Marquette Law Review

Volume 101
Issue 4 *Symposium: Conference on the Ethics of Legal Scholarship*
Article 7

The Ethics of Normative Legal Scholarship

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THE ETHICS OF NORMATIVE LEGAL SCHOLARSHIP

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I am afraid that we need a fresh start. By that, I mean that we may need to think from the ground up about the nature of legal scholarship—or, so as not to beg the question, non-adversarial academic legal writing—and of its goals, its point, its methods, and then the ethics of it. Let me start, though, with this seeming banality about its location, or at least, the location of its production. The legal academy is a part of the academy—it is a part of university life, structures, and expectations. It is a department, or a school, within a larger academic institution. Faculty from across disciplines share an interest, and have a vested interest, in the law that is its focus. Its students share a campus, and libraries, and facilities, with students from other disciplines and from other professional identities. Tenure decisions, which include evaluations of scholarship, are made by law faculty but then reviewed by faculty from a cross section of the university as well as by a University or College President. Many law school faculty members have joint appointments in other parts of the university, and many faculty from other disciplines teach in law schools. Law school administrators share in the governance of the larger university.

But: the legal academy is also a part of the legal profession. Its faculty members are often members of bar associations. They are prolific authors of amicus briefs; they appear in front of congressional committees regularly and as an ordinary, not atypical part of their lives; they confer routinely in bar or bench associated conferences, and participate in bar-sponsored symposia; they sometimes represent clients or interests in courts; and, by no means unimportant, they socialize routinely with judges and lawyers. Most important, however, for these purposes, legal academicians are overwhelmingly lawyers, who are themselves trained in law. Their professional habits of thought are therefore the habits of lawyers—the same habits they seek to inculcate in their students. As such, law professors, like the future lawyers and judges they seek to train, and like the lawyers and judges with whom they professionally associate, respect, understand, and "live in" legal precedent, and legal pronouncements, and past legal authority—which is not at all the same as respecting, understanding, or living in, the discipline of history or economics

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or political science. Nor is it the "same thing" as being overly bound by or reverential toward that past authority. Law professors, like lawyers, don't worship authority, they are not even particularly inclined to obey it, any more so than others who are laws' subjects. Rather, law professors, like lawyers, participate in that authority, both in its production and reproduction: they interpret it, they stretch it, they use it, they work with it. Again, they do so as a participant in its production, as owners of it.

And mostly, and this is the difference that matters, vis-à-vis our ethical obligations in our writing, law professors participate in the production and reproduction of legal authority toward the end of law's betterment, or improvement. As respectful and mindful as they are to the past, legal academicians push, when they are speaking as lawyers, rather than as historians or philosophers or sociologists, to mold a better law here in the present and to thereby create a better social future, at least compared to that which past authority has wrought. I'd sum it this way: legal academics live, professionally, within the world created by legal authority in the past, they participate in the creation and production and reproduction of that authority in the present, and they seek to project a reformed version of it into our collective future. All three of these temporal orientations—the assumption as one's own, of legal authority laid down in the past, the creation through writing, teaching, and conferring, of legal authority now, and the reformist orientation toward the future—are parts of the identity of the legal academic. It is a distinctive identity. It is also near-instinctual; it runs deep.

So, on scholarship. The scholarship produced in the legal academy, today, vividly reflects this one-foot-in-each-square dual identity. Much of the scholarship produced in or around law schools—that which is produced by law professors jointly trained in both law and other disciplines, or by members of other departments and trained in other disciplines but interested in law, and who may be housed in law schools, or by fellow traveling legal academics themselves trained only or primarily in law but who employ, either wittingly or unwittingly, the methods of other disciplines—lies comfortably within the paradigm of scholarship artfully described by Professor Fish: using tools honed over centuries within disciplines designed for the purpose, that scholarship aims for truth, or to at least illuminate truth, or maybe to approximate it, or maybe to cast a light on whatever had been in truth's shadow, or even, best case, to capture that ray of light.[1] The truth that is sought, in this kind of legal

1. *See* STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME 12–14 (2008); *see also Transcript—Conference on the Ethics of Legal Scholarship*, 101 MARQ. L. REV. 1083 (2018) (Stanley Fish).

scholarship, is truth *about* law: about its history, or its content, or its relation to politics, or to philosophy, literature, or culture, the economics of its production, or of its consumption. Crudely: law is the subject matter, various non-legal disciplines provide the method, and truth is the aspirational goal. So, some examples: *Why the "Haves" Come Out Ahead.*[2] Why do moneyed interests win so consistently in courts, seemingly independent of the substance of law? Marc Galanter's iconic article that ushered in, in so many ways, the Law and Society movement, and hence the very idea of legal scholarship that aims for empirical truth, aims for the truth of the matter. Another: *We the Court.*[3] Did the Framers really intend the institution we know as judicial review*?* Then-Stanford Dean Larry Kramer's Supreme Court Foreword suggested maybe not—and he suggested that that's the historical truth of the matter.[4] A third example: *Race and Gender Discrimination in Bargaining for a New Car.*[5] Do women and African Americans pay more for new cars because of the way they bargain or because of the way they are perceived? Yes they do, and because of both, according to Ian Ayres and Peter Siegelman's research findings.[6] *The Impact of Legalized Abortion on Crime.*[7] Did crime rates go down fifteen years after *Roe v. Wade,* and why?[8] Yes, they did, or so argue John J. Donohue III and Steven D. Levitt, and *Roe v. Wade* is a part of the reason why.[9] Take an example from philosophy: Hart's *Positivism and the Separation of Law and Morality.*[10] Are legal positivists right to insist on the separation of law and morality?[11] Or is law dependent upon its fidelity to morality?[12] Legal philosophers have disagreed for centuries, but both Hart and Fuller were unabashedly aiming for the truth of the matter. And so on. Law is the subject matter of these attempts to contribute to our store of knowledge. Other disciplines—in the exemplary list above, history, sociology, and philosophy—supply the method. I think it is relatively easy to state the ethical obligations of legal academics—whatever their professional training, and whatever degree of sophistication they may

2. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

3. Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

4. *Id.* at 36.

5. Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995).

6. *Id.* at 319.

7. John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON. 379 (2001).

8. *Id.* at 380, 382–83.

9. *Id.* at 414–15.

10. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

11. *Id.* at 594–95.

12. *Id.* at 617, 620.

enjoy or be saddled with—working within these disciplines and toward these goals. The goal is to contribute to knowledge by aiming for the truth of the matter, the matter, here, being law. The ethical obligations of fidelity, honesty, integrity, diligence, and publicity—all follow.

We should be clear, however, and it seems to me that we are not at all clear on this, that much, and maybe even most of what legal academics write does not conform to this model, or at best, does not conform to it comfortably. Not too long ago, in fact, I think it would have been fair to say that almost *none* of what legal academics wrote, within the pages of law reviews, fell within that model. First of all, the method of what legal academics produce is legal, it is not history, it is not literature, or philosophy, or economics, or sociology, even as it of course makes use of those fields, and of course makes use of their findings, and even if it occasionally makes a meaningful contribution to them. But much, and maybe still most, of our academic legal writing is not motivated in the way Stanley Fish suggests must motivate the scholar.[13] The disconnect is simple: the legal method, unlike the scientific, the sociological, the literary-critic's, the economist's, and the historian's, doesn't aim relentlessly or even fundamentally for truth. Sometimes it does. It may, for example, seek a clearer statement of existing law in the face of considerable legal confusion; and in this extremely limited way it aims for the truth, that is, it aims to make true statements of law, whatever that might mean: a prediction of what the courts will do in fact, perhaps. In the course of so doing, it may seek to resolve a "split in the circuits." It may argue that while many, maybe most, people, including a bunch of judges, think the law of X topic is "a", in point of fact, it's actually "b." But what academic legal writing mostly does is something very different from that. What most mainstream legal writing may, and typically does, suggest is that "while the law of some subject is widely viewed as x, and even 'authoritatively' held to be x by various courts, it really *should be* y." This is true now, of most academic legal writing, and it has been true for the last century's worth of the genre. Another way to put the point is that academic legal writing is still, overwhelmingly, at least to some degree, "normative." It aims to improve the law; it aims to make the law better. Not *all* academic legal writing is normative. Some of it is analytic, some is descriptive, some is critical, some is theoretical, and some is interdisciplinary. Those are overlapping but nevertheless distinct categories. If you're aiming to make a better mousetrap, you're not aiming to say anything true, no matter how profound, about the history, culture, philosophy, or economics of mousetrap. My point here is not about those forms of writing, each of which carries its own hazards. Here, I'm making the limited, descriptive point that most academic legal writing—most

13. *See Transcript*, *supra* note 1 (Stanley Fish).

of what is published in law reviews—is normative. It attempts a statement regarding what the law ought to be—and unabashedly so.

Let me take two historic examples and then a few contemporary ones. Professor Prosser engaged in this kind of writing three quarters of a century back with respect to tort law in his iconic Hornbook and in his scores of articles on the topic, and he succeeded admirably.[14] "The tort rule on such and such an issue is confused and unjust; it ought to be x."[15] Justice Cardozo did the same kind of thing—the law is x, and it is confused and unjust: it should be y—in his iconic private law opinions.[16] In both cases, these two legal giants from a century or three quarters of a century back aimed to clarify our private law and in the process reform it toward its betterment. Both men were grounded in decades of precedent, of restatements, legislation, regulation, and American Law Institute reports to support their assertion that they were clarifying while improving, and not impermissibly legislating. They weren't doing op-ed writing, and they weren't doing politics, they were doing law. But their writing was again unabashedly normative. In both cases, their vision was clearly directed toward the future, toward creating a better—not just a clearer—tort law, a better—not just a clearer—contract regime. In the course of all this writing, did they aim at truth? Only in a mixed, complex, or partial way. They wanted to state the law clearly and accurately, but to do so, they had to restate it, and to restate it, they aimed not at the truth of any matter, but rather, at justice. The goal or purpose of their writing was not primarily to add to our store of knowledge about the world, or to shine a light on truth's shadow, or to bring us closer to it, or to approximate it, or to claim it. Whether contract depends upon consideration or can instead be founded on a relied upon promise, or whether we should be liable for failing to give aid to a dying stranger when we could do so at no or little cost, is not a matter of truth or falsity. Likewise, answering these questions definitively—no, Cardozo suggested although never held, a binding contractual promise perhaps shouldn't require consideration, if there is reliance;[17] tort liability for failing to rescue, Prosser urged, perhaps should not depend upon an act of commission, perhaps an omission should suffice[18]—doesn't add to our stock of knowledge about the world. Rather, answering these questions clarifies our obligations: these rules, and their improved upon

14. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

15. *See, e.g.*, *id.* at 375–76.

16. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928) (tort liability); Allegheny Coll. v. Nat'l Chautauqua Cty. Bank, 159 N.E. 173, 175 (N.Y. 1927) (promissory estoppel); Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917) (contract consideration); MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053–54 (N.Y. 1916) (product liability precursor).

17. *See Allegheny Coll.*, 159 N.E. at 175.

18. *See* KEETON ET AL., *supra* note 14, at 375–76.

versions, tell us whether we need to keep a promise for which we got nothing in return, or whether we better rescue that stranger in distress if we wish to avoid a lawsuit.

Bodies of law—rules of law, areas of law—are telling us to do or not do something. They are commands. As such they are just or unjust; they are not the sort of things that are true or false. The law says something more complex, but not different in form, from "close the door," or "close it gently" or, maybe, "slam it." The command to "close the door" or "do what you contracted to do or pay damages" or "avoid being negligent or pay those you injure," is not either true or false, any more than is "close the door." These imperatives can be just or unjust, foolish or wise, tyrannical or democratic, oppressive or liberating, wealth-maximizing or not so much so, sensible or inefficient. They can lead to an excess of societal benefits over costs or perhaps the other way around. They might be idiotic or brilliant; generous or narcissistic. They might or might not be consistent with what law ought to be, as determined by an appreciation of natural law or god's law or human rights law or a categorical imperative or a utilitarian calculus. "Shut the door," like "pay or do what you promised," can be, in short, good or bad. It can be just or unjust. It can be based on a good or a bad desire, backed by a just or an unjust sanction. It can be many things. It just can't be "true" or "false."

So, when Prosser wrote on torts, or Cardozo on contract, the goal, for both men, was to clarify and improve the law, which they both understood more or less positivistically as a system of authoritative commands issued by courts and legislatures. They were participating within that system of authority. The goal, or purpose, of that writing—the goal of *Prosser on Torts*,[19] as well as the goal of Cardozo's iconic opinions[20]—was a better system of law for dealing with the impact of injuries or breached private promises. They hoped to make a contribution, and they did. But the contribution they hoped to make was not toward truth. It was toward justice. They aimed to achieve a better tort law, and a better contract law, through clarifying, criticizing, and, where possible, improving the authoritative pronouncements of that law's past architects. They did so toward the end of improving that law and the lives lived within it. They wrote in order to make the law more just.

Now my claim is that whatever you want to call it, much, certainly not all, but very likely most, legal writing emanating from the legal academy over the last century falls squarely within this paradigm. Legal academicians write to clarify, criticize, reform, restate, describe, or analyze legal commands. They

19. *See* KEETON ET AL., *supra* note 14.

20. *See, e.g.*, *Palsgraf*, 162 N.E. 99; *Allegheny Coll.*, 159 N.E. 173; *Lucy, Lady Duff-Gordon*, 118 N.E. 214; *MacPherson*, 111 N.E. 1050.

almost always—because it is part of the job, part of the identity, part of the DNA—do so toward the end of making those commands better commands—more efficient, perhaps, or more in keeping with sound policy, or more true to the law's deep premises, or, basically, more just. They try to make the law "the best it can be" to use Dworkin's early phrasing for this.[21] So, some modern examples. Re-read *Toward Neutral Principles of Constitutional Law* from 1959.[22] That profoundly influential and extraordinarily misguided article sought to clarify, and criticize, and then improve the constitutional command not to discriminate, by issuing a challenge regarding it.[23] Look at *Torts as Wrongs* from about a decade back.[24] That article, which might prove equally influential, looks to reorient tort law away from its current obsession with accident costs, to, instead, the provision of recourse for wrongs.[25] It does so to make tort law better, as in more just, as well as our scholarship that so informs it. Most recently: look at Hanoch Dagan and Avihay Dorfman's *Just Relationships,* in Columbia Law Review.[26] It seeks to understand contract law's public law dimension, and to render it, and the relations it governs, more just by virtue of so doing.[27] Look at Charles Fried's *Contract as Promise*[28]—a lovely book that pulled me into teaching. That slim, graceful volume looked to ground contract law in our moral obligations to keep our promises rather than any conception of efficiency.[29] Why should the law change in the ways urged by these authors? Basically, whether they say so or not (and most of the authors above do say so) it is because, in their view, justice demands it. If the law conforms to their proposed reforms, it will be made more just. Their goal is to make it so.

A great deal—again I think most—of academic legal writing aims for justice. It does so, furthermore, in some of the same ways—with the same seriousness of purpose, and with the same lack of self-consciousness—that Fish describes as true of the scholarly pursuit of truth.[30] Some of that writing is small bore—it aims to resolve a circuit split, or answer an unresolved issue, or weigh in on a current issue before the Court. Some of it though is very large bore

21. RONALD DWORKIN, LAW'S EMPIRE 229 (1986).
22. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
23. *Id.* at 3.
24. John C. P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).
25. *Id.* at 918.
26. Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016).
27. *Id.* at 1398–99.
28. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).
29. *Id.* at 8, 11, 14.
30. *Transcript*, *supra* note 1 (Stanley Fish).

indeed—like the pieces mentioned above, they seek to re-orient an entire body of law, not just one issue. But whether small or large in ambition, academic legal writing that more or less takes the form, "the law is x and should be y," is normative in this sense. It aims to make the law better, against some metric.

I have elsewhere defended this practice, and its value, both in terms of its impact on law, on our teaching, on our students, on the profession, and indirectly on the rest of the academy.[31] I don't want to re-state those arguments. The subject here is more limited. *If* this is an accurate enough description of what a lot, if not all, of academic legal writing is aiming to do, what are the ethical constraints? What does the requirement of objectivity demand of academic legal writing, the aspirational goal of which is justice? What is the difference in the ethical obligations between that legal writing which is aiming for justice—which again I've suggested elsewhere is a valuable enterprise, and which should be defended against its many critics, both in and outside the academy—and scholarly writing, about law or any other subject, aiming for truth? And what is the difference, if there is one, between that academic legal writing, and writing that is also about law and aims to change it, but is polemical, political, or adversarial, and which is the target of Stanley Fish's (and many others) considerable and in my view justified wrath? Is it an ethical difference or a difference in kind?

I don't have a full answer, but I would like to note what I regard as two minimal ethical constraints on traditional normative legal scholarship that are obscured by our assumption, which I believe is unwarranted, that that writing can be easily assimilated to the scholarly writing, and hence the ethical obligations, of the rest of the academy, and *also* obscured by the critics' assumption that that writing is no different in kind, although may be different in depth or breadth, from the brief writing of lawyers, committee reports of legislative assemblies, or op-eds in *The Washington Post*. First: the legal academic engaged in normative legal scholarship is not a hired gun. Maybe no lawyer is, but that's not the issue here. Whether or not it makes sense to think of the lawyer as a hired gun, the legal academic most assuredly is not. Ethical constraints follow. One doesn't argue for what justice requires (either explicitly or implicitly) while harboring the knowledge that it's really a client who's paying you whose interest requires us to believe whatever you're saying justice requires. The same is true for a tenure committee, or your best guess as to what the hiring committee of some other law school will want you to think justice requires. Justice is partly a matter of our heart's teaching. If you are writing in pursuit of justice, you write from the heart or you don't write at all.

31. Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 8, 15–17 (2016).

Second, and less obviously: I believe you are obligated, if you are writing about what justice requires *of law*, to contribute to centuries' long and wide-ranging philosophical and jurisprudential dialogue over what justice is, and not just what it requires of any particular issue. Normative legal scholarship *in toto* aims to answer a question: what does justice require of law, and particular pieces of it aim to answer the specific question, what does justice require of this law. The question, please note, is not about distributive justice or social justice or sexual justice or gender justice or racial justice or political justice. All of those might be implicated, but they are not what's asked by normative jurisprudence. The question is what justice requires of law. If you, or we, can answer that question, or at least if you, or we, try in good faith to do so, then we can proceed toward objective debate over the particulars. Perhaps we can shine a light on its shadow. We can reach for it. We can aim for it. We can try to capture it. It will prove illusive, as does truth. But the quest for justice, we should acknowledge, is what should guide us.

For various reasons, none of them good, the legal academy has studiously avoided debate, or even discussion, over the nature, meaning, content, and demands of legal justice.[32] This is perverse, and we are still bearing the consequences. But it is a perversity that should end. We are not Hercules or super-human, and we don't have to answer anything definitively, either for our own or our children's generation. But as the rest of the academy has long and fruitfully debated the nature of truth, so the legal academy should be debating the nature of justice. What does justice demand of law? Does it demand due process? Yes, likely. Does it demand academic freedom? Not so clearly. Does it demand the non-discrimination principle? Yes, very likely. Does it demand the consideration doctrine? Unlikely. Does it demand strict liability for all injuries caused? Or, no liability ever, in the absence of a clear contractual assumption of a risk? And so on.

We cannot claim to aim for objectivity if we do not press ourselves toward the task of understanding the justice that purports to guide our labors. And make no mistake, academic legal writing, most assuredly including normative academic legal writing, is laborious. When it is good, it is not op-ed writing, and it is not political sloganeering. It is best when its normative thrust is dictated by the demands of legal justice. What our practice should require, I believe, is that we make those demands clear, be willing to defend them, and to cede ground when we've been shown to be mistaken.

32. There's no easy answer to the question why we have neglected this question. For a discussion of the subject, see ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 2 (2011).

So understood, and so constrained, normative legal scholarship, I believe, is of value, and should be defended. A world without it would be a much poorer place.