

## *On Legal Scholarship*

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Why is legal scholarship valued, required, pursued, and rewarded in the legal academy? What do legal scholars contribute to the academic pursuit of knowledge? What does the pursuit of justice have to gain from legal scholarship?

We take up these questions at a time of crisis. The scholarly mission of the legal academy is under unprecedented attack from all corners. Critics include the universities in which they are housed, the [legal profession and the bench](#), law scholars [themselves](#), and law schools' cost-conscious critics. So what is the cause for complaint?

### **The Brief Against Legal Scholarship**

University colleagues [fault](#) legal scholarship for its lack of discipline and peer review, but also, and more fundamentally, question its point. Academic critics contend that legal scholarship, compared to scholarship from the social sciences and the humanities, is too "professional." It is brief writing or perhaps white paper writing in disguise. It is overly argumentative, political, or, most generally, too "normative," by which is meant simply that its aim is to state what the law should be, as well as what the law is. At its best, critics say, it seeks to develop a more just world, rather than a more knowledgeable one. Therefore, even the best of it is not *true* scholarship: it lacks true scholarship's defining goal of uncovering subtle and interesting truths through the pursuit of knowledge within the discipline of a recognized academic field.

Critics from the Bar and the judiciary proffer the opposite complaint: that legal scholarship is not professional *enough*. The purpose of contemporary legal scholarship, according to professional critics, is obscure, and at least a good bit of it no longer seems primarily aimed at clarifying the law or suggesting pathways for the law to follow. It is of scant use to the practicing lawyer, and even less helpful for the sitting judge. Some judges [brag](#) that they don't bother to read it. For these critics, legal scholarship is *too* "academic." It is enamored with fads from other disciplines, and it is unmoored from any discipline or learning that is distinctively "legal."

Law schools' legions of cost-conscious critics, with their eye on the bottom line, complain bitterly about legal scholarship's costs. Whatever might be its *aim*, tenured law professors with low course loads and high salaries produce far too much of it, driving up tuitions. It is a whole lot of costly nothing, these critics claim. The cost critique urges law professors to retreat from producing little-read and low-impact scholarship toward teaching instead. The overall theme is that scholarly professors are eschewing the work of training students to be "practice ready" in favor of obscure research agendas and boutique seminars on overly precious topics that are of no use to practicing lawyers.

Lastly, a significant number of law professors themselves are profoundly unsure of the essence or even the point of the scholarly enterprise. Conferences, colloquia, law review symposia, and informal conversations, to say nothing of tenure meetings and hiring deliberations, are replete with debate over the nature of legal scholarship, its point, and its value. Law professors still take pride in teaching students how to “think like lawyers,” and seemingly have some idea of what that phrase means. But as a group we seem to have lost any shared consensus, if we ever had one, on what it might mean to think, write, or act like legal scholars. Legal scholarship, according to at least some legal scholars themselves, seems to have no unifying discipline and no clearly shared drive. It seems to have no essence.

That’s the modern brief against legal scholarship. It is too professional or too normative to be true “scholarship” for some critics and too academic for others. It is too disorganized, undisciplined, or disperse: no one can articulate widely shared standards of quality, or even a widely shared method that defines the discipline. No one can state its point. And, to add insult to injury, it costs too much.

There is a substantial grain of truth in these complaints, and more than a grain in the last. Law school *is* too expensive, and legal scholarship is partly why. Schools pay top dollar to secure the appointment of faculty with prestigious publication records and the download and citation counts accompanying them. Their salaries do indeed drive up the cost of tuition. And, some of the costs of all of that scholarly productivity, even assuming its value, could and should be cut. The legal academy could cut back on expensive workshops with out of town presenters, travel expenses and honoraria. Papers-in-progress can be presented for critical feedback locally and electronically. More significantly, perhaps, faculty could be required to teach four courses a year rather than the now standard three, which would reduce the need to expand the faculty to meet desirable student-teacher ratios. And third, and as Brian Leiter has argued repeatedly and accurately, law schools could revert back to a traditional understanding of tenure: it could institute post-tenure reviews with the understanding that “tenure” grants protection against firings for no cause, but not against firing *for* cause. Teaching courses with no pedagogical innovations, foregoing scholarly pursuits altogether, and not contributing to faculty governance, collectively, should be cause for dismissal. These simple reforms would go some way toward cutting the costs of scholarly productivity, without questioning, undermining, or reducing its value.

### **The Case for Legal Scholarship**

But what of the rest of the critics’ brief? The various grains of truth in the rest of the bill of complaint against legal scholarship are collectively suggestive not of legal scholarship’s *weakness*, however, but rather of its defining characteristics, and even of its strengths. Legal scholarship is indeed often “normative” – both doctrinal and reformist legal scholarship which by most measures is still the bulk of legal scholarship in its entirety – virtually by definition aims to state what the law should be as well as to clarify what the law is. But that normative aim does not strip

it of scholarly value. And, much legal scholarship – particularly critical legal scholarship, legal theory, and multidisciplinary legal scholarship -- is of course more academic than most professional legal writing. But that doesn't undermine its professional value. Last, legal scholarship does lack a unifying method and goal, as internal critics, legal scholars themselves, often complain. But that does not make it undisciplined. Let us explain why this is the case.

### *On Normativity*

To understand the concerns voiced by scholars in other disciplines about legal scholarship's normativity, it's crucial to remember that most legal scholarship is produced *in law* schools, and those law schools, in turn, are most often part of universities. The university's scholarly commitment to the pursuit of knowledge and its revelation of truths guides its scholarly mission. That mission – to uncover truth through the pursuit of knowledge, within the structure of established disciplines may be perverted by faculty politics, or poisoned by ambition, greed, self interest, sympathy, or antipathy. It may be honored most often in the breach. Nevertheless, it defines the university's scholarly mission.

Law schools, however, while parts of universities, are *also* a part of the legal profession. And, while law faculty are parts of university faculties, law professors are also (mostly) lawyers engaged in the profession of law. The legal profession is committed to, and even defined by, the ideal of *justice*. Here as well, the mission may be perverted by partisan politics, self interest, greed, and so on. But nevertheless, and whatever the shortcomings of the legal profession, the organizing commitment of both the Bar and Bench is to the ideal of justice, pursued through the means of law, just as the university's organizing commitment is to the ideal of truth, pursued through the means of knowledge.

Legal scholarship reflects the legal academy's dual identity. Some legal scholarship aligns most cleanly with the professional commitment to justice, and some with the university's commitment to truth. All of it loosely reflects both goals. But doctrinal and reformist legal scholarship – two paradigmatic and quite mainstream forms of legal scholarship often called, collectively "normative legal scholarship," – aims quite explicitly to state what the law should be, (as well as what it is). It does so not because it is biased or untrue to an objective or disciplined pursuit of the truth that should be its rightful object. It does so, quite simply, because such scholarship is a part of a legal, judicial, and professional project—the creation of a just society. It seeks justice through its careful elucidation of the law. Justice, no less than truth, is central to its scholarly goal.

The premise of the academic complaint is then clearly right. At least a good deal of legal scholarship, viewed from an academic's perspective, is not exclusively knowledge seeking. The ideal of justice is the law profession's central mission, so it is for much legal scholarship. Normative legal scholarship aims to add to our stock of knowledge about the law, but it also aims to influence judges, lawyers, legislators or regulators to reform, interpret, or preserve existing law to make our world more just. It aspires to influence the public conversation about the law's ability to serve justice and to point it in a more just direction. It seeks to educate all of us – the

public -- about the ways in which they can and should pursue law's protection for a more just society. And it does so in varying ways. We'll consider two.

Consider first, so-called "doctrinal scholarship," which might be defined as scholarship of that attempts a clear interpretation of the existing "law" on a previously unclear legal topic, that attempts to make the law "the best it can be," to paraphrase Dworkin's memorable argument. Doctrinal scholarship aims to interpret existing legal materials in such a way as to render them consonant with both the best principles of political justice and consistent with the totality of given law. It aims for truth, definitionally defined: it aims to make true statements *of law*. But the "truest" statements of law are those interpretations that will render the law most just. A scholar who argues that the Affordable Care Act is unconstitutional because the individual mandate violates the individual liberty protected by the Fourteenth Amendment, or who contends that the Violence Against Women Act is a fully constitutional exercise of Congress's obligations under Section Five of that Amendment to protect equality where states have failed to do so, or who claims that the indefinite detention of prisoners in Guantanamo Bay with no right to a hearing is unconstitutional, or who argues that the Fifth and Fourteenth Amendment embody a right to informational privacy that protects against government's disclosure of intimate information such as someone's HIV status, or who conceptualizes "hostile environment" harassment at work as prohibited sexual discrimination under Title VII, is arguing for an interpretations of existing law that are dictated by the best reading of existing legal material that is consistent with the demands of justice. If accepted, all of these arguments, according to the scholars making them, will ensure more just interpretations of existing law. Doctrinal legal scholarship thus aims, through interpretation, to bring a full understanding of law and its commitments to bear on the project of bringing law closer to an ideal of justice, and of what justice requires.

Normative legal scholarship, however, isn't always "doctrinal" or "interpretive" in this classically Dworkinian way. In fact the amount of normative legal scholarship that can fairly be called doctrinal may be shrinking. As the nature of law itself has shifted over the last century away from judicially created common law to legislatively created state and federal statutory law, the role of the legal scholar has increasingly become not that of a faithful interpreter of pre-existing legal precedent, but rather, of a scholarly advocate for statutory or regulatory reform.

This second type of normative legal scholarship is best understood as "reformist" rather than as doctrinal or interpretive. Reformist legal scholarship aims to render the law more just not by interpreting pre-existing law, but by arguing for proposed legal reforms. It's different from political advocacy or white papers generated by think tanks, however, just as doctrinal scholarship differs from professional briefs: The reformist as well as doctrinal scholar's arguments can and should be broader and deeper, even if less precise, and are not bound to a client, sponsoring entity or agency or non-profit's agenda. But reformist legal scholarship

differs from professional policy writing in more subtle ways as well. Notably, the legal scholar is more likely than the think tank or partisan to stress the need for statutory reform so as to bring the law in line with broader norms of legal justice, rather than to please an even fully deserving political constituency.

The reformist legal scholar looks to reform, and feels the need for it, in part, to render the law more internally just. The reform is needed, he or she argues, to do so: some group is lacking a remedy where others, similarly situated, enjoy one. That disparity – sometimes called a lack of “horizontal justice,” or of “legal justice” demands reform, not only so as to make the social world a better place, but because justice demands it. Consider banking scholars who argue that consumers of financial instruments should have the same rights protecting against the fraud or negligence of the purveyors of those instruments, and the same panoply of remedies, as the consumer of a toaster has against the manufacturer of those consumer goods. Or scholars who [call](#) for criminal penalties for invasions of sexual privacy enabled by emerging technologies, just as the law punishes malicious privacy invasions like video voyeurism. Or scholars who argue that persons of the same sex who wish to marry should be entitled to do so, as are persons of the opposite sex. Or scholars who [argue](#) that online threats of violence designed to intimate people because of their gender ought to constitute a civil rights violation, as is true of online threats are motivated by victims’ race or religion. If successful, these new legal claims and penalties are desirable not only in their own right but because legal justice demands them: perpetrators of revenge porn accomplish destructive privacy harms as video voyeurs do and should be punished along similar lines, the consumer of the financial instrument is situated similarly as the purchaser of a toaster, so should be treated similarly, and so on. Legal justice requires that likes be treated alike. Legal scholars, perhaps unlike their colleagues in schools of public policy, are predisposed to at least recognize, and sometimes to privilege claims of justice over claims of the good. The reformist legal scholar tends to emphasize claims of injustice, or at least couple them with the more direct appeals to the common good, or to public policy writ large.

Both doctrinal or interpretive and reformist legal scholarship are thus guilty as charged: all of it, collectively, quite explicitly aims to say something about what the law should be, as well as what the law is, rather than just to add to our understanding of it. Even the narrowest understanding of the function of the most traditional (and without doubt now outmoded) form of legal scholarship—to simply state clearly what the law is— seemingly requires an interpretive act that itself rests on some cluster of stated or unstated moral principles, themselves dictated by justice. Interpretive legal scholarship of any depth or breadth though invariably intertwines purely “legal” claims with moral and political claims about what justice requires the law to be, and generally does so explicitly; law simply cannot be so bathed in a Holmesian cynical acid as to be rid of them. Reformist legal scholarship is even more unabashedly normative: its goal quite explicitly is to argue a case for a substantial change in the law.

Does this mean that doctrinal or reformist scholarship is not “scholarship” -- given its normativity -- as academic critics suggest? Only if we beg the question of what scholarship is in the first place. Normative scholarship is not “brief writing” for the simple reason that it is not on behalf of a client and is not bound by either temporal or substantive restraints. Nor is it “opinion writing” for essentially the same reasons: it can both probe deeper and with a broader lens than the opinion rendered by the judge. It is not bound by standing, mootness, what the lawyer’s argued, or the presence or absence of a litigant seeking a remedy. It can address the normative foundation of entire swaths of law, such as the relation of efficiency to tort, or of individual liberty to contract, or of distributive justice to labor law, or of a norm of anti-subordination to discrimination law, that are not posed by individual cases because of the structures and limitations of litigation.

The goal of normative scholarship is to influence the shape of the path of the law, but its impact will be felt differently than that of briefs, opinions, or white papers, and sometimes over a longer time frame. Normative legal scholarship does not aim to have the impact of an amici brief written for a particular case or a white paper written for a congressional subcommittee. But that does not mean that it lacks impact or that if it has an impact, it is not scholarly. Scholarship advocating a “reasonable person” or “reasonable woman” standard for purposes of some tort causes of action, arguing that cyber gender harassment [constitutes](#) a form of sex discrimination, or making the case for a new law protecting consumers of financial instruments against seller over-reach, or documenting the pernicious and racially skewed effects of over-incarceration of a large swath of the population for relatively trivial and victimless crimes, and demonstrating the racially skewed effects of *both* the death penalty *and* of failures of policing in both city and rural populations, are all self-avowedly “normative,” and arguing that all of that violates fundamental constitutional norms, and are all, in different ways, looking to change law quite fundamentally, albeit not directly through the filing of a lawsuit.

The impact of normative scholarship is felt, rather, through the force of its argument on its [readership](#), including students who go on to become judicial clerks, lawyers, judges, and legislators. More broadly, and sometimes more deeply, it is felt in the understanding of law and the possibility it holds out for justice, held by law students who go on to become critically and constructively engaged citizens, bringing to the work of citizenship a deep understanding of both the law that is their calling and the justice it purports to serve. The doctrinal and reformist scholarship – all of which aims to align law with justice – that they read and in some cases edit in their much maligned student-run law reviews, contribute mightily to that self understanding. It all rests on the understanding that the work of justice is squarely within the purview, and the reach, of law. It also rests on as well as demonstrates the implicit assumption that that work of the citizen-lawyer requires scholarly virtues: deep engagement and rigorous thought.

*On Academic Esoterica*

What of the complaint lodged by the Bar and even more notably by prominent members of the Bench, including the current Chief Justice of the Supreme Court, that legal scholarship is too academic, faddish, and impractical, so that even if it is scholarship, and even if it remotely about “law” in some esoteric sense, it is not particularly *legal*? Here too, there is a substantial grain of truth to the claim, if we rid it of its pejorative undertone. The distinction between normative and non-normative legal scholarship can help make sense of the complaint.

The professional’s complaint that legal scholarship is unhelpful typically is not aimed at normative scholarship – doctrinal or reformist work that explicitly aims for a just interpretation or reform of pre-existing law. Rather, the target of the professional’s critique – and his ire -- are those growing fields and sub-fields of legal scholarship that often explicitly, and sometimes aggressively, but in all cases quite avowedly, are “non-normative,” that is, legal scholarship that has no reformist agenda at all. Scholars engaged in the various sub-genres of this enterprise are not seeking to put forward interpretations of pre-existing doctrine that aim to “make the law the best it can be.” The “point” of non-normative scholarship is not to state the content of the law clearly or to proffer an improvement of it, whether through interpretive or reformist methods. It is not motivated by the desire to clarify or to improve the law. Just as its critics charge, it is not seeking any sort of *professional* engagement with the law.

What then, *is* it doing? And if its not aiming to restate or improve the law, why should the Bar and Bench care? It is, in a loose sense, and just as the professional critic complains, “academic. Its purpose is either to criticize law, though not toward reformist ends, or to seek a better understanding of it, either by engaging its more theoretical foundations or by examining it through the lens of other disciplines, drawn, loosely, from the social sciences or the humanities.

It’s worth parsing out three strands of non-normative legal scholarship, which can be labeled as critical, theoretical, and inter-disciplinary, before turning to its defense. These strands overlap and their boundaries are vague, but the distinctions are useful for our purpose here.

Let us first consider critical legal scholarship. Contemporary critical legal scholarship was triggered, or re-triggered, by the Critical Legal Studies movement of the 1970s and 1980s. Although the label and the central ideas of that movement have faded, the impulse to engage in it has not: critical scholarship aims to elucidate the moral, political, and theoretical foundations and functions of a legal system or a doctrinal area of law, not so as to interpret them to make them the best they can be, but *so as to criticize them*, either from a moral or political perspective. That critical perspective, unhinged from a reformist or interpretivist bent, can unleash insight into law that are hidden by the reformist’s or doctrinalist’s normative commitments. Thus, for example, an area of law such as contracts might be seen by the critical scholar not as a body of generally laudable principles subject to interpretation or reform, but rather, in terms of its “legitimizing” rather than liberating function, as

contracts scholars from the early critical legal studies movement have argued. By rhetorically stressing the voluntariness of contracts and the benefits of free markets, contract law in its entirety might serve not only to structure commercial life, but also to legitimate unjust distributions of wealth, status, or power. If so – if the critical claim can be defended – that is obviously something worth knowing about our law and its rhetoric. Discrimination law, to take another example, might not only protect individuals subjected to unfair and irrational categorization on the basis of illegitimate characteristics. It might also legitimate ongoing unintentional, subconscious, or institutionalized racial subordination by focusing narrowly on overly individualized discriminatory animus as the evil at which the law is aimed. Antidiscrimination law itself might thereby give a gloss of fairness to subordinating practices that are not motivated by bias. Again, if the claim can be maintained, the entire body of law then is a double-edged sword, with real costs as well as virtues for our pursuit of racial justice. If so, that is surely worth knowing about our antidiscrimination law.

In addition to these “legitimation critiques,” critical legal scholarship, particularly that branch of it still connected to the critical legal studies movement, also explores the extreme indeterminacy of legal doctrine, and therefore the coherence of the supposed divide between political analysis and legal analysis, or more generally, the legalist claim that law provides stable and lasting solutions to the problems of social life among people with incompatible political world views. Critical scholarship today, however, is by no means tied to or even identified with either the legitimation or indeterminacy theses first articulated in critical scholarship from the 1970s and 80s. Some critical scholars, such as those identified with the normative wing of the law and economics movement, criticize law, and even entire fields of law, for its inefficiency. Some, such as some feminist scholars, criticize law for its claimed implicit embrace of norms that presuppose a masculine world view, or even a masculinist conception of justice or of the good. Others criticize anglo-american law, and particularly constitutional law, for its heightened commitment to individualistic norms, and its relative disdain for communitarianism, and relatedly for its relentless focus on individual rights and neglect of either individual or group responsibilities. The shared point of critical scholarship is not necessarily the legitimation or indeterminacy theses. The shared point of critical legal scholarship is simply its ambition: to criticize existing law and legalism, and without regard to whether or not the criticism leads to discernible paths of immediate legal reform.

A second and closely related subgenre of non-normative legal scholarship can be described as “theoretical.” Like critical scholarship, theoretical legal scholarship, or “legal theory,” is not typically, or at least not necessarily, motivated by a desire to make law “the best it can be.” Rather, it is motivated by a desire to *understand* the law: to lay bare and then explore its foundational and not always transparent concepts, to consider alternatives, and to consider their history, political implications, coherence, and justice. Theoretical scholarship might [ask](#) whether mid and late nineteenth century tort doctrines like contributory

negligence, the fellow servant rule, and assumption of risk doctrines constituted an embrace of efficiency as guiding norms of common law adjudication, or whether those doctrines instead collectively constituted a crude prioritization of the interests of factory owners, railroads, and industrialists over those of mangled workers injured by factory machines, passengers maimed by trains and ferries, or neighbors killed by bursting reservoirs? Or, to take another example from the same field, did the common law judges deciding tort cases subconsciously, even if inarticulately, decide them in such a way as to render the outcomes in line with the goal of efficiency, as Richard Posner famously argued? To take a third possibility, did the elected judges who held major industrialists strictly liable for various disasters do so in order to shift tort toward an economic, deep pocket conception of responsibility, or were they influenced instead by the moral outrage of the citizenry who elected them? More broadly, legal theorists ask, what is the relation between the positive law we author and live by, and the ideals of justice we hold out for it? What is the relation between the law we should have, or think we should have, and the law we do have? Should we judge the law we have by reference to the moral views held by the “people,” or a majority of them, or by some more objective moral standard? What is the relation between our law and popular morality? What is the relation between our law and our political life, or our economic life? All of these are, loosely, questions of “legal theory.” None are fashioned for a lawsuit, regulatory intervention, or legislation innovation that will alter, tomorrow, the path of the law.

The third, and most rapidly expanding strand of non-normative legal scholarship, at least over roughly the last ten years, is “inter-disciplinary,” which obviously covers a lot of ground. “Law and social science” or “socio-legal studies” for short, includes, at least, all forms of empirical legal scholarship, all forms of the economic analysis of law, and various subfields within law and sociology and law and psychology. “Law and humanities” include the well-established fields of legal history and legal philosophy, and the somewhat newer fields of law and literature, law and religion, law and narrative, and law and culture. These various interdisciplinary fields have a common thematic goal, or motivation, and that is to better understand law itself or some significant slice of it, from the vantage of another academic discipline’s methods, distinctive insights, and objectives.

Consider as an illustration the economic analysis of law, which may be the most developed of the socio-legal fields. It seeks, alternately, to understand the law as a product of economic forces, or to analyze the consequences of the economic incentives it creates, or to criticize it, to some extent, by reference to the efficiencies and inefficiencies legal actors and legal actions either willfully or unintentionally occasion. Do restrictions on what we can and cannot buy and sell, such as prescriptions against the sale of newborns or body parts, simply leave people poorer for no reason other than a presumption that we are not, contrary to popular belief, the best judge of what’s in our own best interest? Should private sphere discrimination in employment really be unlawful, given that its patent irrationality should drive out discriminating employers through ordinary market mechanisms? More controversially, practitioners with the “law and economics” movement seek to

both understand and criticize law, legal doctrine, and legal systems by reference to a hypothesized rational, utility maximizing actor, a construct that has been at the heart of its analytic construction now for a little over a hundred years.

Socio-legal theory, in some contrast to law and economics but closely related to it, seeks to understand law in its sociological context, and to analyze its constituent parts by reference to the sociological forces that produced it, while “behavioral legal studies,” or “behavioral law and economics” merges the two fields. Socio-legal scholars distinctively look at legal behavior *empirically*, formulating and then proving or disproving hypotheses regarding possible causal connections between law and behavior. Do we [suffer](#) from both “risk aversion” and an “optimism bias,” tending us away from rational decisions that would help us at least get what we think we want out of life? Do we generally ask more to part with something we own than we would pay to acquire it, either because of a tendency to overvalue whatever we already possess, or just a settled predisposition toward maintaining the status quo? Do damage caps in tort actions really bring down the amounts of money paid collectively to victims of medical malpractice, or do they counter-intuitively raise that amount, by virtue of removing some of the disincentives on medical practitioners to cut corners? Empirical socio-legal studies holds out the promise of not just formulating, but actually answering, at least tentatively, some of these questions.

When judges, lawyers, and journalists rail against the excesses of legal scholarship, they almost invariably are referring to non-normative legal scholarship. Of the three types, interdisciplinary legal studies take the brunt of the beating. They are on infirm ground when it comes to normative legal scholarship, which is of obvious relevance and utility to professional legal work. Doctrinal arguments to the effect that a body of law means x instead of y is useful to the lawyer or judge intent on arguing or holding just that, as are arguments that a law ought to be passed to prohibit some sort of conduct, or a regulation passed to encourage socially valuable behavior, to the legislator or regulator looking at just those options.

It is easy to find concrete proof of the impact of normative legal scholarship on legal doctrine and legislative reform. The sexual harassment of women at work was hashed out in a considerable body of [scholarship](#) before it was recognized as sex discrimination under Title VII of the Civil Rights Act of 1964, just as were the supposed constitutional infirmities of anti-pornography legislation. Previously invisible, trivialized, or ignored injuries or harms – such as harms caused by the [disclosure of deeply embarrassing, purely private information](#), domestic violence, stalking, cyber stalking and cyber harassment, sexual abuse of children, and racially segregated schooling – are often, and perhaps typically, debated, argued, thought through, and first articulated in normative legal scholarship, before they are embraced by courts, legislators and regulators. There’s [not much](#) to the complaint that such normative legal scholarship has no utility or impact.

There is, though, no obvious comparable professional use by lawyers, judges, lawmakers, or administrative agencies for non-normative legal scholarship. That striking difference is vividly apparent in the criticisms of legal scholarship now emanating from the Bench and the Bar. Critical legal studies, legal theory, and interdisciplinary legal studies all, according to these critics, simply lack professional utility: they do not clarify the content of the law as it is, nor do they present arguments with which one might engage regarding what the law should or even could be. Critical legal arguments about the social-scientific investigations of the role of prospect theory or cognitive biases in the way we bargain are not aiming to make their way into Supreme Court cases interpreting the Fourteenth Amendment, or Title VII of the Civil Rights Act, or the law governing contracts. They rarely make direct appearances in case law.

It does not follow, however, from a lack of citation in Supreme Court cases that non-normative scholarship lacks impact. Its impact is [real](#) though it is felt *differently*. There are three salient differences between the impact of doctrinal scholarship, and the impact of theoretical, critical, and interdisciplinary work. First, with even just the slightest bit of hindsight, we can pretty readily discern the profound impact of non-normative scholarship on substantial swaths of our law and legal doctrine. It is impossible to gainsay the effect of the academy-borne law and economics movement, on judges, regulators and legislators all: an understanding of both legally created economic incentives and the value of efficiency have [shaped](#) the meaning as well as application of nearly every aspect of the law. Indeed, the development of cost-benefit analysis has created a vast regulatory field and an administrative agency to generate it. It has changed the way we think of the value and point of entire fields of law that touch on the operation of markets, and it has challenged conventional wisdom in fields, such as family law and criminal law, that are not obviously market-driven. Much of the analytic power of this legal academic movement has become conventional wisdom. The economic analysis of law affected not just particular cases or doctrines, but far more deeply, the way we think about, and act within, the law.

Some of that conventional wisdom is now being re-thought and usefully challenged by a new wave of inter-disciplinary, theoretical, and critical legal scholars. Behaviorally and sociologically savvy empirical legal scholars have usefully challenged the role and psychological makeup of the rational actor maximizing individual utility that was so central to the first wave of economic analysis of law—and the belief in the wealth enhancing effects of unfettered markets that followed from that market driven actor—and replaced it with a more nuanced, less rational, and more altruistic actor, who might sometimes, even often, benefit from regulated rather than purely “free” markets that might nudge him ever so slightly toward wiser choices. Similarly, we are more sensitive than we were fifteen years ago, because of theoretical investigations in law schools, to the various ways in which “cost-benefit” analysis fails to capture what we value and should value, and hence the limits to the usefulness of that tool. We are more open, again because of

theoretical legal-academic work, to ways beyond utility and preference maximization of measuring and pursuing both the individual and collective good.

A sizeable number of theoretical legal [scholars](#) are beginning to investigate how the “capabilities” or “human flourishing” approach to welfare, first pioneered by the economist Amartya Sen and then by the legal philosopher Martha Nussbaum, might serve as a better guide than utility, to legislators or judges seeking to either employ or interpret law so as to better the collective good. Law and religion scholars have pursued other understandings of the good, beyond the economic focus on utility, that have begun to bear fruit. The waves of critical responses to the driving ideas of the law and economics movement, in other words, coming from behavioral economists and sociologists, but also from legal philosophers and legal and critical theorists, have also had a discernible and in my view entirely salutary impact on the way we think about public law, and the public control of private markets, entirely independent of any immediate and discernible impact on decided or litigated cases.

Non-normative scholarship affects the way we *experience* law, and our role within it. To take the most obvious example, critical legal scholarship, decried for thirty years for its lack of utility, made the utterly and profoundly practical argument, over that same span of time, that law is far less determinate than liberal legal orthodoxy holds, and it did so, in part, for the express purpose of inspiring novel interpretations of seemingly settled doctrine. As a consequence, an entire generation of students as well as other readers of that scholarship came to see redemptive possibilities in law that might otherwise have been foreclosed: perhaps, Title VII might be deployed to take on the regulation of employees’ self expression through dress and high style, and so on. The argument and others like it may be novel, but particularly if law is as indeterminate as critical scholars argued, they are all colorable. Likewise, and more modestly, a straightforward but hard won understanding of the historical antecedents of current law can unsettle the conviction, sometimes both deeply and wrongly held, that law simply must be the way it is. Understanding that a bit of law was not always so, and that it came to be as it is because of the actions of relatively autonomous people, can shake the “false necessity” with which both students and lawyers too often view law, and it was the stated goal of the historical wing of the critical legal studies movement to do precisely that.

Legal theory likewise often has the effect, if not the intended goal, of changing the way we experience our lives in law, by changing what we value in it, and what our aspirations might be for it. A theoretical scholarly movement – legal realism – made the political and moral case against a strict adherence to common law precedent or laissez faire constitutionalism. It supported the overturning of the excesses of the *Lochner* era, highlighted the political and humanitarian need for a New Deal, and suggested the plausibility and importance of the administrative state. It did so in the course of developing a “theory” of law, of adjudication, of legal chance, and of constitutionalism that stressed the role of law as a tool for improving lives, rather than a bequeathed set of rules protecting privilege and constraining

change. Its theoretical goal was to change our experience of law from something that supremely governs us, to something we can democratically deploy as a tool – an instrument – for social justice; something we can use to yield a better social world.

The legal process school in the 1960s paved the way for the development of proceduralism in the courts, and respect for administrative processes in the executive branch, that likewise changed our experience of law, highlighting our understanding of its potential as a fair mechanism for resolving our disputes. Liberal legalism, an academic movement of constitutional legal scholars and philosophers in the sixties, seventies and eighties, cemented the intellectual foundation of the Warren Court's individual rights jurisprudence in the seventies, and libertarian and conservative legal theory similarly laid the groundwork for conservative judicial review in the Roberts Court era.

In private law as well, legal theoretical movements in scholarship cleared the underbrush so as to facilitate the development of various paths of law, all toward the end, loosely, of liberal social reform: scholarship in the forties, fifties and sixties bolstered the move toward strict liability in various consumer transactions causing injuries, and the Coase theorem and its elaborations have re-directed tort law in the direction of quasi-contractual and more market friendly deregulatory modes, from the seventies through to the present. Rethinking of the gendered tilt of seemingly neutral legal categories across doctrinal boundaries prompted reforms in tort, and reforms of rape, sexual discrimination and sexual harassment law, while feminist work on the nature of justice in the liberal state has prompted a massive and still ongoing re-thinking of the relation between work, commerce, home and property, felt in statutory innovations, such as the Family and Medical Leave Act and the inclusion of contraceptive coverage in the Affordable Care Act.

And importantly non-normative scholarship impacts the way we *feel*, as well as how we experience law and what our aspirations might be for it. There is surely no better text, for example, than Melville's *Billy Budd Sailor* to prompt self examination of the ways in which personal psychic turmoil can affect the objectivity, humaneness and soundness of both legal and moral judgment, and there is no better guide to that complex legal novella's exploration of those themes than Richard Weisberg's groundbreaking essays on the illegality of Vere's decision to execute Billy, and the mendacity of his contrived reasoning that purportedly supported it. Weisberg's essays on *Budd* have prompted a re-thinking of Melville's jurisprudential masterpiece by scholars in law schools and literature departments, and ushered in the law and literature movement. It also invited a generation of students, lawyers, and law professors to think carefully through the contorted relations between individual psychic dynamics and legal judgment and reasoning. A skepticism regarding one's own failings, an appreciation of the effects of unreckoned emotionalism in law, and a healthy regard for the constraints law imposes on decision makers as well as the potential of it holds for legal reform was and is the natural consequence of an engagement with those texts. That is impact of a

profound sort, whatever may be the citation count for those essays or that novella in the pages of the Supreme Court reporters.

In sum, non-normative scholarship, precisely because it is not aimed at affecting immediate court decisions or legislative enactments, plays a long game. Its impact is felt, if it is successful, well down the road. What contemporary scholarship might have such an eventual impact? One cannot predict with certainty, but we can surmise. A growing number of constitutional law scholars are rethinking fundamental tenets of that field, from the value of judicial review and the efficacy of negative individual rights, to the “state action” requirement as it has developed over the last century and a half, to the worthiness of constitutional law writ large. Borrowing from international law, learning from earlier constitutional scholarship, and probing the wisdom to be had from political philosophy, these theorists, critics, and interdisciplinary scholars collectively are fashioning a new understanding of constitutionalism that vests more decisional authority, and perhaps more dignity, in the people, and less in courts, and with an eye toward protecting the interests, the welfare and the aspirations of the weakest members of a society under law, rather than a constitution seemingly relentlessly aimed at protecting the position of the already powerful. Such a Constitution won’t be enacted tomorrow, and the aspiration for an unwritten version of it won’t guide judicial interpretation any time in the foreseeable future. Nevertheless, and partly under the auspices of the American Constitution Society, such scholarly work proceeds apace.

Tort scholars are looking to the past as well as to international law and theories of justice to articulate theories of responsibility that bind us closer in community as well as show more respect for our individualism than the cost-benefit driven tort law of the 1980s to the present. Privacy scholars are [re-imagining the meaning](#) (or meanings) – the [theory](#) – as well as the role of privacy, precisely so as to render it ultimately more [useful](#), perhaps not today or tomorrow, but eventually to those seeking to ward off technological intrusion without sacrificing the benefits and conveniences of our networked revolution. In every field, theoretical legal scholarship can go further in the past, and look further ahead, to articulate longer lasting more enduring legal principles that accord with justice, that respect the constraints of law, and that speak to the frailties and vulnerabilities, as well as the strengths and virtues of our human nature. This is made possible, not frustrated by, the disavowal of any goal of affecting cases now under review.

Entirely aside from its impact on law, the impact of non-normative legal scholarship is felt in an [educated student body](#), who are encouraged to think deeply rather than instrumentally about the value of the law, how and if it measures up to different standards of justice, their future role as lawyers, and the relations, otherwise obscure, between the substantive law they are learning, and the culture, politics, economy, and society, within which it is borne and which it so dramatically affects. Students understand from their interdisciplinary and critical and theoretical seminars that a part of their responsibility as a lawyer will be to continue to think deeply, and non-instrumentally, and with an eye on the long game, about both law

and its social value. They may, as a result, have a deeper appreciation of either the rootedness of law or of its contingency, or quite possibly both, as well as of its potential for liberating human potential and nurturing human capabilities, or its capacity for legitimating oppression and perpetuating misery at grotesque and even genocidal levels.

Regardless of subject matter, students should acquire an appreciation of the immensity of law and its tendrils, and the complexity of its interplay with individuals' aspirations, family life, and community. They may, if they're fortunate, acquire a sense that the complexity of those relations just might be manageable: a student's seminar paper, like his professor's developed scholarship, can, if its good, state a problem cleanly and explore it thoroughly. Students would have a better understanding of law, and have more confidence in his ability to bring it off. That earned confidence might in turn find an echo in life after law school: confidence in one's scholarly abilities, in law, might feed his confidence in his ability to contribute, by carving out particular problems, stating them cleanly and exploring them thoroughly, to the professional lawyer's task of finding and doing justice, and using law to do it, in the face of enormous local, national and global challenges.

### *On Disciplinarity*

What of the law scholar's complaint, that legal scholarship is so diffuse, and so diverse, that it lacks a unifying discipline and unified goal? Although the complaint is more true than not, it does not cast doubt on legal scholarship's value. Legal scholarship does indeed embrace a wide spectrum of disciplines, goals, motives, and organizing principles. It is not very organized. There are no easily stated unifying goals, methods, or criteria of excellence. All that said, what unifies it, ultimately, is subject matter: everyone engaged in something called "legal scholarship" is interested in law. But the skeptic is certainly right that there is no unifying shared discipline, and certainly no unifying goal.

There are varying forms of scholarship, from the doctrinal and reformist to the theoretical and interdisciplinary and pedagogical. Some of the scholarship is excellent; some is not so good. Legal scholarship has different goals and methods, and accordingly there are different criteria of value. The scholarly enterprise is diverse and that is a good thing. Pluralism is in order, indeed. Doctrinal scholarship and reformist scholarship is scholarship, even though it is "normative," and critical, theoretical and interdisciplinary scholarship is legal scholarship even though it is not. The common thread is the focus on law. Doctrinal scholarship might be good or bad, deep or shallow, but it isn't disqualified by virtue of the fact that it is doctrinal. Interdisciplinary scholarship might be good or bad, but should not be disqualified by virtue of the fact that it isn't normative, and has no immediate utility for practicing lawyers. It deepens our understanding of the law we have, just as normative scholarship, ideally, deepens our appreciation of the law that should be. A healthy law faculty has room for all of it; a healthy community of legal scholars values it all. Doctrinal scholars keep us grounded in the law itself, as well as our

ambitions for it. Theoretical scholars keep our focus on foundational questions and our “long game” ambitions and aspirations for law. Interdisciplinary scholarship has enriched hugely our understanding of the connections between law, politics, the economy, and humanistic, religious and moral traditions. Pedagogical scholarship keeps returning our focus to what we convey to our students.

### **A World Without Legal Scholarship**

The value of legal scholarship can best be appreciated perhaps by imagining a world without it. Without legal scholarship, law schools would be arid, mechanistic and formalistic places. They would train students, but less well because they would not aspire to educate. An exclusive focus on skills would be self-defeating; it would leave out lessons on how to think, much less think like lawyers. Law schools’ vision of law and lawyering would be stunted, and limited by current practices, uninformed by foundational understandings, and un-tempered by even a glancing acquaintance with the disciplines of the humanities, of which law is a part, or the inquiries of the social sciences, to which law and empirical legal studies contribute. We would lose the attention and loyalty of our graduate students from other countries, who value their US law degrees in part because of the breadth and depth of the interdisciplinary and deep legal education they find here – precisely because of, not in spite of, the schools’ scholarly mission.

Judges, legislators, and administrators would lose the critical commentary on law, and the theoretical understanding of its underpinning. Without legal scholarship on gray areas of doctrine, for instance, judges would have rendered opinions, to be sure, but those opinions may not have been as [thoughtful](#) or justice seeking as they are. Lawmakers and administrators would not have had the benefit of richly developed work articulating the need for legal change to address injustice. State lawmakers for instance might not have adopted anti-SLAPP (Strategic Lawsuits Against Public Participation) legislation without legal scholarship calling for the early dismissal of cases for suits designed to silence criticism. Congress might not have adopted the Civil Rights Act of 1991 without [scholarly critique](#) of Supreme Court decisions that made it harder for employees to prove discrimination.

The legal theories that have fundamentally changed our thinking about the law might not exist or they might not be articulated as richly as they are. Judge Alex Kozinski has argued that without the law and economics scholarship of Guido Calabresi and Richard Posner, “no lawyer would have undertaken the educative function of training the judiciary to understand and deal with economic concepts.” In his view, “grand transformative ideas” always come from academia because legal scholars are uniquely suited to generate them and because they infuse their courses with ideas that then become second nature to a generation of students who become practicing lawyers, judges, and administrators who then employ them.

Without legal scholarship, the profession would lose its sense of law as either a science or an art, or of course alternately both. It would be a drab, cold, technocratic world. When we lose, or threaten, the scholarly mission, we lose the “learning” at the legal profession’s core and hence we sacrifice professionalism.

Everyone involved in the legal enterprise—law schools and their students, the practicing Bar and their clients, courts and their law clerks, lawmakers and their staffers, administrative agencies and more—would surely be worse off without it.

Recommended Blogs:

[43 \(B\)log](#)  
[Access to Justice](#)  
[ACS Blog](#)  
[Althouse](#)  
[Balkinization](#)  
[Becker Posner Blog](#)  
[Brian Leiter's Law School Reports](#)  
[Chicago Law Faculty Blog](#)  
[Conglomerate](#)  
[Crime & Federalism](#)  
[CrimLaw](#)  
[CrimProf Blog](#)  
[Crooked Timber](#)  
[Discourse.net](#)  
[Dorf on Law](#)  
[Election Law](#)  
[Feminist Law Profs](#)  
[Freedom to Tinker](#)  
[Google Blogoscoped](#)  
[How Appealing](#)  
[Ideo Blog](#)  
[Info/Law](#)  
[InstaPundit](#)  
[Juris Novus](#)  
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[Legal Profession Blog](#)  
[Legal Theory](#)  
[Legal Times Blog](#)  
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[Lessig](#)  
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[Point of Law](#)  
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[Professor Bainbridge](#)  
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[Red Tape Chronicles](#)  
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[TaxProf Blog](#)  
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[The Moderate Voice](#)  
[The Volokh Conspiracy](#)  
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[Workplace Prof Blog](#)  
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