Legal Theory and Linguistic Reality: A Critical Examination of Modern Legal Scholarship

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LEGAL THEORY AND LINGUISTIC REALITY: 
A CRITICAL EXAMINATION OF MODERN LEGAL SCHOLARSHIP

Marin Roger Scordato*

INTRODUCTION

What is it that we, as students and researchers of the law, expect when we approach the vast body of academic literature known as “legal scholarship”? What should we expect?

Until quite recently, few legal scholars have attempted to systematically describe just what legal scholarship is, or what it should attempt to do. During a symposium on legal scholarship sponsored by the Yale Law Journal in the early 1980s, Owen Fiss observed that, “The law . . . is lacking a literature on its own scholarship.” George Fletcher, during the same symposium, asserted that "we have no jurisprudence of legal scholarship,” and Arthur Leff, in trying to describe the nature of legal scholarship, simply said, “Legal scholarship is what legal scholars do.”

Although there may be a relative shortage of scholarly efforts to systematically analyze legal scholarship as a distinct social and intellectual activity, there is certainly no lack of criticism aimed at the overall product of legal scholars. In 1962, Fred Rodell wrote, “There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground.” Edward Rubin recently wrote:

These are not cheerful times for standard legal scholarship. In fact, the field is widely perceived as being in a state of disarray. It seems to lack a unified purpose, a coherent methodology, a sense of forward motion, and a secure link to its past traditions. It is bedeviled by a gnawing sense that it should adopt the methods of other disciplines but it is uncertain how the process is to be accomplished. The field even lacks a conceptual framework within which to criticize itself.

These are serious and substantial criticisms. Many have been echoed by other highly respected legal scholars. They should not, I think, be lightly dismissed. This essay is my attempt to take up the challenge implicit in these criticisms; to identify and to clarify both the substantive problems and the intellectual challenges faced by modern legal scholarship. It represents an effort to develop an accurate and reasonably functional perspective on legal
scholarship, and it is my hope that this perspective can serve for some as a useful framework with which to evaluate the nature and the function of the large variety of academic work currently produced by legal scholars.

To establish a starting point for the analysis, I begin by identifying and discussing the possible functions served by scholarship in a legal environment defined by the classic jurisprudence of natural law. I then consider the intellectual challenge posed to natural law jurisprudence by the modern Legal Realist movement and the consequences of that challenge for legal scholarship in particular. Lastly, I attempt to characterize the mainstream of current legal scholarship as a series of variations on two very basic intellectual responses to the modern Realist critique of established legal process and traditional legal scholarship.

**NATURAL LAW AND TRADITIONAL LEGAL SCHOLARSHIP**

Legal scholarship grows out of a specific legal culture, a generally-accepted jurisprudential view of the way in which legal rules should be designed and applied to the myriad activities encountered in society. The concept of "natural law" is one such view. With its roots reaching as far back as ancient Greek civilization, the concept of natural law begins with the idea that there exists in the world a universally correct and proper set of legal rules for the optimal regulation of human behavior, a "natural" and ultimately preeminent set of basic legal principles.

The concept of natural law has been an exceptionally powerful force in the intellectual history of law and in the actual design of legal systems. Its embrace of the notion that there exists an ascertainable and normatively superior moral order in the world is readily compatible with both traditional religious views of morality (and thus theocratic forms of government) and with modern science and its search for what are presumed to be the immutable physical laws of nature.

From a natural law perspective, legal scholarship has at least five primary functions. The first is to search for the natural law; to determine and to clearly articulate the normatively "best" set of legal principles upon which society's legal rules should be based. This is fundamentally a truth-seeking function and is closely associated in its basic goal and orientation to the work of natural and social scientists.

The second function of legal scholarship in a natural law world, following largely from the first, is to design and to develop the full array of sub-principles, doctrinal rules, and exceptions that logically follow from the basic principles of natural law. In performing this function, legal scholarship
is operating much like a form of applied philosophy, in which the mainstream work of judges and scholars is to rigorously identify and to articulate the necessary inferences and conclusions that can be logically derived by using legal reasoning to analyze fundamental legal principles. As Walter Cook, former Professor of Law at Yale University put it in 1927:

Every 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, a finding that the facts of the particular case are those certain facts, and the application of the rule is a logical necessity . . . . It must be perfectly apparent to any one who is willing to admit the rules governing rational mental action that unless the rule of the major premise exists as antecedent to the ascertainment of the fact or facts put into the minor premise, there is no judicial act in stating the judgment.\(^1\)

A third important function of legal scholarship in a natural law regime is to describe the current state, and to monitor the future development, of the law as it actually exists. In performing this function, legal scholars try to summarize and to systematize the work of a very large number of courts operating in different jurisdictions at many different appellate levels at different times, all deciding discrete and individual disputes involving different parties and different factual elements.

A fourth function of legal scholarship under natural law is the critical evaluation of existing law. In performing this function, legal scholars, by closely reading and analyzing appellate court opinions, monitor the actions of judges and then compare and contrast the results with the ideal set of principles, doctrines and rules that have been developed by means of a rigorous logical analysis of natural law principles (the result of the second function of legal scholarship described above).

The fifth, and for my purposes the final, basic function of legal scholarship is to serve the more or less bureaucratic needs of the legal academic profession. It is certainly no surprise to anyone familiar with law schools and law professors that the production of legal scholarship plays a critical role in the ordering of formal and informal relationships both between and within law schools. The status of individual and institutional careers in legal academia is heavily dependent upon the quantity and perceived quality of legal scholarship produced.

In quick summary, then, there are at least five basic functions of legal scholarship in the jurisprudential world of natural law: the identification of legal first principles (legal truth-seeking); the development of legal doctrine based on these first principles (conceptual analysis); the depiction of the law as it actually exists (legal description); the comparison of the existing law to the natural law ideal (doctrinal analysis); and the creation of incentives and
the ordering of relationships within legal academia itself (bureaucratic utility). By separately identifying these five basic functions, I do not mean to suggest that any given piece of legal scholarship, even under an exhaustively natural law regime, will fit within only one functional category. On the contrary, most pieces of legal scholarship seek to simultaneously serve more than one of these basic functions. However, it is the purpose of this essay to develop an overall perspective on modern legal scholarship and I believe that the above taxonomy will prove useful for this purpose.

**NATURAL LAW AND THE MODERN REALIST MOVEMENT**

Despite the fact that natural law has been facially rejected by our modern legal culture, it still exerts a powerful influence on much of what happens in law schools, courts, and law offices. Most of us are told as first-year law students that legal reasoning involves the rigorous analysis of general rules of law in order to correctly select and apply the appropriate legal rules to a particular factual situation. The process as most often described seems closely akin to a form of applied philosophy, in which "legal propositions, like so many philosophical propositions, are not statements of the kind that have empirical truth values." In law, much like in philosophy, these statements serve as seemingly immutable first principles from which the analysis originates. For example, as George Fletcher has noted:

[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 the Constitution means and at the same time make a mistake about the true meaning of the Constitution.]

Perhaps the best and most concise statement of legal scholarship as an essentially philosophical endeavor belongs to H.L.A. Hart, who has written that the appropriate scope of general jurisprudence consists, "in the elucidation of fundamental legal notions to be achieved by the analysis of the distinctive vocabulary of the law and by the classification of its terms in such a way as to bring out their logical interconnexions [sic]." The vision of a mature legal system, from this perspective, involves a highly ordered, carefully structured system of legal rules that have been systematically derived from fundamental legal principles by means of decades of cumulative logical analysis and reasoned argument in hundreds of appellate cases and law review articles.

Serious concerns about viewing law as a branch of moral or ethical philosophy arose within the ranks of legal scholars as early as 1924 when
John Dewey, himself a philosopher, approvingly quoted Justice Oliver Wendell Holmes when he said:

The actual life of the law has not been logic: it has been experience. The felt necessities of the times, 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.\textsuperscript{16}

Dewey asserted that “there is a wide gap separating the reasonable proposition that judicial decisions should possess the maximum possible regularity in order to enable persons in planning their conduct to foresee the legal import of their acts, and the absurd because impossible proposition that every decision should flow with formal logical necessity from antecedently known premises.”\textsuperscript{17}

The primary focus of this challenge to the traditional philosophical view of law is the asserted inadequacy of formal logic to the task of satisfactorily deciding actual legal disputes, and hence, to the task of accurately describing the actual operation of the law. This critique claims that philosophically styled legal analysis can only rely upon “objective” legal and philosophical values that are so abstract that they cannot provide reliable normative guidance in the resolution of real life legal problems.\textsuperscript{18} This critique also claims that, as a necessary result, philosophically styled legal scholarship cannot accurately capture the nature and purpose of the law as it actually operates and exists in the real world.

An important intuition underlying this view of the law and legal reasoning is that particular deductions may be logically valid but false in fact. Though concerned primarily with the problems of strictly logical analysis in another area of academic research, astronomy, Samuel Pierpont Langley has illustrated the danger of relying on logical induction as the exclusive means of developing general explanatory laws through the use of an allegory:

We have read somewhere of a race of ephemeral insects who live but an hour. To those who are born in the early morning the sunrise is the time of youth. They die of old age while the sun’s beams are yet gathering force, and only their descendants live on to midday; while it is another race which sees the sun’s decline from that which saw it rise. Imagine the sun about to set and the whole nation of mites gathered under the shadow of some mushroom (to them ancient as the sun itself) to hear what their wisest philosopher had to say of the gloomy prospect.

If I remember aright, he first told them that, incredible as it might seem, there was not once a time in the world’s youth when the mushroom itself was young, but that the sun in those early ages was in the eastern, not in the western
sky. Since then, he explained, the eyes of the scientific ephemera had followed it, and established by induction from vast experience the great ‘law of nature’ that it moved only westward; and he showed that since it was now nearing the western horizon, science pointed herself to the conclusion that it was about to disappear forever, together with the great race of ephemera for whom it was created. What his hearers thought of this discussion I do not remember, but I have heard that the sun rose again the next morning. 19

Proponents of traditional doctrinal analysis might respond to the above critique by agreeing that while there may exist problems in the correct and proper application of legal doctrine, and while these problems may well be deserving of attention, the existence of this situation in no way detracts from the legitimate mandate of legal scholarship to rigorously develop the proper logical structure of legal doctrine. In fact, these proponents could say, it is precisely the rigorously logical nature of legal doctrines and doctrinal systems that distinguishes the necessary and preferred methodology of legal scholarship from the preferred methodology of scientific research. In addition to meeting the stated challenge, this response also possesses the additional advantage of elevating traditional doctrinal analysis to an appropriately lofty “academic” plane; one, it suggests, that exists above the “applied” realm of the actual legal process.

Faced with this response, critics of traditional doctrinal analysis had to find a way to directly challenge the legitimate authority of strictly logical legal reasoning as the primary mode of discovering new truth in the field of the law. Given the number and variety of intellectual bonds that doctrinal analysis shares with traditional philosophical inquiry, it is somewhat ironic that it has been the academic discipline of philosophy that has provided modern legal critics with the conceptual foundation for their most profound and influential challenge to the legitimacy and efficacy of traditional doctrinal analysis.

At the core of this challenge is the idea that human language possesses little, if any, objective meaning. That is to say that the words and syntax that compose a human language have very little meaning independent of the customs, usages, and values that are in effect in the society in which the language functions. When the philosopher Ludwig Wittgenstein, 20 writes that, “ . . . to imagine a language means to imagine a form of life,” 21 he is highlighting the fact that language is the major tool by which a human society conceptually categorizes and systematizes the otherwise uselessly random and dissonant mass of sensory stimuli that can be perceived by human senses. From this perspective, human language contains within it a full ontology; a categorized and systematized version of the world.
Once seen as an integral and inseparable element of the human society in which it exists, language quickly loses the status of a value-neutral medium which is used to objectively refer to extra-linguistic objects out in the world. Instead, language is seen as a symbolic medium which derives its meaning from the changing human values and linguistic conventions that exist in a given linguistic community at any given time. One way to appreciate this insight is to reflect upon the difficulty of defining, or translating, idiomatic words and phrases outside the particular contexts in which they thrive. For example, the phrase “grade point average” could hardly be adequately explained to a naive listener without describing the dynamics and the structure of the academic world in which the phrase exists and has meaning. Similarly, many words in our language possess a large number of possible formal meanings. The word “court” for example carries fifteen separate definitions. As a result, the selection of the correct meaning to ascribe to a particular use of the word “court” depends almost entirely on the social context in which the word is used.

Given this view of language, statements of logical classification are not seen as descriptions of objectively valid and final truths about the world, but are instead seen as working hypotheses and mental devices to which we resort in order to deal more effectively with our experiences, and which are subject to change and revision in the light of further experience.

Legal scholars soon recognized the potential power that these new ideas regarding language could have when transferred to the field of law and, most vigorously in the 1920s and 1930s, they applied these new insights to the traditional structure of legal scholarship. What resulted, for the most part, was a powerful critique of both the efficacy and the legitimacy of understanding the law by means of logical doctrinal analysis. This new perspective was adopted and espoused by some of the most respected and influential members of the Bar: “The whole outline of the law is the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust.”

For the purposes of this essay, I will group the sometimes varied proponents of this line of criticism under the label “Legal Realists” (or “Realists”), with the explicit recognition that not all the scholars cited would necessarily classify themselves as such, and that criticism of traditional legal scholarship does not by any means exhaust the range of ideas embraced by the Legal Realists.
Perhaps the most straight-forward description of the application of these new philosophical ideas on language to the field of law has been made by Mark Tushnet:

The problem of language is that when lawyers look at a complex system of rules, they find that the rules, and the standard rhetorical devices for manipulating them, can justify any result at all—or, put differently, justify no results. Since controversies are in fact resolved, the problem of language means that the outcomes rest on choices external to the system of rules.25

Realists assert that legal rules cannot guide courts to definite results in particular cases because of the logical indeterminacy of the language which constitutes the legal rules. Because of this indeterminacy, a single legal doctrine can often be interpreted in various ways to support very different legal conclusions. This assertion is supported by the Realists’ factual observation that the actual legal precedents in most areas of substantive law are extremely varied, and the more conceptual observation that “the acceptable techniques of legal reasoning, such as distinguishing on the basis of the facts or analogizing to other areas of law where cognate problems arise, are so flexible that they allow us to assemble diverse precedents as we wish.”26 As a result, “. . . there is no compelling reason of pure logic which forces the judge to apply any one of the competing rules urged on him by opposing counsel. His task is not to find the preexisting but previously hidden meaning of the terms in these rules; it is to give them a meaning.”27

LEGAL SCHOLARSHIP AND THE MODERN REALIST MOVEMENT

While it is clear that the Realist critique of the traditional conception of the legal process has had a profound impact on the way in which most of us, and legal scholars particularly, think about law and the operation of the legal system, it is far less clear just what impact the Realist analysis has had on the activity of legal scholars and the product of legal scholarship. As a means of approaching this issue, I would like to utilize the five traditional purposes of legal scholarship that I identified as existing in a natural law environment: the identification of legal first principles (legal truth-seeking); the development of legal doctrine based on these first principles (conceptual analysis); the depiction of the law as it actually exists (legal description); the comparison of the existing law to the natural law ideal (doctrinal analysis); and the creation of incentives and the ordering of relationships within legal academia itself (bureaucratic utility).
In a natural law environment, these five separate functions of legal scholarship operate in close harmony. Legal scholars engaged in the regular teaching of law students and possessed of a desire to improve the legal system and to aid the bench and the practicing bar can rather easily further each of these goals and activities by engaging in traditional legal scholarship. At bottom, a more or less unified set of intellectual talents and conceptual tools are called upon in legal truth-seeking, conceptual analysis, legal description and doctrinal analysis under a natural law approach. In addition, and quite importantly, it is this same set of intellectual talents that law professors are presumed to be imparting to law students through their instruction—the oft-cited ability to “think like a lawyer.”

In a post-Realist environment, however, the proper goals and purposes of legal scholarship become much murkier and much more difficult to discern. In fact, the Realist-based critique of legal scholarship has itself seemed to evolve in at least two increasingly separate directions. On the one hand, some Realists have linked their criticism of traditional legal scholarship to an explicit political agenda. These critics have employed the notion of a value-laden language to challenge the traditional liberal political ideal of objective law as the guardian and guarantee of individual freedoms against the illegitimate intrusion of governmental power, and to characterize traditional legal scholarship as an essentially rationalizing and legitimizing enterprise.

Alan Freeman, for example, writes:

I would suggest . . . that the production of liberal scholarship is really 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, that holds out utopian promises while ensuring their nonattainment, that cuts off access to genuine possibilities of transformation . . . . The process of delegitimating scholarship eventually reveals a world that is characterized more by conflict than by harmony, and by patterns of illegitimate hierarchy.

The second aspect of the Realist critique, while not as explicitly political in nature, also strongly challenges the status of traditional legal scholarship as a genuine truth-seeking activity. In other words, the Realists claim that while doctrinal analysis may attempt to work out the proper logical relations between legal doctrines when different values and conventions are plugged into the basic premises, it will never really discover new truth about the law itself or about the legal process as it actually exists; and in this sense doctrinal analysis does not pursue the same ends and goals as does scholarship in the social or natural sciences.
Instead of searching for as yet unknown empirical facts, 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.” Consequently, “[w]hen inquiry is focused only upon rules of law—perspectives—to the exclusion of actual choices or practices—operations—there can be no assurance that it will have any relevance to what is actually happening in a community.” This has led at least one scholar to conclude that “the obvious partisanship of the professional [academic] enterprise, and the realist perception that prescriptions will be adopted or not for reasons independent of their rational force, deprive . . . [the vast majority of law review] articles of intellectual interest.”

POST-REALIST LEGAL SCHOLARSHIP

It is my belief that current legal scholarship can most productively be viewed as an amalgamation of varied scholarly responses to the legal realist critique of traditional doctrinal analysis. What follows is a brief description of what I perceive to be the two major reactions to the Realist critique currently present in modern legal scholarship: teleological analysis and denial.

THE TELEOLOGICAL ANALYSIS OF LAW

Legal scholarship that I believe falls within the category of “Teleological Analysis” appears, at least on one level, to have solved the conceptual dilemma posed by Wittgenstein and the Realists. It does this chiefly by making explicit the social policy choices that are used to interpret and analyze both general principles and specific legal doctrine. Once the interpretive value choices have been made explicit, legal scholars can productively assert and refute whether one or another doctrinal system best achieves the desired result without the problem of disguised subjectivity encountered by more traditional doctrinal analysis. Some scholars have described this style of scholarship as “legal engineering.” The conceptual foundation for this methodological approach in the field of law was clearly articulated as early as 1927:

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. If this is to be done, quite clearly we must know what
at any given period these ends are and also whether the means selected, the
given rules of law, are indeed adapted to securing them.\(^{35}\)

There are at least three other significant differences between teleological legal analysis and traditional doctrinal analysis. The first of these
differences is the greater degree to which teleological analysis, as compared
with doctrinal analysis, does not smoothly mesh with the routine legal
analysis that takes place in actual adjudicative practice. So long as it is still
the case that the great majority of legal disputes are decided by courts on the
outward basis of a standard analysis of the facts and the applicable legal
precedent, then teleological analysis will be removed enough from direct use
by practitioners and judges to acquire a certain “scholarly” quality not
always enjoyed by traditional doctrinal analysis. In cruder terms, one can
almost think of legal scholars operating in this mode as having shifted from
viewing the law from the implementation-oriented perspective of a judge or
an advocate, as is done in large part in traditional doctrinal analysis, to
viewing the law from a larger legislative perspective; one that is primarily
concerned with identifying and evaluating the various factors that should be
considered and analyzed in the process of developing the law itself.

This first difference between teleological and doctrinal analysis gives
rise to the second. Because teleological analysis, by its very nature, focuses
on the degree to which different doctrinal systems succeed in achieving the
policy choices, or social values, for which they were designed, it must itself
refer to a social reality that is external to the law and the legal system. Unlike
traditional doctrinal analysis, which by its own notion of the rigorously
logical and stolidly objective nature of law can comfortably confine the scope
of its inquiry to the contents of a legal library, teleological analysis is
necessarily committed to an examination of the nature of the interaction
between the substance of the law and the procedures of the legal system on
the one hand, and the actual behavior of those actors and systems of actors
that are meant to be influenced and regulated by the law on the other hand.
Without such an examination, teleological analysis would possess no prin-
cipled way of describing or predicting the degree to which even the simplest
doctrinal system would actually achieve its stated purpose.

It is in this necessary commitment to an examination of extra-legal
reality, however, that teleological analysis begins to encounter its most
serious methodological problems. Perhaps it is the powerful and continuing
legacy of traditional doctrinal analysis at work, but it appears as if the great
majority of teleological legal analysis currently produced continues to
confine the scope of its research to the four corners of the law library.\textsuperscript{36} Because of this practice, the raw data of most teleological analysis is the written and reported appellate case decision.

Since reported appellate cases (hereinafter "cases") constitute the basic facts in the legal scholar's epistemology, there must also exist a basic, though often unstated, assumption that the available facts in the cases correspond in a reasonably satisfactory manner to the actual state of affairs in the relevant world at large. Without such an assumption, any scholarly claim with respect to the relative efficacy of different doctrinal schemes is, at best, problematic. Nonetheless, there exist a large number of reasons to believe that the above assumption is, in fact, without sufficient factual foundation to support the basic intellectual ambitions of teleological analysis.\textsuperscript{37}

The most serious problems involved in assuming that reported appellate cases accurately correspond to the societal behavior of relevant parties outside of the legal system can be divided into two basic categories: (1) those that demonstrate that the civil or criminal trial is a very inaccurate process for systematically gathering all of the facts that are relevant to the consideration of a legal doctrine; (2) and those that demonstrate that reported appellate opinions cannot be relied upon to be representative of the actual operation of the law in society or the frequency of types of lawsuits that are dealt with by the legal system as a whole.

Taking the former category first, the following passage illustrates the basic thrust of the argument:

\begin{quote}
[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. . . . In short, there are other factors to be weighed against the probative value of evidence.\textsuperscript{38}
\end{quote}

The Federal Rules of Evidence, however, are not the exclusive source of impediments to the trial being a vehicle for accurate investigation of historical facts. Another very significant impediment is the impact and operation of the exclusionary rule in criminal cases.\textsuperscript{39}

In addition to impediments in the form of evidentiary and procedural rules, there exists a rather substantial risk of historical inaccuracy when an appellate court is faced with the task of reconstructing the relevant facts for its written opinion after a general verdict from the trier of fact at the trial level has left the relevant facts unidentified or undecided. In such cases, the
appellate court has little choice but to create a new history of the case from the briefs and the arguments of the advocates, and the cold written record of the trial proceedings.

It should be noted here 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, for the purposes of this essay, 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 various ways in which significant actors respond to a given system, or a particular modification in a given system, of legal rules.

Turning now to the second category of problems, those that tend to demonstrate that reported appellate opinions cannot be relied upon to be representative of the actual operation of the law in society or the frequency of types of lawsuits that are dealt with by the legal system as a whole, the latter half of the above disjunction can be rather easily demonstrated by noting: (1) that something less than five percent of all civil cases are litigated through trial to verdict;40 (2) that of those civil cases that are fully tried, less than one percent are appealed;41 and (3) that 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 the appellate court.42

Regarding the legal reasoning set forth in most written appellate opinions, John Dewey had this to say almost sixty 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.43

At a minimum, it seems safe to say that the explications of legal reasoning set forth in written appellate opinions are, by their very nature, exercises in rationalization that should rarely, if ever, be accepted at face value by a responsible legal scholar.
The above two broad categories of epistemological problems encountered by teleological analysis, when taken together, present a formidable challenge to the efficacy and accuracy of this type of scholarship. In its strongest form, this challenge asserts that:

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. 44

It should be recognized here that there is at least one sub-category of teleological analysis which has, in my opinion, managed to escape both the normative/objective problems posed by Wittgenstein and the Realists as well as the epistemological problems outlined above, and this is the now fairly well established field of Law and Economics. In general, scholarship that is thought to fall under the Law and Economics rubric borrows both social value choices and behavioral assumptions from the long established academic field of economics. 45 The general intellectual strategy being employed is the adoption of highly simplified models of social reality for use in legal analysis, with the hope of achieving both greater analytic rigor and increased elegance in the resulting product. 46

The relevant question in evaluating scholarship of this type becomes whether anything significant is lost when we accept the tightly structured models of human behavior offered by these scholars. At least one commentator has answered this question by asserting that:

[the simplifying approach in law and microeconomic analysis achieves elegance at the cost of accuracy. If the complexity of the real world is taken into account, the analysis provides neither a full positive description of nor an accurate prescriptive guide to the development of legal rules in all their variety. 47

Perhaps it is, in the final analysis, most productive to view and evaluate the Law and Economics material in much the same way as one would evaluate any other highly formalized system of thought (like Euclidian geometry); which means not asking to what degree it possesses explanatory power, or how empirically accurate it is, but to instead say that so long as the theory under examination contains within itself no inconsistencies or absurdities, then it should be regarded as true in so far as it is interesting or useful.

One conclusion that could be drawn from the foregoing analysis is that in order for legal scholarship in the form of teleological legal analysis to
achieve its fullest academic ambitions, it must become very seriously involved in empirical social research. After all, it is only through rigorous empirical research that legal scholars can confidently identify and discuss the likely societal effects of possible variations in legal rules. A fundamentally instrumentalist approach to law is a necessary part of teleological legal analysis and such an approach, if bereft of supporting empirical research, is fueled only by seat-of-the-pants hunches and the social intuitions of the author of the work. This basis for instrumentalist legal analysis is particularly suspect when one considers the fact that the overwhelming number of likely authors of such pieces—professors of law—were born into similar circumstances, educated in much the same way, and reside, on the whole, in roughly the same socio-economic class.

This clear need for teleological legal analysis to engage in empirical research gives rise to the third important difference between teleological legal analysis and traditional doctrinal analysis, and that is the very significant difference in their relative bureaucratic utility. As I have noted earlier, a law professor engaging in traditional legal analysis, which Richard Posner describes as, "... the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis," is operating in almost complete harmony with his or her other institutional responsibilities, most notably the responsibility to teach law students. A law professor engaged in the empirical research necessary to support teleological legal analysis however:

(1) is occupied by an activity which has little relevance to, and will undoubtedly draw personal resources away from, the teaching of law students. Even now, there have been questions raised about the degree to which law faculties effectively train students to practice law in the world outside of the appellate judge's chamber and the calls for a greater presence in the curriculum of clinical courses has been answered by utilitarian arguments in favor of predominately theoretical and policy-based approaches to learning the law. One can only imagine the furor that would be created by significant numbers of law faculty taking up the challenge of empirical social research and thus further distancing themselves, at least intellectually, from the professional aspirations of their students.

(2) is engaged in an activity which will require enormous resources to complete effectively. Sophisticated empirical research of any sort, and large-scale empirical social research in particular, is notoriously expensive. It
seems unlikely that any law school, save for those associated with large research universities, could possibly afford it. Even those law schools that are associated with large research universities are most likely to require legal research to be funded in the way that most research in the university is funded—through the acquisition by individual faculty members of research grants, either from the federal government or from private foundations, corporations, and individuals. The most salient problem associated with such financing for legal research, apart from the fact that there has been no history of such funding and there simply may not exist a significant pool of interested patrons, is the perception of political or ideological bias that will inevitably accompany it.

(3) is involved in an activity for which the law professor is very likely not sufficiently trained. On the whole, law faculty are recruited by law schools after having completed an undergraduate degree, a professional degree program in law, and then either a judicial clerkship (or a series of clerkships) and/or experience for a few years in private law practice. None of these experiences, even when taken together, constitute sufficient training in the kind of sophisticated empirical research necessary to support serious teleological analysis.

Perhaps because of these problems, and the resulting incompatibility between teleological legal analysis and the bureaucratic needs of law schools, a second major reaction to the Realist critique of traditional legal scholarship has emerged.

DENIAL

Simply put, denial describes post-Realist legal scholarship that proceeds more or less as if the Realist critique of traditional legal scholarship did not exist. According to Robert Gordon, “The purest form of denial is [for current legal scholars] to assert that legal reasoning’s exclusive concern should be to work out the relationship of legal texts to a system of suprahistorical norms transcending time and space.” Far from being a small, isolated, hold-out realm of traditional legal scholarship in the post-Realist academic world, classical doctrinal analysis, seemingly unaffected by the intellectual challenge of the Realist critique, apparently continues to occupy the very mainstream of current legal scholarship. It is not at all hard to find modern legal scholars saying openly that current legal scholars have ignored or rejected without serious analysis the disturbing implications of the Realist challenge to the objectivity of the rule of law.” and that,
consequently, "[l]egal scholarship proceeds as if the Realist critique had never been made." 53

How should one approach this type of legal scholarship in light of the insights provided by Wittgenstein and the Realists? As an initial matter, I think that the Realist critique has rather persuasively demonstrated that classical legal doctrinal analysis can no longer be viewed and evaluated in the same manner as traditional truth-seeking scholarship in the social and natural sciences. It does not seem to be a useful or productive endeavor to question the empirical truth of the products of doctrinal analysis, nor to expect one piece of scholarship in this vein to definitively disprove or to supersede another. Does this mean that the product taken as a whole is useless? I do not think so.

I believe that a better perspective on traditional doctrinal analysis is one that views it within the larger context of the legal profession. Certainly, practicing lawyers and judges have little choice but to engage in creative and sophisticated doctrinal analysis in the pursuit of their professional practice; and legal scholars, much like scholars in those other area of academia that border and support professional practice (e.g. medicine, engineering, architecture, and psychology), can be thought of as pursuing and expanding the basic intellectual activity (in this case, legal reasoning) that provides the conceptual foundation for the practical professional activity. From the perspective of the practicing Bar, therefore, legal scholarship of this sort is a research tool which can often provide very efficient access to the most respected and relevant cases in an area and can occasionally serve as a source of sophisticated legal arguments on either side of a particular doctrinal issue. From the perspective of law students, legal scholarship of this sort serves an important pedagogical purpose as an example of the best and the brightest application of legal reasoning available. From the larger perspective of the legal system, this type of scholarship, by providing to judges and practicing lawyers a very high-level analysis of both general legal doctrine and specific legal rules, certainly serves to elevate the quality of both advocacy and adjudication in the legal system.

Given the obvious utility of traditional doctrinal analysis for the interests represented by the perspectives discussed above, and its problematic status as a truth-seeking endeavor, it becomes especially important to highlight the political nature of this type of scholarship. Political, not in the Realists' sense of legitimating a given social order, but because the very nature of interpreting inherently ambiguous linguistic statements (rules of
law) requires a commitment to some relatively stable set of social values and choices. Even the classic treatises of the common law have been recognized to possess a significant political component: “In an era when the courts were guarded about their capacity to ‘make law,’ the treatise was a vehicle for subtle and diplomatic advocacy, often under the guise of saying what the law was.”

This insight can potentially provide readers with an evaluative perspective by which to evaluate, at least as a preliminary matter, the relative merit of any given product of traditional doctrinal analysis. Assuming that the theory advanced is not plagued by internal inconsistencies or patent absurdities (these being first-order evaluative criteria for any piece of scholarship), then the value of this sort of theory is measured by the degree that it is regarded as conceptually interesting or heuristically useful; but not to the extent that it is considered to be “true” in any traditionally empirical sense. From this perspective, the outwardly objective posture of most traditional doctrinal analysis can be seen as an essentially strategic technique for enhancing both the persuasive power of the particular position set forth in the piece, as well as the general persuasive potency of this genre of scholarship as a whole; and while this veneer of objectivity is important in order to attain maximum influence for a given piece, it is perhaps more important that sophisticated users of this type of scholarship not be drawn into investing valuable intellectual time and effort into attempts to definitively prove or disprove such theories.

There are at least two additional aspects of this analysis worth noting. The first involves the choice of an appropriate academic analogy. While the objective posture of most doctrinal analysis might lead one to look toward the social and natural sciences for an appropriate evaluative framework with which to assess the relative merit of a given piece of scholarship, the above analysis points instead toward philosophy and the humanities as the proper sphere from which to borrow an evaluative scheme. As Richard Posner has noted:

[d]octrinal 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.55

The second aspect of the above analysis that I believe worthy of note is the light that it sheds on what some observers believe to be the declining
status of traditional doctrinal analysis as a powerful influencing factor in the adjudicative process. Richard Posner has stated that “doctrinal analysis . . . is currently endangered at leading law schools” and Christopher Stone suggests that “[t]he aspiration that drove the traditional treatise—to locate the quintessential legal rules and principles—was at the least, deflated by the realist attack.”

The account of traditional doctrinal analysis detailed in this essay explains, to some extent, this apparent decline by pointing out that the persuasive power of traditional legal scholarship would naturally decrease as those who are generally persuaded by it become increasingly aware of the necessarily non-technical value choices that underlie the work. In fact, some commentators sincerely believe that as the insights provided by Wittgenstein and the Realists become more generally understood, the traditional persuasive power of legal scholarship that is based on purely doctrinal analysis may fade significantly.

ENDNOTES

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4Fletcher, Two Modes of Legal Thought, 90 YALE L. J. 970 (1981).


7Rubin, supra note 1, at 1835.

8For example, in 1986, Roger Cramton, Robert S. Stevens Professor of Law and former Dean of the Cornell Law School and the former President of the Association of American Law Schools, wrote:
Much of legal scholarship pretends to an objectivity it does not deliver; it fails to state or to examine the premises on which it is based; and it conveys a hubris of truth and righteousness (and sometimes even moral indignation directed at those holding opposing views) that is inconsistent with the humility of the true scholar.

Cramton, supra note 1, at 7-8.


10Id. at 97-126.


14Fletcher, supra note 4, at 973.


16Dewey, Logical Method and Law, 10 CORNELL L. Q. 17, 21 (1924).

17Id. at 25.


20Though the development of the ideas described in this section of the paper enjoy a long and rich tradition in modern philosophy, I will here refer to the work of only one philosopher; the one I believe to be the seminal and most influential in the movement. L. Wittgenstein, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans. 1953); L. Wittgenstein, THE BLUE AND BROWN BOOKS: PRELIMINARY STUDIES FOR THE PHILOSOPHICAL INVESTIGATIONS (1958); L. Wittgenstein, TRACTATUS LOGICO-PHILOSOPHICUS (1961). See also Russell, Ludwig Wittgenstein, MIND, Vol. 60 (1951); Feyerabend, Wittgenstein's Philosophical Investigations, PHILOSOPHICAL REVIEW, Vol. 64 (1955).


O.W. Holmes, COLLECTED LEGAL PAPERS 50 (1920).


Id. at 1385.

Cook, supra note 12, at 308.

See generally, M. Kelman, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

Tushnet, supra note 25.


Id. at 376.

Tushnet, supra note 25, at 1388 n.11.


Cook, supra note 12, at 308.


Much of the following analysis is developed at greater length and in much more detail by Philip Shuchman in P. Shuchman, PROBLEMS OF KNOWLEDGE IN LEGAL SCHOLARSHIP (1979).


45For two excellent examples of this type of scholarship in the field of contract law, See Goetz & Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 YALE L. J. 1261 (1980); Kronman, Mistake, Disclosure, Information, and the Law of Contracts, 7 J. LEG. STUD. 1 (1978).


47Tushnet, supra note 25, at 1393.


50Gordon, supra note 46, at 1025.

51See Tushnet, supra note 18, at 1207, 1208 n.13 and n.15, where a survey is described that examined the signed articles published in the two most recently completed volumes of eight highly respected law reviews and found that between sixty and seventy percent of the articles were representative of “traditional legal advocacy”.

In a recent report on an empirical research project by three law professors, 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.” R.C. Allen, et al., MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 4 (1968).

See also Posner, supra note 48, at 1123; A.F Conard, CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 92, 105-106 (1955) (comments by K.N. Llewellyn on “Manpower for Research”).

52Tushnet, supra note 18, at 1207.
53Freeman, supra note 16, at 1233.


56Posner, supra note 48, at 1113.

57Stone, supra note 54, at 1151.

58See Ahrens, supra note 44, at 439:

In the future I think we shall see the decline of the prestige of the limited style legal scholarship along with a decline of the prestige of the student edited law review. Student writings will continue because they believe potential employers are impressed by it. Faculty candidates whose interests in scholarship go little further than getting a tenure piece in print will contribute a continual stream of the old style stuff. Academic jurisprudence will be based in letters and the social sciences: in forthright literary criticism, the history and philosophy of culture, and in empirical studies. Practicing lawyers will rely on specialized bar publications and newspapers, written and edited by professional lawyer-journalists.