts, statutory schemes and various theories of statutory interpretation without encountering much sustained attention to the role of sophisticated lobbyists, special interests, logrolling or earmarking in the formation of that legislation, or the implications of such routine legislative influences on the possible interpretation of the resulting law.\textsuperscript{128} Descriptive legal scholarship, at least thus far, is work for which there is a severe lack of empirical data.\textsuperscript{129}

\textsuperscript{126} See, e.g., James R. Wolf, Judicial Discipline in Florida: The Cost of Misconduct, 30 NOVA L. REV. 349 (2006) (discussing the penalties available for judicial misconduct, the factors used to determine the appropriate penalty, and the goal of punishment); Charles Gardner Geyh, Informal Methods of Judicial Discipline, 142 U. PA. L. REV. 243 (1993) (exploring the circumstances in which informal and quasi-disciplinary mechanisms are used, how well they work and setting forth proposals to improve or modify their operation).

\textsuperscript{127} See, e.g., Philip Rucker, Former Senator Pleads Guilty to Racketeering, WASH. POST, July 25, 2007, at B2 (“Former Maryland state senator Thomas L. Bromwell pleaded guilty Tuesday to federal racketeering and tax crimes, admitting that he used his influence as a lawmaker to benefit a prominent contractor in exchange for secret payments of more than $190,000.”); Editorial, Mr. Jefferson Indicted; Prosecutors Allege He Took Much More Than the $90,000 Seized from His Freezer, WASH. POST, June 5, 2007, at A16 (“To read the indictment of Rep. William J. Jefferson is to wonder how, if the allegations are true, the Louisiana Democrat, so busy soliciting and dispensing bribes, had any time left over for his day job.”).

\textsuperscript{128} See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14, 20 (1994) (“Traditional legal writers have no theory of legislatures in general or of enacting coalitions in particular. Without such a theory statutory archaeologists lack a methodology for linking up their approaches with democratically legitimate expressions of preferences by the legislature, an unruly and incoherent group.”).

I do not mean to say here that legal scholars and legal scholarship have failed to notice that lobbyists, special interest groups, logrolling and earmarking are a regular part of the legislative process. Certainly not. But most of the focus of such attention, when it occurs, is in service to considerations of the optimal set of legal regulations for the legislative process itself, as in public choice theory. See, e.g., NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW 84-100 (1997). Attention to such aspects of legislative lawmaking is not much present in the field of statutory interpretation, even in those schools of statutory interpretation that seek to identify the reasons why the legislature actually adopted the law, because such factors, no matter how practically influential they may have been, are simply not helpful to the practical professional task of interpreting and applying the statute. ESKRIDGE, supra at 19-21 (“To the extent that conventional intent is
that overwhelmingly seeks to explain and to understand the law from the perspective, and within the working context, of the legal profession.129

C. An Alternative Approach to Second-Order Descriptive Legal Scholarship

1. The Basic Strategy

Given these various tensions, one can see that a different kind of second level descriptive scholarship can be imagined that might satisfy both the intellectual demands of realism and the more practical demands of students, attorneys and judges. Moreover, this kind of descriptive legal scholarship would fit perfectly within the traditional jurisdiction of the legal scholar. Such second level descriptive scholarship would attempt to depict existing doctrinal law in a given area as the expression of an underlying, even if unarticulated, set of social goals or principles.

Thus, for example, the common law rules regarding the tort law cause of action of negligence are described as being designed to encourage efficient, but not excessive, levels of precautionary investment.130 Traditional contract law doctrine is described as being designed to maximize beneficial reliance.131 Property law doctrines dealing with private nuisance are described as being designed to place the burden

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129. See Gordon, supra note 97, at 2112 ("Legal scholarship is still primarily the earnest and high-minded work of legal improvement. Most scholars continue to assume that the managers of the legal system want the system to work justly and efficiently and to serve its best purposes; and that when deficiencies are pointed out, and rational arguments made for amendment, concerned lawyers will respond with dialogue and collaborate in the reform effort, if necessary even against their own and their clients' immediate interests.").


131. See, e.g., L.L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages: I, 46 Yale L.J. 52, 62 (1936) (discussing traditional contract doctrine and stating, "[t]he juristic explanation in its final form is then twofold. It rests on the protection accorded the expectancy on (1) the need for curing and preventing the harms occasioned by reliance, and (2) on the need for facilitating reliance on business agreements."); Goetz, supra note 44.
of precaution upon the least cost avoider.  

This kind of second level descriptive legal scholarship masterfully combines an implicit rejection of precedent based logical formalism in a way that satisfies the demands of realism with a wholehearted embrace of the ultimate rationality, coherence and purposefulness of the law that is more or less demanded by the legal scholar's professional role. The product of such an approach can be enormously complicated and sophisticated; it can avoid almost all taint of cynicism regarding the legal system and it can promise to its readers a potentially powerful guide to the likely future judgments of appellate courts.

In addition, such an approach to legal scholarship typically substitutes some set of general standards—efficiency, economic productivity, deterrence, compensation, risk spreading, beneficial reliance—for the traditional legal maxims and generalized statements of legal principle of the formalist paradigm, and then works out an explanation for the broad array of doctrine in a particular subject area by deductively reasoning from these new first principles. In this way, legal scholarship of this sort enjoys the satisfying appearance of objectivity and logical inevitability that was thought to be the hallmark of formalism in its heyday while still appearing to be consistent with post-realist perspectives. It is little wonder then that such scholarship has flourished, and perhaps can fairly be said to have dominated the field during the past forty or fifty years.

132. See Ronald Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960) (arguing that actions of business firms which have harmful effects on others are problems of "reciprocal nature" and "[t]he real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?").

133. See Francesco Parisi, Introduction: The Legacy of Richard A. Posner and the Methodology of Law and Economics, in RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF THE LAW, at i, xviii (Francesco Parisi ed., 2000) ("One of the leading themes of law and economics is that the common law process generates efficient rules . . . . The efficiency hypothesis has become an important focal point among law and economics scholars. The efficiency hypothesis suggests that the common law . . . is the result of an effort, conscious or not, to induce efficient outcomes.").

134. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (applying the principles of law and economics to common law torts, formulating tort laws designed to maximize efficiency and comparing the results to existing laws); Richard A. Posner, A Theory of Negligence, 1 J. LEGAL STUD. 29 (1972); POSNER, supra note 132.

135. See BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 177 (Sweet &
2. The Problem of Verifiability

Descriptive scholarship of this sort makes a most remarkable claim. It purports to discover retrospectively the real, genuine, internal calculus of decision-making employed by courts in creating and refining common law over hundreds of years, when the courts that actually produced this vast body of doctrine were required to explain their decision-making process in writing and made relatively scant, if any, mention of the general standards and principles that it is suggested they were pursuing all along.136 The existence of unconscious processes of this sort exerting such a strong and systematic influence upon a particular individual’s outward behavior may seem plausible after Freud,137 and one can also imagine a specific public decision maker being less than fully candid about the reasons for coming to a given conclusion, but the claim is quite hard to accept when it is generally applied to the professional work of thousands of appellate court judges operating largely independently over hundreds of years.138

Furthermore, as a descriptive effort, it is difficult to know just how the claims of such legal scholarship could be definitively refuted.139 It hardly seems fair to such work to

Maxwell, Ltd., 2d ed. 1999) ("In the United States, no approach to law in recent decades has been more influential than the economic analysis of law . . . . It dominates thinking about antitrust law, tort law, and most commercial law areas. Even areas of the law which would seem uncongenial to economic analysis, like domestic relations (family law), criminal law, and constitutional law (civil liberties), have had significant contributions by law and economic analyses. There seem to be no domains free from attempts to apply this approach.").

136. See Fiss, supra note 9, at 8 ("Judges do not see themselves as instruments of efficiency, but rather as engaged in a process of trying to understand and protect the values embodied in the law.").


139. See George P. Fletcher, Two Modes of Legal Thought, 90 Yale L.J. 970, 973 (1981) ("If the Supreme Court declares the meaning of the Constitution, we might question the political wisdom of the decision, but one could hardly say that the Court's statement was true or false. The Court cannot declare what
say that it is somehow wrong and discredited because not all
of the traditional legal doctrine in a given area conforms to
the suggested general principles.\footnote{140} Surely it still remains a
remarkable thing to be shown just how much of the common
law of torts, contracts and property conforms to the
expectations and predictions of law and economics, even if
every last doctrine, or even some significant segments of a
particular body of law, does not do so.

But to judge this kind of work as important and valuable
on this basis, as it unquestionably is, is to acknowledge that it
is not descriptive analysis in the usual, traditional academic
sense.\footnote{141} Unlike an attempt, say, to describe a natural
phenomenon,\footnote{142} the failure of this kind of legal scholarship to
explain the presence of three or four visible characteristics
and to be unable to precisely predict the response of the object
of study to certain stimuli is apparently not fatal to its
perceived value as a descriptive thesis.\footnote{143}

This kind of second order descriptive legal scholarship
does not claim to offer a complete and accurate explanation
for the common law in any given substantive area, and thus

\footnote{140. \textit{See} ALAN CALNAN, \textit{A Revisionist History of Tort Law: From
Holmesian Realism to Neoclassical Rationalism} 75 (2005) (commenting on
Posner, \textit{A Theory of Negligence}, supra note 133, “[h]ad courts openly proclaimed
their economic intentions, Posner’s approach might have served him well. But
this was not the case. Of the over 1500 appellate cases Posner examined, none
explicitly adopted an economic analysis of negligence.”); Fiss, \textit{supra} note 9, at 3
(“The efficiency hypothesis always seemed weak. The evidence marshaled has
not been wholly convincing; the exceptions seemed almost as important as what
purported to be the generalization, and although a story might be told as to how
a particular rule . . . served efficiency, it also seems possible to tell a similar
story about the opposite rule.”).

141. \textit{See} Alex C. Michalos, \textit{Philosophy of Science: Historical, Social and Value
Aspects, in A Guide to the Culture of Science, Technology, and Medicine

142. \textit{See, e.g.,} DAVID EISENBERG \& WALTER KAUMANN, \textit{The Structure and

143. Karl Popper is generally credited with recognizing and emphasizing the
critical role of falsification in the development of descriptive science. \textit{See} KARL
RAIMUND POPPER, \textit{Conjectures and Refutations: The Growth of
Scientific Knowledge} (2d ed. 1965); \textit{see also} WILLIAM BECHTEL, \textit{Philosophy
of Science} 33-34 (1988) (“A scientist should begin by making hypotheses about
how the world is and then seek to disprove them. If the hypothesis is disproved,
then it should be discarded . . . True scientific theories are ones that can be put
to critical tests where we can specify in advance what would count against the
theory.”).}
its failure to fully account for all aspects of the doctrine under examination, or to predict all future movements in the law, should not significantly diminish its importance or its value.\textsuperscript{144} It is not, then, like a descriptive account of the physical communication among bees in a hive,\textsuperscript{145} or the movement of stars and planets.\textsuperscript{146} There is not really an expectation that further research and discovery will result in the refinement of a unified set of principles that can fully account for all of the law of contract, or torts, or property.\textsuperscript{147} Nor is there really any prospect of additional data being revealed that will somehow definitively refute these kinds of descriptive theories.\textsuperscript{148} That traditional tort law doctrine can be characterized as advancing values like economic efficiency, or risk spreading, or corrective justice, is interesting and important even if it is thought that such descriptions do not fully and completely account for all of the existing doctrine.\textsuperscript{149}

\begin{footnotes}
\item[144.] See Eric Brousseau & Jean-Michel Glachant, The Economics of Contracts and the Renewal of Economics, in \textsc{The Economics of Contracts: Theories and Applications} 26 (Eric Brousseau & Jean-Michel Glachant eds., 2002) ("The difficulty of formulating testable propositions is only one of the problems encountered when testing theories of contracts."); Oliver Hart & Bengt Holmstrom, The Theory of Contracts, in \textsc{Advances in Economic Theory: Fifth World Congress 71-155} (Truman Bewley ed., 1987) (expressing regret at the absence of empirical verification of the economics of contracts).
\item[146.] See George W. Collins II, \textsc{The Fundamentals of Stellar Astrophysics} (1989).
\item[147.] See Fiss, supra note 9, at 5; George P. Fletcher, \textsc{Two Modes of Legal Thought}, 90 \textsc{Yale L.J.} 970, 973 (1981) ("Scientific theories are not built out of claims about what is the 'sensible' or 'rational' thing for someone to do, but instead require an identification or description of those observable features of the environment that systematically lead people to behave the way they do (regardless of what they say about their beliefs or anything else). That Posner and his colleagues never provided . . . . The theory of 'sensible objectives' fails to supply the explanatory mechanism needed to give the 'law is efficient' hypothesis predictive validity, or even descriptive credibility.").
\item[148.] See Carl G. Hempel, \textsc{Studies in the Logic of Confirmation}, in \textsc{Readings in the Philosophy of Science} 384 (Baruch A. Brody ed., 1970) ("The defining characteristic of an empirical statement is its capability of being tested by a confrontation with experimental finding, i.e., with the results of suitable experiments or 'focused' observations. This feature distinguishes statements which have empirical content both from the statements of the formal sciences, logic and mathematics, which require no experimental test for their validation, and from the formulations of transemipirical metaphysics, which do not admit of any.").
\item[149.] See Jack M. Balkin, \textsc{Too Good to Be True: The Positive Economic Theory}
If attempts to describe the law in this way are not like descriptive efforts in the natural sciences, where the basic measure of success is the degree to which the explanation accounts for observable features and predicts future action, then how should they be viewed? On what basis can they be evaluated? How should one determine if a descriptive theory of this sort is improved by a suggested refinement?

There are at least two possibilities that can serve as instructive examples. One is non-empirical descriptive work in sociology and psychology. Here, as in law, academics look at complex human phenomena and attempt to describe or to characterize them in a meaningful way. The work is intended to offer important insights and perspectives on the subject but does not set forth a verifiable, or refutable, descriptive account. The work of Sigmund Freud, for example, is incredibly powerful and has been enormously influential irrespective of whether it is, in modern scientific terms, strictly accurate and true. The same can be said for


151. See Herbert L. Costner, Theory, Deduction, and Rules of Correspondence, in CAUSAL MODELS IN THE SOCIAL SCIENCES 229-50 (Hubert M. Blalock, Jr. ed., 1985) (“Traditionally, sociological theorists have focused on abstractions with loose and ill-defined implications about matters of fact.”).


153. See THOMAS TEO, THE CRITIQUE OF PSYCHOLOGY: FROM KANT TO POSTCOLONIAL THEORY 32 (2005) (“From the perspective of human-scientific psychology, the problem lies in what is considered the solution in natural-scientific psychology: The conceptualization of psychology as a natural science is the problem because it does not do justice to the specific subject matter of psychology, and the unique, fundamentally and qualitatively different relationship between researcher and research object in psychology and the natural sciences.”).

154. See SCOTT L. MONTGOMERY, THE SCIENTIFIC VOICE 361 (1996) (“Sigmund Freud, founder of psychoanalysis, reformer of Western concepts of the individual, the family, and their deformations, is quite possibly the most influential writer of the 20th century. No other author has had his ideas permeate public sensibility to such a degree.”); FRANK J. SULLOWAY, FREUD, BIOLOGIST OF THE MIND: BEYOND THE PSYCHOANALYTIC LEGEND 500 (1979) (“Perhaps only Aristotle and Darwin have equated Freud’s marriage of theory and observation in the broad realm of the life sciences.”); see also PETER D.
the work of Carl Jung. Which is the superior account? By what criteria should one go about answering that question? Given the ways in which both thinkers have enriched the culture and added to our insights into human psychology, does this question have any real practical meaning?

Another, not inconsistent, but perhaps more controversial approach to examining this kind of second order legal scholarship is to treat it as being analogous to the academic discipline of literary criticism. Both disciplines look at a large written canon and seek to comment insightfully upon it. Neither necessarily believes that only the conscious intentions of the individual authors of the work...
should control its appropriate interpretation. The identification and explication of overarching or underlying themes in the cannon is highly valued. Counterintuitive and novel insights and perspectives, if plausible, are also valued highly. Creativity and elegance of expression matter. The degree to which a descriptive theory or insight can thoroughly account for every aspect of the texts under consideration matters little. Empirical verifiability is more or less irrelevant.

Like non-empirical work in psychology and sociology, and academic work in literary criticism, the quality and value of second-order descriptive legal scholarship will inevitably be determined by a consensus of opinion in the relevant community. Beyond the very fundamentals, like logical

160. See Ann Jefferson & David Robey, Introduction, in MODERN LITERARY THEORY 7-8 (Ann Jefferson & David Robey eds., 2d ed. 1991) (1982) ("What writers think about literature in most cases has a limited bearing on the way in which critics and scholars approach the subject. In dealing with a given author literary studies have traditionally paid considerable attention to his views on writing, but only as part of the 'background' to his work. These views have been used to explain his motives or intentions, and to account for the peculiar character of his texts, but on the whole they have not fundamentally affected the way in which these texts, or those of any other author, have been treated.").

161. See Gordon, supra note 97, at 2105 ("Scholars aim to make structural connections across practice specialties and doctrinal categories, for example to show the commonalities of tort, contract, property, competition, and labor rules. They aim to understand the structural and historical determinants of legal policies and practices, to understand how these came to be the way they are.").

162. See Victor A. Kramer, Introduction, in AMERICAN CRITICS AT WORK: EXAMINATIONS OF CONTEMPORARY LITERARY THEORIES 3 (Victor A. Kramer ed., 1984) ("[S]o many contemporary critics and theorists keep celebrating the complexity of texts which reveal more than we might suspect, or even sometimes wish. This fact of surprise is basic to the critical act.").

163. See Raymond Tallis, Evidence-Based and Evidence-Free Generalizations: A Tale of Two Cultures, in THE ARTS AND SCIENCES OF CRITICISM 71-93 (David Fuller & Patricia Waugh eds., 1999) ("[T]he widespread and uncritical acceptance of the evidence-free assertions of the founders of [modern literary theory] is an extension of a much longer tradition of accepting evidence-poor assertions . . . the discrepancy between the scope of the general statements made within literary and cultural studies and the minute size of the database upon which such statements are founded is not new.").

164. See LIVINGSTON, supra note 159, at 15 ("It should be clear that we do not presently possess any literary theories that fulfill such requirements [empirical testability]. . . . To say that x's essay on y was a rigorous analysis usually means that x said something incisive, that the essay was detailed, careful, accurate, and so on.").

165. See HENRY H. BAUER, SCIENTIFIC LITERACY AND THE MYTH OF THE SCIENTIFIC METHOD 88 (1992) ("The knowledge filter produces consensual knowledge, which is not the same thing as objective knowledge."); Patrick Colm
consistency and clarity of expression, the value of scholarship of this sort is in the degree to which it is considered interesting and insightful—values that are both highly contingent and perspective dependent. One can consequently expect trends and countertrends, movements and counter-movements. Rarely, if ever, will work that is considered truly important come from an unexpected source. Much of the basis for the evaluation of such work will necessarily be aesthetic.

3. An Inevitable Bias

Given this, and given the larger legal culture within which legal scholarship is produced and consumed, one would expect that over time a strong preference would develop for descriptive scholarship that seeks to show that longstanding

Hogan, The Political Economy of Criticism, in Criticism in the University 178, 181 (Gerald Guff & Reginald Gibbons eds., 1985) (“[T]he application of a literary theory cannot be said not to ‘work’ in the clear and straightforward sense in which it can be said of the application of a theory of aerodynamics . . . . There results a situation in which all literary critical adjudication is interested, and interested in a way that truth or falsity is irrelevant to the fulfillment of the interests in question.”).

166. See MARIO AUGUSTO BUNGE & RUBEN ARDILA, PHILOSOPHY OF PSYCHOLOGY 17-18 (1987) (“Indeed, philosophical psychology survives not only in philosophy departments but also in the psychology community, though marginally . . . . To be sure, occasionally one finds more interesting insights on the human mind in the writings of armchair psychologists, or even writers of fiction, than in many a rigorous but unimaginative experiment.”).


168. See MAX STEUER, THE SCIENTIFIC STUDY OF SOCIETY 26-27 (2003) (“There have been instances where someone outside the establishment has been successful in championing an idea that initially ran counter to accepted knowledge . . . . This is rare, but it can happen.”).


Doctrinal analysis today is a humane rather than scientific discipline. As in the other humanities, great emphasis is placed on writing well (sometimes on writing impressively—which is not the same thing), footnoting copiously, treating every topic exhaustively, and staying within the linguistic and conceptual parameters of the doctrines being analyzed. Soundness is valued above originality, thoroughness above brevity; originality, where it is present, tends, indeed, to be concealed.

Id. For a very similar description of the appropriate evaluative scheme to be employed in the academic field of philosophy, see JOHN PASSMORE, PHILOSOPHICAL REASONING (Basic Books 1969) (1961); Friedrich M. Waismann, How I See Philosophy, reprinted in LOGICAL POSITIVISM 345-80 (Alfred Jules Ayer ed., 1959).
legal doctrine can be understood to implicitly embrace and to promote important social values.\textsuperscript{170} For the same reasons, work that seeks to demonstrate that a certain legal doctrine, or doctrinal area, is logically incoherent, or often inappropriately applied, or applied in a manner that is inconsistent with its stated rationale, is not likely to be highly valued, at least not for long.\textsuperscript{171}

In tort law, for instance, different value will be placed on two articles addressing the special limited duty rules of negligence applicable to the owners and occupiers of land. An article that seeks to show that these rules advance efficient use of real property would be thought to be a more sophisticated and significant contribution than an article that describes the rules as an incoherent mess whose primary effect is to favor the economic interests of relatively wealthy landowners over those who are physically injured on their land.\textsuperscript{172} Similarly, an article or book that claims to identify underlying, as-yet-unstated, principles that unify and make sense of United States Supreme Court's jurisprudence regarding the dormant commerce clause would likely be more highly valued than a similar work whose main purpose was to demonstrate that the existing cases lack convincing rationale and cannot be logically reconciled.\textsuperscript{173}

Perhaps this difference in the prestige accorded to the first kind of descriptive legal scholarship over the second results from a widely held belief that the former is simply more likely to be true than the latter, that long standing common law doctrine most likely makes good sense at some

\textsuperscript{170} See CRITICAL LEGAL STUDIES, at xlv (James Boyle ed., 1992) (“Perhaps we should not start with the assumption that legal doctrine as it existed was entirely correct and entirely legitimate, and then try to fashion a theoretical cover which fitted the status quo like a slipcover on an overstuffed armchair.”).

\textsuperscript{171} See Martha T. McCluskey, Thinking with Wolves: Left Legal Theory after the Right's Rise, 54 BUFF. L. REV. 1191, 1205 (2007) (“In the conventional wisdom, the critical legal studies (CLS) movement that stirred legal academics from the mid-1970s through the late 1980s is dead . . . .”).


level, and that the search for those underlying principles—even when they are not articulated by the appellate courts themselves—is a more valuable scholarly activity than a purely negative critique of the doctrine. While possible, it could be noted that such a bias is not normally thought to be a virtue in other areas of academic work.\textsuperscript{174} For example, research into the efficacy and side effects of a new medicine should not be considered more of a contribution to the literature if the results confirm the value of the drug than if the research uncovers previously unknown harmful side effects and problematic interactions with other drugs.\textsuperscript{175}

Interestingly, one can see a similar bias in the field of literature. Work that attempts to uncover and explain previously unrecognized levels of meaning and sophistication in the works of a celebrated author, like Shakespeare, is quite likely to be viewed as more valuable than work whose thesis is that the author's use of symbolic images is in fact far less coherent and rich than is generally supposed. Similarly, one can suspect that both Freud and Jung have had a more powerful and lasting impact on the broader culture than has B. F. Skinner in part because their depictions of human nature are so much more attractive and appealing than the one offered by behaviorism.\textsuperscript{176} This, despite the fact that

\textsuperscript{174} See Steuer, supra note 168, at 41 ("One would expect much of scientific research to have the potential of furthering the generally accepted ends of the society in which it takes place . . . . While being aware of the ever present, and often hard to detect, influences away from objective results, social scientists should and do aim to reduce the amount of bias in their work.").

\textsuperscript{175} See Andrew A. Toole, Does Public Scientific Research Complement Private Investment in Research and Development in the Pharmaceutical Industry?, 50 J.L. & ECON. 81, 85 (2007) ("If a particular compound is shown to be toxic or ineffective . . . . the knowledge gained about a compound's absorption, toxicity, elimination, side effects, and efficacy may provide valuable information to industry scientists. Using the specific knowledge gained from a publicly supported clinical trial, industry researchers might investigate a modified compound from the same chemical family or a modified dosage regime and find a safe and effective drug."); see also Bernard Barber, The Case of the Floppy-Eared Rabbits, 64 AM. J. SOC. 128 (1958).

\textsuperscript{176} See Daniel W. Bjork, B.F. Skinner: A Life, at xi (1993) ("To his most fervent opponents, Skinner was the Darth Vader of American psychology, perhaps even the Hitler of late-twentieth century science itself – a man whose science of conditioning threatened the dearest humanistic traditions, indeed, those that made life most worth living."). I visited three large retail bookstores in the Washington, DC area in July 2007. On the shelves of these three stores were an average of twelve different books authored by Sigmund Freud, nine different books authored by Carl Jung and only one book at only one store
Skinner's work has yielded far more in the way of empirically verifiable predictions and results.\textsuperscript{177}

In the field of legal scholarship, the value of descriptive academic work to judges, to practicing attorneys, and to law students is simply much greater if it helps them to better understand, to rationalize, and to manipulate existing legal doctrine than if it describes that same doctrine as a product of flawed logic, an inconsistent line of cases, or extra-judicial social influences. This difference in the relative value of the work to the bench, the bar and to law students is largely independent of whether the one account or the other is actually more convincing, or more accurate.\textsuperscript{178} Because the necessary currency of the realm of daily practice before courts is the fundamental rationality and reasonableness of existing legal doctrine, sophisticated descriptive legal scholarship that produces the consequence of legitimizing and rationalizing existing law is considered more valuable, and is thus likely to garner greater prestige, than more critical work, irrespective of the likely underlying accuracy of the description.\textsuperscript{179}

\textsuperscript{177} See Leslie Spencer Hearndshaw, The Shaping of Modern Psychology 219 (1987) ("Within the limits of the rigidly controlled experimental situations and the insulated Skinner boxes with which he works he has undoubtedly produced convincing results . . ."); Richard Evans, Jung on Elementary Psychology (1979) ("On the whole, American psychologists found Jung's work too mystical and philosophical to satisfy their criteria for sound, scientific research. In fact, it is interesting to note that at that time, Jung's ideas were more characteristically heralded by members of philosophy and English departments in universities than by the inhabitants of psychology departments."); see generally Burrkus Frederic Skinner, Beyond Freedom and Dignity (1971) (arguing that our traditional concepts of freedom and dignity are responsible for the futile defense of a presumed free and autonomous individual and are blocking the development of more effective cultural practices); Burrkus Frederic Skinner, About Behaviorism (1974) (setting forth the general principles of Behaviorism, proposing that all things that organisms do can and should be regarded as behaviors).

\textsuperscript{178} See Tamanaha, supra note 19, at 236 (arguing with respect to the realist critique of formalism that, "[t]he threat to the rule of law posed by this complex of ideas is not that judges are incapable of rendering decisions in an objective fashion. Rather, the threat is that judges came to believe that it cannot be done or that fellow judges are not doing it. This skepticism, if it becomes pervasive among lawyers, judges, and the public, will precipitate a self-fulfilling collapse in the rule of law.").

\textsuperscript{179} See Alan D. Freeman, Truth and Mystification in Legal Scholarship, 90 Yale L.J. 1229, 1235-36 (1981) ("[T]he production of liberal scholarship is really
4. Increasing Specialization and a Narrowing of Focus

Second order descriptive legal scholarship of the sort described above is likely to share one further characteristic with the field of academic literary studies, which is a tendency towards increasing narrowness and hyper-specialization over time. After all, the canon that is the subject of study in each field, while not static, is relatively stable and to some degree fixed. It has been the object of scrutiny and examination in professional academic work for a long time. Significant additions to the existing body of published material in each area are, therefore, most likely to be found in smaller and smaller niches.

For a scholar working in descriptive legal scholarship, identification of a reasonably meaningful topic that has not enjoyed sustained attention in the existing literature is no easy task. Inevitably, that opening is more likely to be found in a quite narrow or a highly specialized approach to the subject. For instance, imagine the enormous difficulty faced by a current English graduate student who is told that her dissertation must be on some aspect of the work of Shakespeare. The same would hold true for a legal scholar who is hypothetically told that her next professional article must be on the doctrine of consideration in contract law.

part of the process of fashioning a legitimating ideology that makes the world appear as if it were not the one we live in, that makes it seem legitimate . . . . The process of delegitimizing scholarship eventually reveals a world that is characterized more by conflict than by harmony, and by patterns of illegitimate hierarchy.

180. See Carrington, supra note 157, at 12 (noting “the tendency of legal scholarship to address ever smaller audiences of ever narrower experts.”).
181. See Glenn Harlan Reynolds, Book Review, 40 JURIMETRICS J. 357, 361 n.19 (2000) (“It is far easier to write the thousandth law review article on a subject than the first, or even the hundredth.”).
182. See Erik M. Jensen, Food for Thought and Thoughts About Food: Can Meals and Lodging Provided to Domestic Servants be for the Convenience of the Employer?, 65 IND. L.J. 639, 639 (1990) (“Authors of law review articles search long and hard for subjects in which no reasonable human being should be interested; most succeed in their quest.”).
183. See Dennis J. Turner, Publish or be Damned, 31 J. LEGAL EDUC. 550, 554 n.11 (1981) (“The lack of quality [of law review articles] is not surprising when one considers the various techniques employed by professors in writing articles. For example, the process of selecting a topic is often the ‘what’s left’ approach. This method entails looking over the field and picking out an obscure issue that has not been the subject of a 60 page article.”).
184. See Scordato, supra note 102, at 376-79.
185. Other publicly identified candidates for topics that have been heavily
A number of consequences flow from this ever greater narrowing of the focus and perspective of much of descriptive legal scholarship. One consequence is that, over time, significant energy is sapped from the enterprise. From an academic perspective, we are now more than a half decade into the paradigm shift from formalism to instrumentalism occasioned by realism. The basic realist critique has been by now frequently stated and restated and has been applied to a wide variety of legal fields and materials. The most likely instrumentalist accounts of nearly every area of legal doctrine have been developed and reviewed and challenged. This is not to say that more interesting and productive work in these areas is not to be expected, but it does mean that the great majority of the work now being done is primarily in the fine stitching.  

Perhaps as a result, a kind of cold-eyed careerism seems to be pervasive in the legal academy, with the greatest excitement and tumult being reserved for the annual publication of law school rankings in U.S. News and the ever increasing lateral movement of individual faculty members among the more elite institutions. It has been some time analyzed in the legal literature include sovereignty in international law and international relations, regulatory takings pursuant to the Fifth Amendment's Takings Clause and corporate charter competition. See Winston P. Nagan & Craig Hammer, The Changing Character of Sovereignty in International Law and International Relations, 43 COLUM. J. TRANSNAT'L L. 141 (2004); Carol M. Rose, A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation, 53 WASH. & LEE L. REV. 265 (1996); John C. Coffee, Jr., Richard Booth, R. Franklin Balotti, David C. McBride & Edward P. Welch, The Direction of Corporate Law: The Scholars Perspective, 25 DEL. J. CORP. L. 79, 88 (2000).

186. John E. Nowak, Woe Unto You, Law Reviews!, 27 ARIZ. L. REV. 317, 320 (1985) (“One of my favorite persons in the profession . . . described to me how to become a successful professor with a national reputation when I was a fledgling professor. He said: ‘Take an obscure little problem that no one has thought much about, blow it out of all proportion, and solve it, preferably several times, in prestigious law reviews.’”).

187. See William Henderson & Andrew Morriss, Rank Economics: Law School Faculty Members Love to Hate the U.S. News Rankings, But for Law Students, Job Prospects Rule, and U.S. News has Valuable Info for Them, 29 AM. LAW. 81, 81 (June 2007) (“As the importance of the U.S. News rankings increases, so does the incentive to game the system. Law faculties may love to hate the rankings, but they pay attention to them because the rankings affect the enrollment decisions of law students and the happiness of alumni and administrators. Unfortunately, some of the measures that some law schools have taken to improve their status seem like the equivalent of using a particularly dodgy tax shelter.”).
since a book or a law review article has been excitedly passed from hand to hand and treated as virtually required reading among law professors not working in that same subject area. Though political affiliations may still matter, it appears that no one with the right credentials and a sufficiently long list of publications is any longer in danger of not being hired because of their jurisprudential commitments.

A second likely consequence of this narrowing of field and focus in descriptive legal scholarship is a reduction in the attention that this work attracts in the larger culture, and an attendant reduction in its general influence. The notice and description of recently published academic work in medicine, genetics, finance and psychology is commonplace in the popular press and broadcast media. Not nearly so much, if at all, with legal scholarship, despite the law being, at least on its face, a far more practical and accessible subject. This also despite lawyers and legal processes being the focus of countless dramatic programs on television and the consistent and sustained coverage that specific legal cases receive in broadcast and print news.

Id.; see also Leigh Jones, Fall Forecast: Top Law Schools Ready for Flood of Job Changes, N.Y. L.J., July 6, 2007, at 19 (“Among the top 15 or so [law] schools, rampant raiding for tenured faculty is under way, with the schools ranked the highest by U.S. News & World Report -- often the same group with gargantuan endowments -- feeding on those below them. Moreover, shuffling is more frequent among professors at the very top schools as they trade places between Columbia, Harvard, Yale, Stanford and NYU.”)

188. See Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 35 (1992) ("[I]t is my impression that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy."); see generally Kenneth Lasson, Scholarship Amok: Excesses in Pursuit of Truth and Tenure, 103 Harv. L. Rev. 926 (1990) ("The lead articles themselves are often overwhelming collections of minutiae, perhaps substantively relevant at some point in time to an individual practitioner or two way out in the hinterlands -- and that almost entirely by chance. Otherwise they are relegated to oblivion, or if luck to a passing but see in someone else's obscure piece.").


190. See TIMOTHY O. LENZ, 7 CHANGING IMAGES OF LAW IN FILM & TELEVISION CRIME STORIES (David A. Schultz ed., 2003) (arguing that because images of popular legal fiction are ubiquitous, such programs can shape and affect viewers' opinions of criminal justice); ELAYNE RAPPING, LAW AND JUSTICE AS SEEN ON TV (2003) (describing the changing tide of the way lawyers are depicted on television programs); PRIME TIME LAW: FICTIONAL TELEVISION AS
This current relative lack of influence, perhaps even relevance, of descriptive legal scholarship on the larger culture may well extend to the practicing parts of the legal community itself.\textsuperscript{191} Very recently, a group of federal judges speaking at a symposium made it quite clear that they find very little value in current legal scholarship.\textsuperscript{192} An account of the conference in The New York Times included the following:

'I haven't opened up a law review in years,' said Chief Judge Dennis G. Jacobs of the federal appeals court in New York. 'No one speaks of them. No one relies on them.' In a cheerfully dismissive presentation, Judge Jacobs and six of his colleagues on the United States Court of Appeals for the Second Circuit said in a lecture hall jammed with law professors at the Benjamin N. Cardozo School of Law this month that their scholarship no longer had any impact on the courts.\textsuperscript{193}

This narrowing and specializing of descriptive legal scholarship also causes greater conflict between a law professor's role as a legal scholar and her role as a teacher of law students.\textsuperscript{194} In core law school courses, students are generally introduced to the subject matter of the course, led through a broad survey of the legal doctrine in the area and exposed to at least the conventional understandings, theories, controversies and open questions in the field. The approach to the material that is likely to be most effective in

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\textsc{Legal Narrative} (Robert M. Jarvis & Paul R. Joseph eds., 1998) (examining the way lawyers are portrayed in television dramas and comedies); \textsc{Thomas Leitch, Perry Mason: Contemporary Approaches to Film and Television Series} (2005).
\end{flushleft}

\textsuperscript{191} See Ronen Perry, \textit{The Relative Value of Law Reviews: Refinement and Implementation}, 39 \textsc{Conn. L. Rev.} 1, 26-27 (2006) (noting that much legal scholarship is never used); William D. Henderson & Andrew P. Morriss, \textit{Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era}, 81 \textsc{Ind. L.J.} 163, 192-93 (2006) (describing legal scholarship as being little noticed and having only a minimal impact on a law schools' reputation ranking).


\textsuperscript{193} \textit{Id.}

\textsuperscript{194} See Scordato, \textit{supra} note 102, at 376-78.
performing this teaching function is not likely to be fertile ground for productive professional scholarship, and vice versa. Put slightly differently, the legal scholar who would be understandably dismayed to be told that their next article must be focused on the doctrine of consideration nevertheless must guide their first year contract law students to a full understanding of that doctrine, and must do so semester after semester, year after year.

A further effect of the continual flow of published insight and commentary on the same basic body of materials and the consequent difficulty of identifying promising ground to work is that scholars facing such a situation are likely to aggressively search for ways of expanding the definition of the field. In the past thirty years we have seen a virtual explosion in interest and resources devoted to international and comparative aspects of law. The same has occurred in the area of interdisciplinary work. While neither of these phenomena can reasonably be said to have been caused by the pressure of scholarly demands, both trends are entirely consistent with a strong need to expand the field of scholarly inquiry.

Another strategy that legal scholars can employ to find fresh topics for study is to move quickly to examine any newly produced legal materials. It is now rare for as much as six months to pass before formal scholarly analysis has begun to appear regarding any significant decision issued by the United States Supreme Court. Editors of law reviews have

195. Id. at 376.

196. See Steven R. Smith, A Remarkable Period in International Scholarship: Thirty Years Before the Masthead, 30 CAL. W. INT'L L.J. 209, 209 (2000); Diane P. Wood, Diffusion and Focus in International Law Scholarship, 1 CHI. J. INT'L L. 141, 141 (2000) (“[T]here are well more than seventy international law journals already being produced in the United States alone.”); see generally Jeffrey L. Dunoff, What's Wrong with International Law Scholarship?: International Legal Scholarship at the Millennium, 1 CHI. J. INT'L L. 85, 91 (2000) (categorizing international legal scholarship as “a rapidly expanding and developing field.”)

197. See Posner, supra note 80, at 1316 (“What was new was the number and density of the external approaches that began to take hold in the legal academy around 1970 and the number and seriousness of their practitioners. I shall call the new approaches “interdisciplinary,” in contrast to the “doctrinal” scholarship that until then had the field of academic law pretty much to itself.”); see generally Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, 92 AM. J. INT'L L. 367 (1998).
noted that the submission cycle following the issuance of a highly anticipated Supreme Court opinion will inevitably include dozens of articles discussing that case.

On the whole, this rapid responsiveness to new legal developments can be thought to be a positive feature of legal scholarship. Some less attractive features, however, can also be identified. One is that the rapid response to, for instance, a new Supreme Court case, can be thought to largely occupy the field. Aside from a scholar who possesses an already well established reputation and can enjoy the luxury of extended reflection, the great majority of law professors know that they must quickly produce an article discussing that case. If their article is not included in the next submission cycle, they run the risk that law review editors will have already seen the earlier submissions, will have either chosen one themselves or assumed that other reviews have, and will view the case as having already received sufficient treatment. This dynamic is likely to result in less thoughtful and less insightful published commentary on many of the most important legal cases than might otherwise have been produced, an ironic result given that few people look to law reviews for breaking legal news.

A second even less attractive feature of an environment that encourages an aggressive competitive leap by scholars to rapidly analyze and discuss important new legal developments is that this pressure, combined with the natural incentive to enhance the apparent significance of the article, will cause scholars who are examining a new phenomenon or development to make more of it than perhaps it is. Consequently, under such conditions one might expect major trends to be spotted, highlighted and advanced on a rather modest, perhaps even an inadequate, basis. Thus,

198. Posner, supra note 80, at 1321 ("Think . . . how mind-numbingly repetitious are the hundreds of articles on Roe v. Wade, now to be eclipsed it seems by a veritable avalanche of articles, most saying the same things, about Bush v. Gore.").

199. See Roger C. Cramton, "The Most Remarkable Institution:" The American Law Review, 36 J. LEGAL EDUC. 1, 8 (1986) ("Student editors prefer pieces that . . . deal with topics that are either safe and standard on the one hand, or currently faddish on the other.").

one sees the rapid rise and eventual decline in the visibility of doctrines that with greater reflection may not have possessed that much potential from the start. Just in the area of tort law, both market share liability and hedonic damages come to mind as possible examples.

V. NORMATIVE LEGAL SCHOLARSHIP IN THE POST-REALIST ERA

Does the picture for legal scholarship brighten when one turns from a consideration of descriptive scholarship to a look at normative legal scholarship? Normative scholarship is meant here to describe legal scholarship that purports to evaluate the relative quality or attractiveness of a legal doctrine or that advances a preferred legal treatment of a given problem or issue. Of course, a given work of legal scholarship may combine elements of the descriptive and the normative in the same way that it may combine first-order fads and fancies.

201. See Daniel A. Farber, Gresham’s Law of Legal Scholarship, 3 CONST. COMMENT. 307, 309 (1986) (“[A]rticles defending the status quo are much less likely to be published than articles attacking the status quo. The more sensible a legal rule, the less will be published supporting it, while articles cleverly attacking it often will be taken as brilliant insights. Thus, the law review literature will be dominated by articles taking silly positions, while the sensible positions held by most law professors usually will be underrepresented.”).


203. Compare Andrew Jay McClurg, It’s A Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 66 NOTRE DAME L. REV. 57, 113 (1990) (“The thesis of this Article has been that life has intrinsic value that should be recognized in tort law.”), with Reuben E. Slesinger, The Demise of Hedonic Damages Claims in Tort Litigation, 6 J. LEGAL ECON. 17, 25 (1996) (“It appears that the various attempts by economists, abetted by other social scientists, to introduce hedonic damages into testimony has run the course. At best, it had a short life of about 10 years”), and Victor E. Schwartz & Cary Silverman, Hedonic Damages: The Rapidly Bubbling Cauldron, 69 BROOK. L. REV. 1037, 1043 (2004) (“Most courts do agree, however, that ‘expert’ testimony on hedonic damages has no place in the courtroom and that hedonic damages are not available in wrongful death or survival actions.”).
description with second-order description, but the distinction remains meaningful.\textsuperscript{204}

A. Formalist and Quasi-Formalist Models

Under a formalist paradigm, there is not much difference in the basic analytical approach that a scholar would be expected to take when engaging in either descriptive or normative work. Both would be grounded on an application of traditional, precedent-based, facially logical legal analysis.\textsuperscript{205} For example, a legal scholar working in the formalist tradition who is examining a particular appellate court opinion might begin by describing the formalist analysis set forth by the court. She might then evaluate the soundness of the court’s analysis and critique it, offering suggestions for improvement in the future treatment of the issue. The primary tool employed by this scholar in pursuing this work, either the description of the court’s analysis or her own evaluation of it, is traditional legal analysis, looking primarily to existing precedent and principle and applying inductive and deductive logic to generate conclusions.\textsuperscript{206}

Because the essential intellectual skill used in this work is traditional legal analysis, it seems both appropriate and inevitable that it be the professional work of law professors. This is the central intellectual skill that they were taught as

\begin{thebibliography}{99}
\bibitem{204} See Stefan Vogenauer, \textit{An Empire of Light?}, 26 OXFORD J. LEGAL STUD. 627, 658 (2006) ("There is widespread agreement that scholarship should be both descriptive and normative . . . ."); Michael Heise, \textit{The Importance of Being Empirical}, 26 PEPP. L. REV. 807, 814 (1999) ("It is at least hoped that empirical scholarship can more easily separate the normative from the descriptive and better maintain neutrality. Of course, this remains just a hope.").

\bibitem{205} Leiter, supra note 35, at 1145 ("Pure formalists view the judicial system as if it were a giant syllogism machine, with a determinate, externally-mandated legal rule supplying the major premise, and objectively ‘true’ pre-existing facts providing the minor premise. The judge’s job is to act as a highly skilled mechanic with significant responsibility for identifying the ‘right’ externally-mandated rule, but with little legitimate discretion over the choice of the rule.").

\bibitem{206} Cox, supra note 48, at 69 ("The formalist adjudicative theory thus depicted entails a deductive procedure. It is deductive in the sense that a rule as a major premise and a set of facts as a minor premise generates a right answer."); Wilson Huhn, \textit{The Stages of Legal Reasoning: Formalism, Analogy, and Realism}, 48 VILL. L. REV. 305, 309 (2003) ("Formalist arguments are deductive in nature, and conform to the structure of a syllogism of deductive logic: the rule of law is the major premise, the facts of the case are the minor premise, and the legal result is the conclusion.").
\end{thebibliography}
students in law school and that they now teach their students in law school courses. The universe of materials required by the legal scholar working within a formalist paradigm is all more or less readily available in the law library.207

This basic approach to normative work is substantially the same for that class of post-realist scholarship that functionally substitutes a defined set of abstract values and goals for formalist precedent and principle as described above in Section IV.C.1.208 The scholar starts with the assumption that a fundamental goal of legal doctrine in a given area is, or should be, the pursuit of certain conditions, such as the maximizing of efficiency in a way that will support increased economic productivity.209 Or the scholar begins with the assumption that the law should seek to achieve fundamental fairness, or social justice, or to maximize human dignity, defined in a particular way.210 The evaluation of existing legal doctrine is then based on an analysis of how well it performs the defined function, and suggestions for change are all based on ways in which it could more effectively achieve the identified goals.211

So long as the set of values that are used to substitute for precedent and conventional legal principle are sufficiently abstract, this kind of analysis can look very much like traditional formalism.212 It is distinctive enough, and sufficiently engaged in the analysis of primary legal materials, to feel that it rightly belongs in the province of

207. See RICHARD C. ALLEN, ELYCE ZENOFF FERSTER & HENRY WEINHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 4 (1968). As late as 1968, legal research is described as, "still largely doctrinal; carried on within the paneled walls of law libraries by lawyers and judges, who presumably feel that no discovery can more effectively shape the law of tomorrow than what has been said by other lawyers and judges about yesterday." Id.

208. See Fiss, supra note 9, at 5 ("The aim of this second, or normative, branch of law and economics is not to describe or explain how decisions were in fact made or predict how they will be made, but rather to guide them. . . . According to this branch of law and economics, the normative concepts of the law should be construed and applied in such a way as to make the judicial power an instrument for perfecting the market.").


legal scholars. The definition and refinement of the substitute values used in this type of work are typically borrowed from other academic disciplines, such as economics or moral or political philosophy, and are not traditionally part of a lawyer's education, but most of what is borrowed is abstract in nature and reasonably accessible. Still, as with traditional formalism, the materials required by a legal scholar doing this kind of work are all more or less readily available inside the law library, or not far from it.

B. Normative Legal Scholarship within an Instrumentalist Paradigm

1. The Fundamental Challenge

It is when one steps away from these highly abstract, quasi-formalist approaches to legal scholarship, however, that things quickly get much more problematic. Once the realist critique effectively exposed and debunked the logical determinism of formalism, at least for most academics, the question as to what the basis should be for an appellate court choosing one possible version of a legal doctrine over another was effectively reopened. For example, on what rationale should a court decide that a therapist either does or does not have a formal legal duty to warn another of the possible danger posed by a patient? On what analysis should a court determine that the tort law of that jurisdiction either does or does not include a duty to affirmatively aid?

As discussed in Section II, the alternative to formalism that has thus far been accepted by most of the legal community in this post-realist period can be called

213. See DUXBURY, supra note 35, at 301-09, 312-13 (discussing characterizations of law and economics as being a natural outgrowth of both legal formalism and legal realism.).

214. See CALNAN, supra note 1, at 75 (“Posner argued that modern – that is, nineteenth century – negligence law was premised on the concept of economic efficiency. He did not support his thesis by examining the economic, social and political environment of the time. Nor did he examine the intellectual traditions of industrial-age judges. Indeed, he made no attempt to prove either that efficiency was a dominant social norm or that judges were trained to think in efficiency terms. Instead, Posner merely reviewed all American negligence cases decided between 1875 and 1905.” (discussing Richard A. Posner, A Theory of Negligence, supra note 133)).


216. See Scordato, supra note 40.
instrumentalism.\textsuperscript{217} Rather than viewing the common law as seeking to develop over time an abstractly ideal set of legal doctrines, a natural law, instrumentalism sees the law as one of a collection of societal responses, or instruments, that can be deployed to try to solve current problems and to achieve desired goals.\textsuperscript{218} Thus the criminal law is seen less as the abstract working out of a catalog of undesirable behaviors that are philosophically deserving of formal societal sanction and more as a social system, necessarily working in tandem with other social systems, that seeks to reduce the occurrence of certain kinds of behavior and their resultant harm.\textsuperscript{219}

Far from being a slowly evolving and ever improving body of bedrock legal principles and the more specific legal doctrines that logically flow from them, as one might view the ever more accurate and evolving body of scientific laws and principles in a natural science like physics or chemistry,\textsuperscript{220} law would be expected, from an instrumentalist perspective, to readily change over time and across different jurisdictions, sometimes dramatically, in response to changes in the perception and prioritizing of current social needs and goals.\textsuperscript{221} In this context, the measure of the quality of a given

\begin{enumerate}
\item[217.] Cf. Vermeule, \textit{supra} note 158, at 2113 ("[T]here is no such thing as 'instrumentalism.' There is only a variety of instrumentalisms, offered in different theoretical contexts for different purposes.").
\item[218.] See Cook, \textit{supra} note 33, at 247 ("Underlying any scientific study of law, it is submitted, will lie one fundamental postulate, viz., that human laws are devices, tools which society uses as one of its methods to regulate human conduct and to promote those types of it which are regarded as desirable. If so, it follows that the worth or value of a given rule of law can be determined only by finding out how it works, that is, by ascertaining, so far as that can be done, whether it promotes or retards the attainment of desired ends.").
\item[219.] See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW § 1.1(b), at 3 (3d ed. 2000) ("But lawyers also play a part, outside of the criminal law, in the area of crime prevention through laws designed to improve social and economic conditions – those relating to public housing, zoning, public health, industrial working conditions, minimum wages, unemployment compensation and such matters.").
\item[220.] See MINDA, \textit{supra} note 4, at 24 ("During the first part of this century, the study of jurisprudence was like an inductive science: principles of law were pragmatically derived from the raw data of appellate opinions much in the same way that the laws of nature were derived from scientific experiments."); Cox, \textit{supra} note 48, at 92, 94 ("[I]t is important to again recognize that the classical formalists were engaged in an inductive project of identifying principles that would reconcile, systematize, and render coherent the common law . . . . Science, for classical formalists, entailed the paradigm of a closed logical system. The objective was to render law on the model of geometry.").
\item[221.] See SCHWARTZ, \textit{supra} note 61, at 472 ("A significant aspect of the [Roscoe] Pound concept of interests is that they have no fixed values which are
legal doctrine is the degree to which it effectively responds to an existing social problem or helps to achieve a particular desirable goal.\textsuperscript{222} It is the practical consequence of the legal doctrine in the world, not its logical consistency with preexisting precedent and principle, that serves as the benchmark against which to measure its desirability and its quality.\textsuperscript{223}

Therefore, for example, in tort law a court should determine whether a formal legal duty should exist for a therapist to warn another of the possible danger posed by a patient on the basis of its analysis of the practical costs and benefits that would likely be generated by the adoption of such a duty, and alternatively by its absence.\textsuperscript{224} Similarly, a court should decide if the jurisdiction in question should embrace a formal duty to affirmatively aid as part of its tort law by comparing the societal costs and benefits of adopting such a rule with the likely practical consequences of not doing so.\textsuperscript{225}

Clearly a legal scholar working in a post-realist era and within the instrumentalist paradigm who desires to do more than to merely describe the analysis reported by a court in its opinion, and who also wants to evaluate that analysis and to perhaps offer suggestions for improvement, must now fully engage the world outside of the law library.\textsuperscript{226} In contrast to the far more philosophical and internal focus of traditional

\textsuperscript{222} See Vermeule, \textit{supra} note 158, at 2121 ("[L]egal instrumentalism amounts to using law 'as a means to an end.'"") (quoting TAMANAH\textsc{a}, \textit{supra} note 19, at 6).

\textsuperscript{223} See TAMANAH\textsc{a}, \textit{supra} note 19, at 241 (describing an instrumentalist judge as one who, "strives to achieve ideologically preferred ends in each case and interprets and manipulates the legal rules to the extent necessary to achieve the ends desired.").

\textsuperscript{224} See Scordato, \textit{supra} note 23; Lake, \textit{supra} note 72, at 106.


\textsuperscript{226} See TAMANAH\textsc{a}, \textit{supra} note 19, at 228 ("Proponents of an instrumental approach to law, from Pound to the Realists, to the legal process school, to contemporary legal pragmatists, have urged that judges pay attention to social consequences and strive to achieve legislative purposes and social policies when deciding cases.").
formalism, instrumentalism demands that normative legal scholarship take into consideration the practical costs and benefits of competing versions of legal doctrine. The question of how regulated individuals will respond to one legal rule as compared to another must now be asked and answered.

Was the court correct in the Tarasoff case that there will be fewer injuries experienced by potential victims if a formal tort duty exists for a therapist to warn the victim of a patient’s possible violent behavior? Will the social cost of false warnings and greater involuntary commitments of the mentally ill be higher than the violent harm prevented? Is a formal duty to affirmatively aid likely to result in better or worse overall outcomes for those in peril? Would a tort duty alone generate a significantly different outcome than a criminal duty alone, or the two operating together?

This bedrock requirement inherent in instrumentalism, that normative legal analysis identify and analyze the practical consequences of legal rules, poses more of a threat to traditional legal scholarship than may at first appear. Legal scholars engaged in such work must literally and figuratively get out of the law library. They must move beyond the materials with which they are familiar and expert, and they must develop a sophisticated sense of the way in which different entities in society normally operate and how they perceive and respond to legal regulation. This is a

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227. See Henry Steele Commager, The American Mind 379 (1950) ("In the last century we studied law from within. The jurists of today are studying it from without. The past century sought to develop completely and harmoniously the fundamental principles which jurists discovered by metaphysics or by history. The jurists of today seek to enable and to compel lawmakers and also the interpretation and application of legal rules, to take more account and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied. Where the last century studied law in the abstract, they insist upon a study of the actual social effects of legal institutions and legal doctrines." (quoting Roscoe Pound, The Spirit of the Common Law 212-13 (1881)).

228. Id.
229. See Scordato, supra note 23, at 311-12 n.74.
230. Id. at 290-94, 300-04.
231. See Scordato, supra note 40, at 14-32.
232. Id. at 41-44.
233. See Bix, supra note 135, 172 ("What was to fill the conceptual gap left when one's faith in the neutrality and determinacy of legal concepts was undermined? For many of the realists, the answer was social science, the
fundamental change in the long-standing professional role of legal scholar, and there exists little tradition or precedent for it.

2. The Hope for a Reprieve

Given the enormity of this change, it is understandable that it may be initially denied, or ignored, or that alternatives to it would be sought. One possible response that may appear helpful is to take the position that legal scholars need not rush out into the world to discover how persons actually respond to legal rules and how they use them to resolve disputes because many of these persons in fact come to them. The thousands of volumes of appellate case reports that reside in the law library each contain hundreds of examples of actual disputes and their resolution in every imaginable area of the law. A scholar who has become familiar with even a modest percentage of these cases in a given area might be able to claim to have little left to learn about the interaction of the relevant legal rules with those who are regularly governed by them.

After all, would we not assume that a sitting judge who has for many years specialized in hearing criminal cases or domestic dispute cases would have developed over that time a deep instinct for the way in which criminals and couples misbehave? Is this not one of the reasons that experienced judges are generally preferred to novices? What better understanding of how people actually behave, and the way in which legal rules reflect or affect behaviour.

234. See James Joseph Duane, *The Four Greatest Myths about Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1540 (1995) ("[T]he presence of an authenticating affidavit often will have little bearing on the ability of an experienced judge to assess intelligently the weight and probative value of a document; so why should its absence preclude the judge from giving the document any legal effect whatsoever?"); Allan C. Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752, 1767 (1982) ("[T]he experienced judge will be able to point to a value or set of values that is appropriate to resolve a particular litigated dispute or be able to perform a thorough stocktaking and present an exhaustive account of the totality of values housed.").

235. For example, Delaware is renowned for offering a state judiciary with deep experience in corporate law to those considering incorporation. See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 280 (1985) ("The value of a Delaware domicile to firms is more than an up-to-date code; Delaware also offers a comprehensive body of case law, which is not easily replicated by another state, and a handful of
guide could there be than such a person for predicting the reaction of the relevant community to one possible legal rule or another? While scholars are not judges with such direct experience, they can claim the benefit of having access to the written accounts of judges performing their professional role in hundreds of thousands of cases in every jurisdiction in this country for more than 100 years.

At first blush, this position has significant appeal. Upon reflection, however, difficulties emerge. The focus of normative legal scholarship is not confined to the application of existing law to discrete disputes. It must also, of course, evaluate the way in which regulated communities respond to applicable law in the normal course and it must imagine how these communities might respond to alternative versions of that law or to entirely different regulatory approaches. Instrumentalism demands a keen sensitivity to the behavioral effect that legal doctrine exerts on the normal daily behavior of those who are regulated by it, and on the ways in which customary routines are established around existing legal requirements. The resolution of specific disputes covers only one limited aspect of the instrumentalist focus on the effect of law on ordinary life.

One can readily see the limitations of this position. As experienced as a judge may be, that experience is largely confined to the function of law as a means of resolving concrete disputes. Certainly that is the dominant focus of the formal published reports of the courts’ activities to which legal scholars have access. Thus, while a practicing jurist

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236. See Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 364 (1973) (noting that instrumentalist analysis, “involves the expression, interaction and measurement of values in conflict, and the assessment of the implications for those conflicting values of infinitely complex factual situations.”).

237. See Milton C. Regan, Jr., *How Does Law Matter?*, 1 GREEN BAG 2d 265, 267-68 (1998) (“Law and economics is confident that we can use law to create effective incentives and disincentives. In this sense, it reflects what I will call a rationalist version of instrumentalism. Someone can accept instrumental premises, however, but doubt that law can have much effect on behavior. What I will call a skeptical version of instrumentalism argues that law primarily should seek to accommodate existing behavior, rather than channel it in new directions. Both versions of instrumentalism take behavioral consequences as the touchstone of how law matters.”).
may well pick up enormous insight into the behavior of persons who are routinely subject to the area of law in which the judge presides, it is not likely that much of that instinctive insight will be included in the formal memoranda and decisions that fill the law reports that in turn fill the shelves of the law library.

Additionally, the court’s focus is necessarily on the resolution of discrete disputes. This means that the experience from which the court extrapolates its notions of regulated community behavior is largely confined, at least professionally, to the behavior of parties engaged in ongoing litigation and parties who have been drawn into disputes that require formal litigation to resolve.\(^\text{238}\) It might be difficult, given this strongly weighted sample, to accurately imagine the dynamics of the regulated community as a whole. That would be like asking surgeons who specialize in cardiac bypass surgery how they believe people in general will respond to a new medication designed to decrease blood cholesterol or to a dietary regime that excludes all sugar.

Still another problematic matter is the fact that the overwhelming majority of the court materials that fill the shelves of the law library are appellate court reports.\(^\text{239}\) Appellate courts rarely have direct exposure to the parties in the case.\(^\text{240}\) They typically work only with the transcribed

\(^{238}\) See Patricia Danzon, Medical Malpractice: Theory, Evidence, and Public Policy 56 (1985) (“[L]awsuits are filed in only 20 percent of automobile claims, and only 1 percent are litigated to verdict . . . .”); Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 360 n.95 (1991) (reporting that the percentage of auto injury cases going to trial in 1988-89 was only 0.9% and that other personal injury suits went to trial at a rate of 2.4%). Factors completely extrinsic to the representativeness or importance of the legal issues involved, usually the anticipated expense of the appeals process and the amount in controversy, play an enormous role in determining what questions and issues will be considered by appellate courts. See Geoffrey C. Hazard, Jr., After the Trial Court: The Realities of Appellate Review, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 60 (Harry W. Jones ed., 1965); Bertram Wilcox, Delmar Karlen & Ruth Roemer, Justice Lost - By What Appellate Papers Cost, 33 N.Y.U. L. Rev. 934, 937 (1958).

\(^{239}\) Roy M. Mersky & Donald J. Dunn, Fundamentals of Legal Research 11 (8th ed. 2002). (estimating that by the beginning of the 21st century, there had been more than 6 million reported cases decided in the United States, and that 200,000 additional cases are now published each year).

\(^{240}\) See Robert L. Stern, Appellate Practice in the United States 175 (2d ed. 1989) (“The function of appellate courts is to review the decisions of trial courts, not to try the cases anew. This means that the record before the trial
record from the proceedings below, the formal written briefs of attorneys and, perhaps, a short period of oral argument.241 The experience of appellate courts with even the small segment of the regulated community that becomes involved in litigation is once removed and somewhat abstract.242

There are also many reasons to believe that only a weak correspondence exists between the portrayal of a regulated community presented in appellate court opinions and the actual reality of the situation.243 Factual investigation in litigation is conducted by the parties themselves and is infused with self-interest.244 The factual presentation made by each party to the trial court is profoundly influenced by the specific set of disputed facts and issues in the case, by the technical demands of proof required by the applicable legal doctrine, by the posturing of each party seeking an advantage in settlement and by the financial limitations of the parties.245 This is hardly reliable source material for a balanced view of a regulated community.

court becomes the record before the appellate court.").

241. See Daniel John Meador & Jordana Simone Bernstein, Appellate Courts in the United States 55 (1994) ("[A]n appellate court considers only those facts that were established at trial and reviews only those questions that were properly raised and presented in the trial court as evidenced by the record."); John C. Godbold, Twenty Pages and Twenty Minutes, in Appellate Practice Manual 84 (Priscilla Anne Schwab ed., 1992) ("A brief may be the only shot that counsel gets at the appellate court. The Eleventh Circuit, for example, assigns 40 to 50 percent of its cases to the Non-Argument Calendar, where they are decided on the briefs and the record. Other courts are moving in the same direction with procedures such as affirmance by a simple order and without argument.").

242. See David G. Knibb, Federal Court of Appeals Manual 467 (4th ed. 2000) ("In reality . . . the court of appeals will rarely look beyond the transmitted record.").

243. See Kenneth Redden & Stephen Saltzberg, Federal Rules of Evidence Manual 12-13 (5th ed. 1990) ("[The Federal Rules of Evidence] recognize that there are other policies served by rules of evidence aside from reaching accurate decisions as to what happened in a particular case. In dealing with offers to compromise evidence of insurance, subsequent remedial measures, and privileges, for example, the Trial Judge must consider factors other than accurate reconstruction of historical facts.").

244. See generally John S. Beckerman, Confronting Civil Discovery's Fatal Flaws, 84 Minn. L. Rev. 505 (2000) (considering several fundamental flaws inherent in civil discovery); W. Bradley Wendel, Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What do Honor and Shame have to do with Civil Discovery Practice?, 71 Fordham L. Rev. 1567 (2003) (using civil discovery as a case study to explore non-legal regulation as a means of maintaining the ethics of honor within the legal profession).

245. See Scordato, supra note 23, at 296-98.
It is also true that the availability, in fact the desirability, of factual stipulations entered into by the parties, admissions, formal presumptions and burdens of proof can all work to significantly skew the factual picture offered to the court. Moreover, the accuracy and the thoroughness of the factual presentations at trial are often burdened by the notorious unreliability of live witness testimony, and by longstanding rules of evidence that exclude from a trial the presentation of unquestionably true and relevant information if it is likely to be more prejudicial than probative, or if it falls under one of a number of recognized privileges.

246. See Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 149 S.E.2d 625, 631 (N.C. 1966) ("[Parties] may, by stipulation or judicial admission, establish any material fact which has been in controversy between them, and thereby eliminate the necessity of submitting an issue to the jury with reference to it. Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position."); see also Andrews v. Olaff, 122 A. 108, 111 (Conn. 1923) ("A stipulatory agreement thus arrived at ought not to be disturbed or relief afforded contravening it, unless one party deceived the other by false and fraudulent statements known to be untrue, or recklessly made without regard to the fact, or definite information."); MARLA K. CLARK, 26 INDIANA LAW ENCYCLOPEDIA § 10 (2004) ("[O]nce the parties enter into a stipulation and the court approves it, the stipulation is binding on all involved, even if one of the parties learns later through discovery that the stipulated facts are not true."). Of course, courts should not accept stipulations agreed to by the parties that are demonstrably false. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 497 (1951); Dillon, Read & Co. v. United States, 875 F.2d 293, 300 (Fed. Cir. 1989); CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 4:8 (7th ed. 1992); see generally id. at §§ 3:1-3:45, 4:1-4:16 (discussing the burdens of proof in civil case, and the general principles of inferences and presumptions ). The United States Supreme Court has disfavored the use of mandatory presumptions in criminal cases, saying that such presumptions intrude upon fact-finding function of the jury. Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring).


248. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). A trial court's determination that evidence should be excluded on the basis of unfair prejudice is typically given great deference by appellate courts. See Freeman v. Package Mach. Co., 865 F.2d 1331, 1340 (1st Cir. 1988) ("Only rarely—and in extraordinarily compelling circumstances—will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect.").

249. See UNIF. R. EVID.. 502 (attorney-client privilege); UNIF. R. EVID.503
Not only do all of these forces at work at the trial court level justify tremendous suspicion about the genuine factual accuracy of the presentations of the parties, but the appellate judges do not even enjoy the benefit of direct observation and exposure to the parties' live presentations, as does the trial judge.\textsuperscript{250} Their experience is limited to the written record of the trial.\textsuperscript{251} Further, in cases of trials before juries who return with a general verdict, it is common for the appellate court to have before them only the written record of the conflicting testimony offered by the parties at trial and the jury's ultimate verdict, leaving them without a definitive legal version of what transpired between these particular parties in this specific case. Furthermore, even if the appellate court was presented with a version of the facts in the case that corresponded perfectly with what actually occurred, the court would have no way of knowing with confidence the extent to which the facts of this specific case could accurately be extrapolated to the larger regulated community.

For all of the foregoing reasons the published reports of

\textsuperscript{250} See \textsc{Steven Wisotsky}, \textsc{Professional Judgment on Appeal} 5-6 (2002) ("Trial judges are in the business of trying cases. With the parties and witnesses appearing before them in person, good trial judges become astute at assessing credibility, finding facts and fairly resolving the human dramas that lawsuits embody. Appellate courts, on the other hand, are much more scholarly in both style and substance. The human drama is abstracted to legal principles applied to previously found facts. The court reviews the cold pages of a record and trial transcript, devoid of eye contact, voice, appearance and body language.").

\textsuperscript{251} See \textsc{Michael E. Tigar}, \textsc{Federal Appeals: Jurisdiction and Practice} 292 (1993).
courts, especially appellate courts, simply cannot serve as reliable guides to the likely behavior of the regulated community when performing serious instrumentalist analysis of legal doctrine. Legal scholars engaged in normative legal scholarship in the post-realist era have little choice but to look out and examine the world through sources not typically available in a law library. This is no small challenge to a profession that has little experience, little training and virtually no tradition in this kind of academic work.

3. Two Important Responses to the Challenge

From this perspective, one can view two of the dominant trends that have emerged in legal scholarship in the past twenty years as being, at least in part, responses to this critical challenge. One is the movement toward greater interdisciplinary legal scholarship. The other is the marked increase in interest and support for empirical legal scholarship. Both of these trends seek a path to an

252. For an excellent and interesting explication of this point, see PHILIP SHUCHMAN, PROBLEMS OF KNOWLEDGE IN LEGAL SCHOLARSHIP 24-60 (1979).

253. It is interesting to note in this context that few, if any, legal scholars have seriously suggested that adjudicative procedures be redesigned in such a way as to increase the purely investigatory capabilities of the civil or criminal trial. Indeed, trials are generally recognized to be forums that seek to provide the fairest possible resolution of legal disputes, engaging in historical fact finding only in those ways, and only to the extent, necessary to satisfy that most basic function. The problem arises when legal scholars substitute the very limited and specialized fact finding efforts of the courts for more thorough and accurate empirical research into the behavioral characteristics of regulated communities.

254. See Posner, supra note 80, at 1316-17 (noting the growth in interdisciplinary legal scholarship).

255. See George, supra note 12, at 141-42 ("Empirical legal scholarship (ELS) is arguably the next big thing in legal intellectual thought . . . . ELS recently and dramatically has expanded in law reviews, at conferences, and among leading law faculties."); Robert C. Ellickson, Trends in Legal Scholarship: A Statistical Study, 29 J. LEGAL STUD. 517, 528-30 (2000) (reporting that "number crunching" is rising in law journals); Gregory Mitchell, Empirical Legal Scholarship as Scientific Dialogue, 83 N.C. L. REV. 167, 168 ("A prominent, if not yet consensus, view within the legal academy is that legal scholars should produce more empirical research."); Elizabeth Warren, The Market for Data: The Changing Role of Social Sciences in Shaping the Law, 2002 WIS. L. REV. 1, 2 n.2 (collecting various sources that have advocated for more empirical legal scholarship.).

academic model of regulated community behavior that can be deployed in normative doctrinal analysis. Interdisciplinary work looks for these models in the existing work of other academic disciplines like economics, sociology, history, psychology and, interestingly, literature. Empirical legal scholarship seeks to develop the models directly.

While both movements offer reasonable responses to the challenges faced by normative instrumentalist legal analysis, and while both movements have thus far produced important and interesting work, significant issues are raised in the active pursuit of these strategies by legal scholars. A few of these problems are briefly mentioned below.

a. Insufficient Predictive Capability

One significant difficulty, faced particularly by interdisciplinary legal scholarship, is that many of the academic disciplines in which help is sought do not offer a

highly developed body of predictive work.\textsuperscript{263} The social sciences in particular have not been very successful in developing sophisticated models that can accurately predict the future actions and reactions of their subjects, except perhaps at the simplest level.\textsuperscript{264} Neither psychology nor sociology currently provide predictive theories of the sort that is likely to be valuable in instrumentalist legal analysis.\textsuperscript{265} The lone exception here is economics, and this surely helps to explain why law and economics has thus far been the breakout star of interdisciplinary legal scholarship.\textsuperscript{266}

Moreover, if these traditional social sciences have yet to find success in this endeavor within their respective disciplines, why would one expect empirical work engaged in by legal

\textsuperscript{263} See Mitchell, supra note 255, at 187 ("For a host of reasons, individual empirical studies of human behavior in social settings provide very limited information about the nature of behavior."); JOHN O. WISDOM, PHILOSOPHY OF THE SOCIAL SCIENCES I: A METASCIENTIFIC INTRODUCTION 6, 29 (1987) ("We may now turn to the failure of the social sciences, insofar as they have failed to come up with answers or significant contributions or discoveries. This failure has indeed been widely felt among the social scientists themselves . . . . Theoretical knowledge in the social sciences is scanty.").

\textsuperscript{264} See KATHRYN DEAN, JONATHAN JOSEPH, JOHN MICHAEL ROBERTS & COLIN WIGHT, REALISM, PHILOSOPHY AND SOCIAL SCIENCE 1 (2006) ("The contemporary social sciences are in a state of theoretical fragmentation. A dizzying array of approaches jostle for attention, each making grander and often increasingly radical claims about the nature of human life and the best method of studying it. . . . [T]he depth of disagreement among the various approaches is such as to render virtually impossible the attempt to map the contours of contemporary social theory. Indeed, it is often difficult to say that the theories are attempting to address the same object, or even engaged in the same enterprise."); see also TAMANAHA, supra note 68, at 79 ("Realists sometimes (overly) optimistically suggested that social science might be able to identify the social good, or at least how its achievement could be facilitated through law, but nothing came of this."); Gordon, supra note 97, at 2087 ("Social science is a value-soaked, fuzzy, messy, dispute-riddled, political enterprise like any other interpretive activity - like law, for instance. But unless it is total hack work or ideological claptrap, the sketch maps it draws are better than nothing - and nothing about the actual workings of the legal system is what the traditional doctrinal education typically provides.").

\textsuperscript{265} See TAMANAHA, supra note 19, at 222-23 ("[T]he Realists, like others of their time, placed an inordinate faith in the capacity of social science to help point the way. . . . The old faith that science will supply answers to these questions now smack of naïveté - the natural and social sciences are themselves caught up in the battles among groups, with contrary studies enlisted to serve all sides.").

\textsuperscript{266} See WISDOM, supra note 26, at 120-21, 129-31 ("The academic social sciences have produced no] [explanatory social theories] at all outside the field of economics.").
scholars to be more successful?  

b. A Lack of Relevant Training and Experience

Another serious difficulty with both interdisciplinary and empirical legal scholarship, at least when practiced by legal scholars, is that there is virtually nothing in the traditional training and experience of law professors, save for the acquisition of knowledge about law and legal processes, that would adequately prepare them to do such work in a serious way. The central tension here is between law schools as institutions engaged predominately in professional education and a widely accepted expectation that law professors should be scholars who, as part of their normal professional portfolio, are regularly engaged in instrumentalist normative legal analysis. The consequence of this tension bears down on law professors from at least two directions.

The first is that it is still overwhelmingly the case that law professors receive their graduate training, most often their only graduate training, in law school, and are taught there by professors who also received the same graduate training in their youth. During their last two years of law school, they may have taken a few small seminars of as few as twenty students that provided them the opportunity for some sustained contact with a faculty member. They may have worked as a research assistant for a semester or a summer. They most likely completed a single writing project of no more than a compulsory thirty pages to satisfy the requirements for graduation. But on the whole, they

267. See Gerald N. Rosenberg, Across the Great Divide (Between Law and Political Science), 3 GREEN BAG 2d 267, 268 (2000) ("[F]or the most part, [legal scholars] lack the training to be contributors to empirical political science scholarship about law and courts.").

268. See Heise, supra note 204, at 817-18 (noting the lack of training for empirical research possessed by most law school faculty members).

269. See generally Scordato, supra note 102, at 372-84.

270. Posner, supra note 80, at 1323 ("Most law professors who engage in interdisciplinary legal scholarship have not gone through the graduate school Ph.D. mill; their only degree is a J.D."); Richard E. Redding, “Where Did You Go to Law School?” Gatekeeping for the Professoriate and its Implications for Legal Education, 53 J. LEGAL EDUC. 594, 613 (2003) ("Although holders of doctoral degrees are increasingly common on law faculties, it is unrealistic to expect that a doctorate will soon become de rigueur for law teachers. Requiring the doctorate would, at least for the foreseeable future, greatly and unnecessarily narrow the pool of legal academics.").

271. See Nancy Millich, Building Blocks of Analysis: Using Simple "Sesame
enrolled in required first-year courses and core upper-level electives that were designed to introduce and to survey the subject matter, that culminated in a final examination and that were taught in a lecture hall to a large number of students who nearly all expected to engage in the practice of law after graduation. And yes, most law professors have also passed at least one state bar examination.272

Contrast this experience with the typical training expected of a professional scholar in the field of psychology, sociology, economics, finance or literature.273 Academics in those fields typically complete both a masters program and then a highly specialized doctoral program that involves intensive apprenticeship with an established professor in the field and culminates in the production of a significant work of original scholarship in the form of a dissertation, traditionally subsequently published as the new academic's first book.274 This training, especially the doctoral program, is specifically designed to provide the graduate student with the skills and the experience needed to successfully pursue a career as a

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272. See Deborah B. Luyster, Practitioners and Law School Faculty: Who's the Real Lawyer?, 81 Mich. B. J. 46, 46 (2002) (noting that many law professors, "have passed a state bar exam"); Mark E. Steiner, Cram Schooled, 24 Wis. Int'l L.J. 377, 391 ("Many Texas law professors are licensed to practice law in Texas, and most have passed at least one state's bar examination.").

273. See George, supra note 12, at 149-50 ("Law schools generally do not teach courses in survey methodology, statistical analysis, or research design. Graduate social science programs do. Indeed, it would be nearly impossible today to get a doctorate in a social science without completing a mathematical methods sequence.").

274. See Posner, supra note 80, at 1322 ("Whether the field is physics or gender studies, economics or art history, the basic shape of the scholarly career is the same and differs markedly from that in law. The career begins with graduate study culminating usually in a book-length dissertation (in technical fields such as economics a series of essays can often be substituted) as the basis for the Ph.D. degree, which is the gateway to the tenure track."); see also Gregory M. Colon Semenza, Graduate Study for the Twenty-First Century: How to Build an Academic Career in the Humanities (2005); American Psychological Association, The Complet Academic: A Career Guide (John M. Darley, Mark P. Zanna & Henry L. Roediger III eds., 2d ed. 2004).
professional scholar in that field.\textsuperscript{275} Obviously, law schools could resolve this aspect of the tension by hiring only those individuals to serve on their faculty who have earned both a graduate law degree and an academic Ph.D. While there is some indication that the possession of a Ph.D. in addition to a J.D. is currently an advantage when seeking appointment to a law faculty,\textsuperscript{276} and while the above analysis makes some sense of this post-realist trend, no law school, no matter how prestigious, has announced, or has even suggested, that it would henceforth hire only those with an academic Ph.D. as faculty members.\textsuperscript{277} Furthermore, to follow the inevitable flow of the argument, no one has seriously suggested that those law school faculty members who do possess a doctoral degree are engaged in meaningful scholarship, or are properly fulfilling their institutional role, only when they produce legal scholarship that reaches out in an interdisciplinary fashion to their doctoral field.\textsuperscript{278}

\textsuperscript{275} Not only are the law professor authors of interdisciplinary and empirical legal scholarship often lacking in sufficient formal training for such work, so too are the law students who select and edit such work for publication in law reviews. See Arthur D. Austin, The "Custom of Vetting" as a Substitute for Peer Review, 32 ARIZ. L. REV. 1, 4-5 (1990) ("Academics had to fess up to a more ignominious scandal; there is no peer review system for the articles that law professors publish in law reviews. As a consequence, their articles do not receive objective and qualified criticism - and respectability."); Heise, supra note 204, at 814 n.39 ("Almost all academics, as well as a surprisingly large number of law professors, find the absence of blind peer-review at most law reviews, certainly the student-edited ones, almost scandalous."). But see Frank Cross, Michael Heise & Gregory C. Sisk, Above the Rules: A Response to Epstein and King, 69 U. CHI. L. REV. 135, 147-48 (2002) ([Epstein and King] certainly have not established the necessary inferences to support their proposal, and they ignore the considerable literature criticizing aspects of the peer-review process.); Frank B. Cross, The Naive Environmentalist, 53 CASE W. RES. L. REV. 477, 486 (2002) ("Peer review is demonstrably unreliable at screening research for validity. It tends to be infected by ideological biases and replicate the preferences of the editor and reviewers.").

\textsuperscript{276} See George, supra note 12, at 148 ("Northwestern University, the University of Pennsylvania, and the University of Southern California (USC) routinely hire entry-level candidates with social science doctorates.").

\textsuperscript{277} The closest that I have encountered is Dean David Van Zandt of the Northwestern University School of Law who has written that "[t]he research faculty of the future law school will be composed largely of academics with a strong disciplinary training in one of the social sciences . . . ." David E. Van Zandt, Discipline-Based Faculty, 53 J. LEGAL EDUC. 332, 335 (2003).

\textsuperscript{278} See Epstein, supra note 78, at 1291 ("[L]awyers qua lawyers have no comparative advantage in doing empirical work . . . . Lawyers should be able to understand, interpret, and critique the work of social scientists, not replicate
c. The Tension between the Legitimate Demands of Instrumentalist Normative Scholarship and the Instructional Responsibility of Law Schools

The reason for not requiring that law school faculty members possess a traditional academic doctoral degree, of course, despite the nearly ironclad logic in its favor, is that even those law schools whom are most impressively represented by graduates currently employed as full-time law professors send only a tiny percentage of their graduates off to do such work.\(^{279}\) The overwhelming percentage of their graduates, like the overwhelming percentage of graduates at every American law school, pursue careers in the practice of the profession of law.\(^{280}\) American law schools are, at the beginning and the end of the day, institutions of professional education.\(^{281}\) Those who attend them, those who finance them

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In its survey of alumni from the classes of 1996-2000, Yale Law School reports that three percent of all respondents worked in academia (including both teaching and non-teaching positions) as their first job after law school and that ten percent worked in academic teaching positions five years after graduation. YALE CAREER DEV. OFFICE, WHAT YALE LAW SCHOOL GRADUATES DO: A SUMMARY OF CDO'S 5TH YEAR CAREER DEVELOPMENT SURVEY CLASSES 1996-2000, at 1, 3 n.3 (2001), available at http://www.law.yale.edu/documents/pdf/cdo-summary_memo_96_00.pdf (hereinafter 5th YEAR SURVEY). It should be noted that the report does not distinguish between alumni teaching in law schools and those teaching in other academic settings. See id. at 1 n.2.

280. See Steven Lubet, Closed Minds and American Law Schools?, 75 CORNELL L. REV. 949, 954 (1990) ("Only a few law students ever embark upon academic careers. The vast majority become employed at large law firms and other private institutions."). Yale Law School's 5th Year Survey of alumni from the classes of 1996-2000 clearly indicates that the great majority of those graduates are practicing law five years after graduation, with at least forty-eight percent doing so in a private law firm setting. See 5th YEAR SURVEY, supra note 279, at 2-3.

281. See Jeffrey W. Stempel, Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession, 21
and those who hire their graduates all expect that they will provide at least a minimally adequate preparation for the practice of law.\textsuperscript{282} The possession of an academic Ph.D., in addition to a J.D., by members of the law school faculty is widely understood to be tangential to that fundamental mission.\textsuperscript{283}

Thus law professors are generally, and quite understandably, insufficiently trained to engage in

\begin{quote}
FLA. ST. U. L. REV. 25, 54 n.126 (1999) ("American law schools tend to be similar regarding professional education, which is not surprising since the organized bar plays a major role in the accreditation process.").
\end{quote}

\textsuperscript{282} See AM. BAR ASS'N, 2006-2007 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, available at http://www.abanet.org/legaled/standards/standards.html (last visited Nov. 12, 2007). The American Bar Association's Standards for Approval of Law Schools includes Standard 301 (a), which mandates that, "[a] law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession." \textit{Id.}

Starting in 1954, Yale Law School launched an experimental program that provided its students with intensive exposure to research, writing and the appropriate social sciences. Brannon P. Denning, \textit{The Yale Law School Divisional Studies Program, 1954-1964: An Experiment in Legal Education}, 52 J. LEGAL EDUC. 365, 371, 364-75 (2002). Modeled after a typical academic graduate school experience, the program involved close faculty mentoring, many small seminars, and a very significant independent research project. \textit{Id. at 274-77.} It was abandoned less than a decade after it started. \textit{Id. at 390.}

Some of the more ambitious portions of the original program - the emphasis on training the academic lawyer and making law school more like an academic graduate school - were abandoned, apparently at the faculty's insistence that the school remain focused on the three-year LL.B. In addition, other than offering courses taught by non-lawyer faculty, it was never clear how effective the Divisional Program was in achieving its goal of integrating law with the social sciences beyond an enthusiastic wave in their direction.

\textit{Id.}

\textsuperscript{283} See Richard L. Abel, \textit{United States: The Contradictions of Professionalism, in} 1 LAWYERS IN SOCIETY: THE COMMON LAW WORLD 227 (Richard L. Abel & Philip S.C. Lewis eds., 1988) ("[A]lthough law professors jealously guard their formal autonomy, law schools actually devote most of their energies to teaching what is tested on the bar examination."); Michael J. Madison, \textit{The Lawyer as Legal Scholar}, 65 U. PITT. L. REV. 63, 76 (2003) (reviewing \textit{EUGENE VOLOKH, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, AND SEMINAR PAPERS} (2003)) ("There are few reasons for students to demand to learn scholarly skills. Few lawyers have any professional need to produce law review articles. Outside of a handful of elite law schools, few law students intend to become legal professors and therefore need or want to learn the craft of scholarship."). \textit{But see} Letter of Owen M. Fiss to Paul D. Carrington, in \textit{"Of Law and the River," and of Nihilism and Academic Freedom}, 35 J. LEGAL EDUC. 1, 26 (1985) ("Law professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover.").
professional level empirical or interdisciplinary scholarship. This might well be where the imperatives of modern instrumentalist legal analysis lead, but when they do they come into stark conflict with the teaching function of the law school and its faculty. Under the formalist paradigm, teacher, scholar, practitioner and student alike were thought to be characterized by their focus on traditional legal analysis as the primary intellectual skill and this belief served to harmonize the teaching and the scholarship functions of law professors. In contrast, the skills required for serious instrumentalist analysis at a professional level are rather far removed from the skills needed to thrive in the practice of law.

This then leads to a second source of the above identified tension that falls upon law faculty. Not only are they, in the main, inadequately trained to engage in serious empirical analysis of the external effect of legal doctrine, but the more they acquire such training, the more sophisticated they become in the tools of academic empirical research and the methods and understandings of other academic disciplines. As a result of this more sophisticated approach, the gap between their professional lives as scholars and their

284. See Lee Epstein & Gary King, The Rules of Inference, 69 U. CHI. L. REV. 1, 6, 15 (2002) ("The current state of empirical legal scholarship is deeply flawed . . . serious problems of inference and methodology abound everywhere we find empirical research in law reviews and in articles written by members of the legal community."); Deborah L. Rhode, Legal Scholarship, 115 HARV. L. REV. 1327, 1343 (2002) ("Research by law students and professors with no formal training in social science methodology provides constant reminders of the limitations of armchair empiricism.").

285. See DUXBURY, supra note 35, at 169 ("From the policy science perspective, the successful teaching of law demanded of students that they endeavor to cultivate the very methodological skills which, according to [Harold] Lasswell, were in short supply among trained social scientists. This was, to say the least, rather a tall order, and it is hardly remarkable that students should have proved resistant. 'My classmates seemed, in general, to have a negative reaction,' one student commented of [Myres] McDougal's classes in particular.").

286. See Ulen, supra note 200, at 404 ("Until relatively recently there was no inherent tension arising from the law professor's roles as a successful trainer of professionals and a successful scholar.").

287. See generally Posner, supra note 80, at 1324 ("Doctrinal scholarship may have been (may be) dull and limited, but it is useful and it is conducted under conditions that ensure minimum quality. Those conditions -- a large professional audience; a common academic culture; continuity with teaching, judging, and performance as a student; and law review editing -- are missing from interdisciplinary legal scholarship . . . .").
professional responsibilities as teachers of law students grows greater. It is almost certainly the case that some practicing attorneys in some practice niches encounter and must deal with empirical research and models of the sort used in academic scholarship. It is also equally certain that a seminar or an upper-level elective on empirical research and modeling would likely make a valuable addition to a law school's curriculum. But that is a far cry from implying that a facility with sophisticated empirical tools and models, and with the professional research techniques and current body of literature of other academic fields, is a necessary component of professional legal training. And yet, the nature of instrumentalist analysis in the post-realist era calls for exactly that of those who must regularly discharge the teaching function, the faculties of law schools.

d. An Unlimited Jurisdiction for Normative Legal Scholarship

Finally, and perhaps most importantly, the serious pursuit of instrumentalist research regarding law and legal regulation in our society will inexorably lead to a progressive, limitless broadening of the intellectual jurisdiction for law schools and for legal scholarship. There is essentially no human activity in our society that is not either touched by legal doctrine or legal regulation of some sort, or about which

288. See Scordato, supra note 102, at 372-84 (arguing that expecting law professors to actively create both legal scholarship and classroom instruction diverts time and resources from the law school teaching function).
291. See Carl N. Edwards, *In Search of Legal Scholarship: Strategies for the Integration of Science into the Practice of Law*, 8 S. CAL. INTERDISC. L.J. 1, 2-3 (1998) ("Unfortunately, although interdisciplinary tools have been made increasingly accessible to lawyers, the typical J.D. curriculum provides no preparation in the skills needed to determine substantive facts beyond legal doctrine, nor in the scientific content and analytic methods necessary to assess and support factual conclusions.").
292. See Ulen, supra note 200, at 404 ("[T]raining students to be professionals is a very different undertaking from that of training students to be scholars.").
a conscious decision has been made to forgo legal regulation.\footnote{293} If the post-realistic understanding of the rationale for existing legal doctrine is an instrumentalist one, based ultimately not upon a deductive application of precedent and principle but on a balancing of practical costs and benefits, then one who would engage in sophisticated scholarship in a given area of law must also become fully conversant and expert in the nature and operation of the regulated community.

Perhaps for any one particular legal scholar, with the field of law sufficiently narrowly defined and with her training and skills uniquely suited to the special area of interest, this goal may be feasible. But for law schools and legal scholarship collectively, this newly understood scope of appropriate study and expertise is virtually unlimited. Once one fuses the nature of our modern administrative state with the prevailing post-realist instrumentalist paradigm, what kind of academic expertise about the nature of the world and its inhabitants could not arguably be made part of legal scholarship?\footnote{294}

Practically everything that we can observe, and almost anything that we can imagine, is either the subject of legal regulation or is the subject of a conscious decision not to regulate. Should legal standards be established for automobile emissions or engine fuel efficiency in an effort to reduce global warming?\footnote{295} Do laws prohibiting development on certain tracts of land in order to protect the continuing survival of an endangered species make sense and are there other possible versions of such regulation that would better achieve that goal?\footnote{296} Is the development of a new drug

\footnote{293. See Vermeule, supra note 158, at 2132 (“More and more domains of social and political life have been legalized.”).

294. See id. (“As various forms of instrumentalism have spread through the legal culture since, say, the 1970s, the boundaries of law's empire have if anything expanded relentlessly.”).

295. See, e.g., Daniel C. Esty, Environmental Protection in the Information Age, 79 N.Y.U. L. Rev. 115, 195-98 (2004) (arguing “as information gaps become less pervasive, institutional design options for addressing environmental problems will expand and we will be able to rethink our regulatory choices”); Michael P. Vandenbergh, From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law, 57 VAND. L. Rev. 515 (2004) (arguing the importance of focusing on individuals behavior to reduce pollution).

296. See, e.g., Elizabeth A. Moore, “I'll Take Two Endangered Species,
sufficiently different from one or more existing drugs to
deserve the issuance of a patent?297 Is this song, play, novel
or film sufficiently the same as one or more existing ones to
consider legal plagiarism?298 Would one or another possible
version of a particular doctrine of matrimonial law most
effectively minimize the rate of separations and divorces?299
Should a specific religious belief and practice that causes
harm to another trigger civil liability?300 Should especially
evil thoughts and intentions increase the possible penalty
when those thoughts can be shown to motivate a criminal
act?301

Virtually every legitimate field of academic study could
plausibly be shown to be relevant to instrumentalist legal
analysis, and thus within the colorable province of normative
legal scholarship. The fundamental issue, then, regarding
interdisciplinary and empirical work should not be whether
they can get a legitimate sustainable start in legal
scholarship but just exactly where we expect them to end.

Please". Is the Commercialization of Endangered Species a Valid Activity that
Should be Permitted Under the Endangered Species Act to Enhance the Survival
of the Species?, 75 GEO. WASH. L. REV. 627 (2007); Josh Thompson, Critical
Habitat Under the Endangered Species Act: Designation, Re-designation, and
297. See, e.g., Brittany Whobrey, International Patent Law and the Public
Health: Analyzing TRIPS' Effect on Access to Pharmaceuticals in Developing
Countries, 45 BRANDEIS L.J. 623 (2007); Obijiofor Aginam, Between Life and
Profit: Global Governance and the Trilogy of Human Rights, Public Health and
298. See, e.g., Deborah R. Gerhardt, Plagiarism in Cyberspace: Learning the
Rules of Recycling Content with a View towards Nurturing Academic Trust in
an Electronic World, 12 RICH. J. L. & TECH. 10 (2006); Stuart P. Green,
Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use
of Criminal Sanctions in Enforcing Intellectual Property Rights, 54 HASTINGS
299. See, e.g., Shaakirrah R. Sanders, The Cyclical Nature of Divorce in the
Western Legal Tradition, 50 LOY. L. REV. 407 (2004); Katherine L. Caldwell, Not
Ozzie and Harriet: Postwar Divorce and the American Liberal Welfare State, 23
300. See, e.g., Ann MacLean Massie, The Religion Clauses and Parental
Health Care Decision-Making for Children: Suggestions for a New Approach, 21
HASTINGS CONST. L.Q. 725 (1994); Paula Ann Monopoli, Allocating the Costs of
Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief
301. See, e.g., Heidi M. Hurd & Michael S. Moore, Punishing Hatred and
Prejudice, 56 STAN. L. REV. 1081 (2004); Sara Sun Beale, Federalizing Hate
Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?,
Law schools would no longer reside in just a single building somewhere on campus, but would, at least intellectually, stand astride the entire university with normative instrumentalist legal scholarship serving as the gatekeeper whose academic expertise is to translate the knowledge of all of the other disciplines into regulatory prescriptions.\textsuperscript{302}

Such a vision, of course, is ridiculous. Yet that is where the logic of normative instrumentalist analysis inexorably leads. Legal scholarship and legal scholars operating under such a conception are unlikely to be ushered to a place of preeminence in the modern university.\textsuperscript{303} It is far more likely that they will slide into increasing irrelevance and obscurity.\textsuperscript{304}

\textbf{VI. CONCLUSION}

For most persons currently working as full-time law professors, there is no real choice to be made between a belief in traditional formalism and adherence to modern

\textsuperscript{302} See Emily Sherwin, \textit{Legal Rules and Social Reform}, 36 \textit{SAN DIEGO L. REV.} 455, 455 (1999) ("Modern legal scholarship has lofty ambitions for law. Some would enlist the courts in utopian social reform, hoping that visionary adjudication will bring about a more egalitarian, more caring, more civically responsible, or otherwise more perfect society. Others would turn to social science to generate new blueprints for law.").

\textsuperscript{303} In his bestselling 1987 book, \textit{The Closing of the American Mind}, Allan Bloom, a noted classicist who served as a faculty member at the University of Chicago, Cornell, Yale and the University of Toronto, does not count law among the "small number of disciplines that treat the first principles of all things." ALLAN BLOOM, \textit{THE CLOSING OF THE AMERICAN MIND} 261 (1987). He instead views it as an "applied science" that is "lower in dignity and derivative in knowledge." \textit{Id.}; see Jonathan R. Macey, \textit{Allan Bloom and the American Law School}, 73 \textit{CORNELL L. REV.} 1038 (1988); Lubet, \textit{supra} note 280; see also THORSTEIN VEBLEN, \textit{THE HIGHER LEARNING IN AMERICA} 211 (1918) ("[I]n point of substantial merit the law school belongs in the modern university no more than a school of fencing or dancing").

\textsuperscript{304} See Rhode, \textit{supra} note 284, at 1331 ("Baldly stated, the uncomfortable fact is that too much of the legal scholarship now produced is of too little use to anyone. A survey undertaken for this Essay found that, of all law review articles published during the 1980s and early 1990s, more than half had never been cited. Other studies report similar findings."); see also Gordon, \textit{supra} note 97, at 2016-77 ("The legal-academic machine is undoubtedly cranking out a good deal of useless blather: articles that seem to have hardly anything to do with addressing or understanding any legal problem, articles clogged with hermetic jargon or puffed up with self-indulgent posturing, articles clumsily practicing intellectual modes that people in other fields execute with much more grace and precision, articles borrowing intellectual fashions that would be better off never having been invented.").
instrumentalism. Having read thousands of reported cases and studied the doctrines and procedures of the law for many years, few can honestly say that what they observe is adequately captured by the traditional formalist account.

No matter how satisfying such a view of the law and the operation of the legal system might be, and no matter how well it works to harmonize the teaching, scholarship and practice of the law and to define the role of law schools and legal scholarship within the larger university, most law professors have simply concluded that legal realism comes much closer to accurately describing the reality they observe and study than does formalism.

Thus, at least within law schools, where virtually every attorney initially encounters and begins to come to terms with a basic understanding of the nature of law, realism reigns. The deeply comforting and benign notion that the common law is largely the product of abstract inductive analysis and that the resolution of specific legal disputes is achieved through the objectively deductive application of existing precedent and principle is no longer believed to be true. Law is understood to necessarily include value-laden

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305. See TAMANAH, supra note 19, at 246 (“[A] return to former non-instrumental understandings of law . . . appears impossible.”).

306. See MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 156 (1988) (“[C]ourts do not begin with doctrinal propositions adopted in past texts and work backward to determine their validity; they begin with a set of institutional principles and word forward to generate the legal rules.”); G. Edward White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 VA. L. REV. 279, 281 (1973) ([A] notable element of Realism was its repudiation of formalistic deductive logic in judicial opinions as an artificial construct employed to conceal the subjective preferences of the judge.”).

307. See Chemerinsky, supra note 7, at 2 (“Now, a century after the legal realists’ attack on formalism, we all surely would say that formalism is gone. Everyone recognizes, of course, that the values of the judges making the decisions largely determines all law, and particularly constitutional law.”).

308. See LEITER, supra note 43, at 21 (“Realism is omnipresent in American law schools . . .”).

309. One of the most famous quotes by Justice Oliver Wendell Holmes, Jr. appears at the very beginning of his book, The Common Law:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).
judgments that force those who create doctrine and those who apply it to choose among competing alternative versions of the public good.  

Law is thus seen as an instrument of the collective, one among many, which can be used in an attempt to solve specific societal problems and to achieve desired goals. The choice of one version of a legal doctrine over another should be driven by the anticipated practical consequences of each alternative. Sophisticated legal analysis does not look merely to precedent and abstract principle for guidance, but also vigorously considers the societal policies that are sought to be advanced and tries to fashion a doctrine, or to apply doctrine, in a manner best calculated to further those aims. This is instrumentalism.  

What happens to legal scholarship when the community that produces it shifts from a formalist to an instrumentalist paradigm? Legal scholarship that seeks to summarize, organize and systematize the rationales for action provided by legal decision makers themselves, what I have termed first-order descriptive legal scholarship, can be expected to suffer a dramatic decline in prestige among legal scholars. This is the case because many legal decision makers continue

310. See BIX, supra note 135, at 166 (describing the theme for which the American Legal Realist movement would be remembered as a critique of legal reasoning: [T]hat beneath a veneer of scientific and deductive reasoning, legal rules and concepts were in fact often indeterminate and rarely as neutral as they were presented as being. It was the indeterminacy of legal concepts and legal reasoning that led to the need to explain judicial decisions in other terms (hunches and biases) and the opportunity to encourage a different focus for advocacy and judicial reasoning: social sciences and 'public policy.'

311. SCHWARTZ, supra note 61, at 471 ("We forget how different the judicial approach was at the beginning of the century. The dominant jurisprudence then was analytic, with the judges marching to pitiless conclusions under the prod of a remorseless logic which was supposed to leave them no alternative. Since [Roscoe] Pound presented his sociological approach and theory of social interests, the law in America has been considered a tool serving the ends of law appropriate to the given society.").

312. See Vermeule, supra note 158, at 2117 ("One might use instrumentalism as a rough synonym for consequentialism, the thesis that an act (or rule or disposition) is good just insofar as its consequences are good.").

313. See SUMMERS, supra note 35, at 70-71.

314. Id. at 20-21. For an effort to elaborate upon, and to complicate, the conventional notion of instrumentalism, see ROBERT S. SUMMERS, Naive Instrumentalism and the Law, in LAW, MORALITY, AND SOCIETY 119-31 (Peter Michael Stephan Hacker & Joseph Raz eds., 1977).

315. See sources cited supra notes 83, 89-90.
to explain themselves in traditional formalist terms and such explanations are no longer thought to be accurately descriptive or to provide a reliable guide to future behavior.\footnote{316}

Descriptive legal scholarship that attempts to expose the indeterminacy and the inconsistency of formalist explanations offered by legal decision makers, what I have identified as one kind of second-order descriptive legal scholarship, runs the risk of merely restating and repeating the basic realist critique.\footnote{317} Moreover, to the extent that it offers descriptive explanations for legal rules and legal decisions that are insufficiently grounded in principle and public policy—that are, put plainly, overly cynical—such work risks rejection as being outside the purview of legal scholarship and being unhelpful to the practical task of engaging in the practice of law.\footnote{318}

However, a second kind of second-level descriptive legal scholarship is possible under the current instrumental paradigm. This kind of scholarship attempts to describe the law as an elaboration of a certain identified set of values or social goals, such as economic efficiency.\footnote{319} Because this kind of second order descriptive scholarship implicitly embraces the notion that lawmakers, be they appellate judges or legislators, are fundamentally well intentioned actors seeking the public good and that the product of their labor is a body of precedent and statutory regulation that is essentially rational and coherent, it is likely to enjoy a far more welcoming reception among the larger legal community.\footnote{320}

\footnote{316. See GILMORE, supra note 35, at 87; Arthur J. Jacobson, Taking Responsibility: Law's Relation to Justice and D'Amato's Deconstructive Practice, 90 NW. U. L. REV. 1755, 1755 (1996) ("Not one rule suffers from determinacy in the United States today. Mere law words have completely stopped constraining any judicial decision. I know. I've litigated.").
317. See, e.g., Cohen, supra note 5 at 810-12 (stating the realist critique of formalism was in full swing by at least the mid 1930s).
318. See Simon, supra note 98 (characterizing Critical Legal Studies as, "a now extinct and never very successful movement" and "extinct as a recognizable movement"); Ulen, supra note 200, at 424 ("[C]ritical legal studies, seem to have had virtually no lasting effect on law or legal scholarship.").
320. Id. at 350 ("Law and economics has commanded an influence comparable only to the work of Langdell and the Realists. I doubt that there is a single academic engaged in the intellectual life of modern legal scholarship..."
However, scholarship of this sort, as interesting and clever as it might be, does not seem to advance a hard descriptive theory of existing law of the sort one might expect to encounter in other descriptive academic work. Little of the insightfulness and the influence of this work seems to be lost even if significant segments of existing common law in a given area do not in fact conform to the underlying descriptive theory. It is remarkable that so many legal judgments made by hundreds of different appellate courts over many different decades can be shown to conform to the basic postulates of, say, law and economics, particularly when the decision makers themselves are silent and seemingly unaware of this dynamic. And it remains quite valuable even if some established branches of common law doctrine do not fit the model. While this is clearly descriptive scholarship, it does not offer an account of the object of study that is, in a traditional sense, either verifiable or definitively refutable.

The shift from formalism to instrumentalism has a potentially even more significant effect upon normative legal scholarship than it does upon descriptive legal scholarship. With its emphasis on precedent and principle, and the use of abstract logical analysis, formalism allowed legal scholars the luxury of finding nearly all of the materials needed for their work inside the law library. Roughly in the same way that appellate courts were thought to be involved primarily in reviewing the choice of precedent and the deductive logic who has failed to define carefully, if only in his own mind, the relationship between his work and law and economics.

321. See David Monsma, The Academic Equivalence of Science and Law: Normative Legal Scholarship in the Quantitative Domain of Social Science, 23 T.M. COOLEY L. REV. 157, 159 (2006) (“[T]he use of empirical research and quantitative analysis, while indispensable in social sciences and encouraged in empirical legal research, is not determinative of the academic quality of legal scholarship or essential to the integrity of legal research.”); Ronald J. Allen & Brian Leiter, Naturalized Epistemology and the Law of Evidence, 87 VA. L. REV. 1491, 1512 n.63 (2001) (“The neglect of even the most basic form of empiricism - accurate description of relevant phenomena - in comparative legal scholarship is astonishing; there is typically a yawning chasm separating what comparativists writing in English say about systems and what is actually true of them.”).

322. See Epstein & King, supra note 284, at 18 n.48 (“[A]mici present empirical evidence that often does not meet Huber’s standard for good science – the science of publication, replication, and verification, the science of consensus and peer review.’ . . . We believe the same is true of a healthy portion of legal scholarship published in the law reviews.” (quoting PETER HUBER, GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM 3 (1991)).
employed by trial courts, more or less checking their math, legal scholars could be thought to be doing much the same when they engaged in normative legal scholarship.\textsuperscript{323}

Decisions could be criticized for failing to properly characterize existing precedent, or for failing to correctly apply it to the facts of the instant case.\textsuperscript{324} Logical extensions of existing doctrine could be considered, as could the appropriate treatment of situations and issues that had not yet come before the courts.\textsuperscript{325} In all of this normative work under formalism the dominant intellectual tool is traditional legal analysis and the essential materials are the statements of the existing law and formal reports of its application.\textsuperscript{326}

Instrumentalism changes all of that. Now the essential benchmark for evaluating an appellate court opinion is the degree to which the change to the common law that it announces, or chooses not to make, effectively advances the underlying social goals that are sought to be achieved in that area of law.\textsuperscript{327} Legal scholars wishing to pursue normative legal scholarship in the post-realist era have no choice but to move the focus of their attention beyond precedent and principle and towards the actual behavior and dynamics of the regulated community.\textsuperscript{328} They must become capable of


\textsuperscript{324} See Bix, supra note 135, at 171 (“The classical perspective of judicial decision-making was that judges decided cases by merely discovering the appropriate legal rule, a process that required the mere application of simple logical deduction from basic principles.”).

\textsuperscript{325} See Duxbury, supra note 35, at 10 (defining formalism as “the endeavor to treat particular fields of knowledge as if governed by interrelated, fundamental and logically demonstrable principles of science.”).

\textsuperscript{326} Tamanaha, supra note 68, at 78 (“Rule formalism was the idea that rules were applied by judges in a mechanical fashion to determine the right answer in every case, without discretion on their part and without the interjection of their values.”).

\textsuperscript{327} See id. at 79 (“To replace formalist understandings, Realists advocated an instrumental view that characterizes law as a tool to achieve desired social objectives.”); see generally Summers, supra note 35.

\textsuperscript{328} See Gary Minda, The Jurisprudential Movements of the 1980s, 50 Ohio St. L.J. 599, 612-13 (1989) (“In focusing on the consequences of behavior under law, the [instrumentalist] observer also places less attention on the legal concepts of rights, as a normative framework for establishing correlative duties, and instead focuses on behavioral consequences of various bundles of legal entitlements. Consequently, ‘rights and their correlative duties no longer hold center stage’ in the economic analysis of law.”).
predicting the likely practical consequences of alternative versions of legal doctrine and alternative schemes of legal regulation in the relevant segments of society.329 Because the nature of fact gathering and fact finding in litigation does not result in reliably accurate accounts of the regulated community, legal scholars cannot rely on appellate court reports to perform this function.330 They must move beyond, and quite far beyond, the resources available in a law library.

The demands of instrumentalism on normative legal scholarship pose enormous, and thus far largely unappreciated, problems for legal scholars. How are they to develop sophisticated and accurate predictive models that will identify the likely consequences of different legal rules on affected segments of society? One natural strategy, and one currently popular trend, is to seek such models in other academic disciplines, such as psychology, sociology, economics, history and literature.331 Another is for legal scholars to engage in their own empirical research.332 Both approaches hold promise, but both also carry with them significant problems, some of which are discussed above.333

From a larger perspective, normative legal scholarship in the post-realist era faces two fundamental challenges, neither of which is likely to be easily overcome. One is the problem of authority. It is true that the shift from formalism to instrumentalism has radically changed our notion of what counts as a meaningful argument and a relevant consideration in the formation of the common law. This change affects the work of the appellate courts as fully as it does the work of legal scholars seeking to describe and to

329. See Neil MacCormick, On Legal Decisions and their Consequences: From Dewey to Dworkin, 58 N.Y.U. L. REV. 239, 254 (1983) (“And surely it is in this very way that behavioral consequences and outcomes matter to us. This follows from the point that responsibility attaches for the foreseen and foreseeable consequences and outcomes of one’s actions. We cannot conceivably speculate on all the things that will or might possibly happen if people react in some way or another to a new ruling in law, but we can at least realize that they are entitled to take the law to be as a court has ruled it to be. People are supposed to act conformably to the law, and when they do act on the law as the court has ruled, the judges at least would be debarred from saying that they hoped it would not be so.”).
330. See supra Section V.B.2; SHUCHMAN, supra note 250.
331. See supra notes 251, 254-58 and accompanying text.
332. See supra text accompanying note 253.
333. See supra Part V.B.3.a.-d.
evaluate that work.

Appellate courts are required in our current system to review the legal sufficiency of the work of subordinate courts and in the process to maintain and develop the common law. If they must do so on an instrumentalist basis and without the benefit of accurate predictive models regarding the regulated community, then so be it. They may have little choice at present but to base their judgments on their instincts and their intuitions. In any case, they are decision makers who have been duly appointed, confirmed or elected and they have been invested with the requisite formal authority.

Legal scholars who are engaged in the normative evaluation of the work of these courts, however, enjoy no such authoritative status. Therefore, when they criticize the work of formal legal decision makers-on the basis, ultimately, that their instincts and intuitions about the practical consequences of various versions of legal doctrine differ-it is hard to see why such commentary should be viewed as being importantly different, or more authoritative, than other formal reports and position papers that constitute public policy analysis and debate in this country. It may be

334. See TAMANHA, supra note 19, at 230 ("In tort cases, similarly, judges routinely weigh such considerations as the deterrence effect, compensation for victims, moral responsibility for actions that cause harm, availability of products for consumers at affordable prices, consequences for the economy, costs of injuries to society, implications for insurance, problems caused by excessive litigation, taxing the resources of the court, and so forth. The analysis relies on contestable political, scientific, moral, and economic issues, and on highly speculative predictions of future consequences, all matters about which judges have no particular expertise or reliable information. A judge who considers these purposes and ends when applying legal rules is at sea in an embarrassingly rich set of unconstrained options.").

335. Id.

336. See generally Carl Tobias, The Federal Appellate Court Appointments Conundrum, 2005 UTAH L. REV. 743 (2005) (discussing the selection of federal appellate court judges); Symposium, The Judicial Appointments Process, 10 WM. & MARY BILL RTS. J. 1 (2001) (exploring the manner in which federal judges are selected and suggesting ways in which the appointments process may be maintained or adjusted to best serve interests of democracy).

337. See Edward L. Rubin, The Concept of Law and the New Public Law Scholarship, 89 MICH. L. REV. 792, 825 n.85 (1991) ("This can be seen most clearly by examining the relationship of the New Public Law scholarship to other fields, most notably public policy and social science. This scholarship, which focuses on planning and treats law as an instrumentality for achieving defined purposes, certainly overlaps substantially with public policy research . . . In fact, there is probably no intellectually meaningful argument for
subtle, and it may not yet be widely acknowledged, but the shift from formalism to instrumentalism inevitably results in a profound contraction in the expertise, and thus the authority, that legal scholars bring to normative legal scholarship.

One obvious response to this problem of authoritative scholarship is for legal scholars to seek, perhaps in interdisciplinary and empirical legal scholarship, a more objective and academic basis for their normative work. This raises the second fundamental challenge, and it has two parts. The first can be thought of as a problem of jurisdiction. Just what in this world could instrumentalist legal scholars, collectively, risk not including in their academic purview if they are to develop sufficient expertise to authoritatively evaluate the legal and regulatory output of the modern administrative state? In other words, what academic discipline, and what subject of empirical investigation, could possibly avoid analytical scrutiny by normative legal scholarship? This expansion toward a boundless breadth of inquiry and ever greater required expertise for normative legal scholarship is more or less inevitable once an instrumentalist view of law is adopted. Nevertheless, no matter how latent it may remain, it is highly improbable that other academic disciplines, and actual legal decision makers, will be willing to grant to legal scholars this virtually limitless academic jurisdiction and authority.

The second problem this fundamental challenge presents is even more formidable. Given that the subject of academic legal scholarship is principally the law and legal processes, the search for an academic basis upon which to normatively analyze and evaluate the subject becomes essentially the search for an objective science of human governance. Just how, within an instrumentalist paradigm, could legal

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338. Madison, supra note 283, at 76 ("The emergence of high quality interdisciplinary work by legal scholars is one of the most remarkable and valuable developments in law schools over the last twenty years").

339. See Posner, supra note 80, at 1319 ("Law has been a university subject in the United States for a long time, but as recently as the 1960s the law schools stood to one side of the academic culture of their universities, structurally as well as attitudinally."); TAMANAHA, supra note 19, at 155 ("[T]he steady drift of legal academics away from the practice of law comes at the cost of credibility that the law professoriate has anything relevant to say to lawyers.").
scholars plausibly hope to discover a sufficiently neutral and objective foundation that would provide to their normative work a genuinely academic status? Such a search, ironically, is an expression of one of the most powerful yearnings of traditional formalism. Among the most influential insights offered by legal realism is the implausibility, if not the impossibility, of such a quest.

Thus legal scholarship in the post-realist era finds itself in a highly uncertain state. The recognized authority and expertise of the legal scholar to engage in a normative analysis of law has been sharply circumscribed by virtue of the shift from formalism to instrumentalism and as yet no plausible strategy exists to reclaim it. While first-order descriptive legal scholarship is as available as before, the relative importance and prestige accorded it has dramatically declined. This leaves various kinds of second-order

340. CARDOZO, supra note 38, at 66 (“The demon of formalism tempts the intellect with the lure of scientific order.”); Randy E. Barnett, A Law Professor’s Guide to Natural Law and Natural Rights, 20 HARV. J.L. & PUB. POL’Y 655, 658 (1997) (“Americans at the founding of the United States well-accepted the idea that the world, including worldly governments, is governed by laws or principles that dictate how society ought to be structured, in the very same way that such natural laws dictate how buildings ought to be built or how crops ought to be planted.” (citing Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 YALE L.J. 907 (1993))).

341. See Pound, supra note 34, at 609 (“We do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs.”); Brian Z. Tamanaha, How An Instrumental View of Law Corrodes the Rule of Law, 56 DEPAUL L. REV. 469, 494 (2007) (“Many observers . . . interpret Legal realism and postmodernism to have taught that the fundamental distinction between an objective perspective and a subjective perspective is illusory.”).

342. See CRITICAL LEGAL STUDIES, supra note 170, at xliv (“The continued, almost frenzied, oscillation from legal process theory to Rawlsian natural law, from original intent to law and economics reveals more than a discipline sampling different theories of interpretation. It may sound strange to say so, but it also marks a problem of role which legal academics must confront every day. What exactly are you? A social engineer, cutting beneath the legal verbiage to find the deep social policies which inform a doctrinal field? A natural lawyer, measuring the court’s decision against the rule which would have been reached behind the Rawlsian veil of ignorance? A hired gun, shouting out arguments faster than your students? A doctrinalist, parsing pluralities and filleting footnotes to find the Supreme Court’s real meaning? An economic analyst of law, seeing every rule as merely a shorthand version of the injunction to seek an economically efficient solution?”).

343. Posner, supra note 80, at 1321 (“Traditional doctrinal scholarship is disvalued at the leading law schools.”).
descriptive legal scholarship. Work of this sort, however, is
descriptive in more of a heuristic sense than in the type of
harder, refutable version of academic description that is
normally associated with the natural sciences.\footnote{344}

Post-realist legal scholarship can be therefore
understood, on the basis of this analysis, to be a kind of soft
social science or perhaps an academic discipline most closely
aligned with the humanities.\footnote{345} Sophisticated work in the
area provides interesting and insightful perspectives on a
recognized body of published materials.\footnote{346} It identifies and
develops possible themes and works out their implications. It
is valued to the extent that it is perceived as novel, perhaps
even counter-intuitive, and elegantly presented.\footnote{347} But it
cannot really claim to be objectively true, and it suffers from
decreasing relevance and influence outside the legal
academy.\footnote{348}

\footnote{344. See \textit{Robert Nelson}, \textit{Economics as Religion: From Samuelson to Chicago and Beyond} (2002) (arguing that modern economic theory is most appropriately viewed as a form of theology); \textit{see also Religion and Economics: Normative Social Theory} (James M. Dean \& A.M.C. Waterman eds., 1998) (presenting a set of case studies of ways in which economics and theology may actually have been combined in the real world); \textit{Economics and Religion: Are They Distinct?} (H. Geoffrey Brennan \& Anthony Michael C. Waterman, eds. 1994) (considering the relationship between economics and religion and if theology and economics are entirely autonomous and distinct areas of inquiry).

345. \textit{See Posner, supra note 169, at 1122} ("Doctrinal analysis today is a humane rather than scientific discipline. As in the other humanities, great emphasis is placed on writing well (sometimes on writing impressively--which is not the same thing), footnoting copiously, treating every topic exhaustively, and staying within the linguistic and conceptual parameters of the doctrines being analyzed. Soundness is valued above originality, thoroughness above brevity; originality, where it is present, tends, indeed, to be concealed.").

346. \textit{See Daniel A. Farber, The Case Against Brilliance, 70 Minn. L. Rev. 917, 917 (1986)} ("In most fields of intellectual endeavor, the highest praise is reserved for brilliant insights that overturn conventional thinking and common sense . . . . Economists and legal scholars, never ones to be outdone by 'hard scientists,' traditionally have applied the same standards in their own fields.").

347. \textit{See Farber, supra note 201, at 310} ("Scholarship is expected to be original, and defense of the conventional wisdom provides few opportunities for brilliance. The professor seeking scholarly recognition is well-advised to steer away from the true but trite, in favor of the false but novel.").

348. \textit{See Tamanaha, supra note 19, at 152} ("A comprehensive study of the law review database, covering about 385,000 articles, found that 43% of published articles are not cited \textit{at all} -- not by courts or law reviews -- and 79% of articles are cited fewer than ten times; a mere 1% of law review articles account for 96% of all citations." (citing A Voice Crying Out in the Wilderness, and Then Just Crying, \url{http://therightcoast.blogspot.com/2005/07/voice-crying-in-wilderness-and-then.html}); \textit{see also} Michael D. McClintock, \textit{The Declining...}
Those invested in legal scholarship need to begin a serious assessment of its possible roles and functions in this post-realist period. What unique expertise do law professors as legal scholars bring to the table and what kind of research and scholarship would be a productive application of that expertise? How might scholarship that better serves the needs of the bench and the practicing bar be identified and encouraged? What is the relationship between the pursuit of different kinds of legal scholarship and a law professor's concurrent professional obligations as an instructor of law students? These are important questions. As a practical matter, they may not need to be addressed for law schools and legal scholarship to continue much as they have, but they must eventually be addressed before legal scholarship can regain its respect and its influence in the larger world.