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## On Defining Academic Scholarship

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## ON DEFINING ACADEMIC SCHOLARSHIP

STEPHEN J. WERBER<sup>1</sup>

In 1970, I left the world of a litigation attorney and joined that of academia. One of the first survival lessons that I learned was that, in order to gain tenure and ultimately achieve the pinnacle of full professor, I had to establish myself as a scholar. This, I learned, meant that I had to publish. Perusal of the Personnel Policies of our University, which are similar to those of many others, indicated that a key to a successful career was that I produce "an outstanding record as a scholar." The closest definition to the term in the personnel policies was found in a description of creative achievement which stressed a working commitment to inquiry and research to meet the University's obligation to generate new knowledge and practices.

In the field of law, this presented a rather difficult assignment in that there are only limited areas in which new knowledge can be developed--an act distinct from synthesizing, analyzing, and offering simply a different perspective based on existing knowledge. Law professors rarely develop new data bases or studies predicated on empirical research. The closest academicians often come to any form of empirical research is to survey all known cases relating to a given subject area.<sup>2</sup> I quickly learned that writings directed toward the practice of law were somehow demeaning to the academic profession.

As the Personnel Policies were lacking in adequate definition, I turned to a leading law dictionary which, regrettably, did not contain an entry for scholar or scholarship.<sup>3</sup> Standard dictionaries provided such definitions of a scholar as a "learned person"<sup>4</sup> and of scholarship as "knowledge acquired by study"<sup>5</sup> or "the academic attainments of a scholar."<sup>6</sup> The emptiness was striking. From a practical viewpoint, I then learned that the definitions meant little. Publish a

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<sup>2</sup> *But see*, James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A. L. REV. 479 (1990). In this article the authors proved that this analysis has its exceptions even though the authors' recognize that their work is "a rare effort to combine comprehensive, national empirical studies . . . to support the assertion of changing legal doctrine." *Id.* at 482.

<sup>3</sup> BLACK'S LAW DICTIONARY 1344 (6th ed. 1990).

<sup>4</sup> The American College Dictionary 1085 (1963).

<sup>5</sup> *Id.*

few articles in recognized law reviews and you become a scholar. Scholarship, in the world of academia, actually means: publish in the right places.

I began to wonder whether scholarship was to be instinctively defined in a manner similar to a well known, albeit questionable, definition of pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand definition [of pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . ." <sup>7</sup> Finding this alternative unpalatable, I began my own inquiry. Posed differently, I placed my scholarly endeavors into defining what my scholarly endeavors were supposed to mean.

It is fairly clear that attorneys, law professors, and judges all respect those peers who are recognized as possessing intellect or who can be described as scholars. Benjamin Cardozo, Roger Traynor, Oliver Wendel Holmes, Karl Llewellyn, Lon Fuller, and Brainerd Currie all come to mind as scholars of the bench and/or academic community. Finding a scholar among members of the practicing bar is more difficult, at least in terms of a name that would have instantaneous national recognition among academicians. One could argue that practicing attorneys are not scholars. This argument, however, is overly simplistic and frightfully wrong. Scholarship is simply the product of the intellect presented in a way which permits that intellect to be evaluated by others who can then apply it to needs. The typical mode of scholarly production is written, although scholarship can also be found in oral communication. With the idea of scholarship being a written record of applied intellect, it must be understood that in the environment of the law there are several forms of such an endeavor. These forms include, but are not limited to:

- (1) Highly intellectual, theoretical legal writing found in law reviews;
- (2) More practice oriented writings found in law reviews;
- (3) Treatises, especially of one volume, providing a survey of the law in a given field;
- (4) Books directed to the practicing attorney which seek to collate and present substantive law;
- (5) Written memoranda and briefs filed in court.

From the perspective of the law teaching community, only the first is regarded as true scholarship. The remaining categories are listed in a rough descending order of recognized academic (scholarly) value. The idea that practice-oriented materials can constitute scholarship is given only grudging recognition, and, even then, it is put on a lower scale. Practice-oriented books, prepared for publishers that pay the professor for his intellectual capacity and ability to synthesize a vast body of law, are often viewed as anathema.

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<sup>6</sup>*Id.*

<sup>7</sup>*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

The proposition that good brief writing is a form of scholarship, even when those briefs lead to significant changes in the law, is often given only lip service in terms of its scholarship. This downgrading exists despite the fact that briefs have often played an integral part in persuading the United States Supreme Court to establish significant new law in many fields. Such briefs are both adversarial and scholarly. For example, the brief submitted by Herbert Wechsler and others on behalf of the *New York Times*<sup>8</sup> in *New York Times Co. v. Sullivan*,<sup>9</sup> certainly evidenced scholarly persuasion. As noted by Professor Harry Kalven: "A careful comparison of the brief and the opinion of the Court would itself be a profitable enterprise. At various critical points, the opinion echoes the carefully precise language of the brief and the structure of the Court's argument reflects the structure of argument in the brief."<sup>10</sup> Professor Kalven simply described the Wechsler brief as "brilliantly persuasive."<sup>11</sup>

Recognition of the impact that briefs<sup>12</sup> may have on the process of judicial decision-making raises the question of the relationship between academic scholarship and the judiciary. This relationship has been defined by Professor David Barnhizer as a symbiotic relationship between professionals approaching the law from distinct vantage points.<sup>13</sup> He observes that:

While judges and legal scholars are two aspects of a single system, this in no way means that the relationship is exclusive, that it is one of master-servant or that the categories of judicial thought are the only ones possessed by academic legal scholars. It is instead an assertion that the judge-scholar relationship is central to what American legal

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<sup>8</sup> Brief for the Petitioner at 28-90, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (Nos. 39 & 40) (submitted by Herbert Brownell, Thomas F. Daly, Herbert Wechsler, and others), *microformed on U.S. Supreme Court Records and Briefs* (Microform, Inc.).

<sup>9</sup> 376 U.S. 254 (1964).

<sup>10</sup> Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 192 n.6.

<sup>11</sup> *Id.* at 192.

<sup>12</sup> See, e.g., Brief of Petitioner, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (No. 86-6169) (submitted by Harry F. Tepker, Kevin W. Saunders, and Victor L. Streib); Brief for Petitioners, *WorldWide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (No. 78-1078) (submitted on behalf of WorldWide by Mike Barkley, Dan A. Rogers, Herbert Rubin, Bernard J. Wald, Ian Ceresney, and Howard S. Edinburgh). Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 8 on Reargument, *Brown v. Board of Education*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, & 8) (submitted by Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, Charles S. Scott, and others), *microformed on U.S. Supreme Court Records and Briefs* (Microform, Inc.).

<sup>13</sup> David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127 (1988).

scholars do and that the judicial thought pattern dominates the system. This relationship does not mean that the legal scholar is little more than a pale reflection of the judiciary. To the extent, however, that legal scholars ignore or deny either the existence of the relationship or its propriety, they risk damaging the system's essence.<sup>14</sup>

The relationship is further clarified by recognition of the functions of both judges and legal scholars in case law decision-making. "Law cases of any complexity present admixtures of fact, rationality, values, judgment, analogy, scientific assumption, metaphysics, doctrinal principle, and more."<sup>15</sup> To resolve cases of such complexity, in a manner favorable to his or her client (and often to society as a whole), the attorney must often act as both an advocate and a scholar. The failure to recognize this dual role, as well as the type of writing necessary to prevail in complex cases, especially those which raise societal and philosophical issues, is an important factor contributing to the limited view of scholarship taken by many academic scholars.

The academicians' narrow and jaundiced view of legal scholarship may reflect two additional factors. First, a vast number of law professors have never practiced law. Second, a significant number of them would be highly uncomfortable in the litigation arena. Yet, on the other hand, many law faculty throughout the United States have the ability to be outstanding practitioners of the law. In fact, many are directly involved in the briefing and argument of major cases throughout the United States.

Rather than recognize the intellectual and scholarly achievements of the practicing bar, the law teaching profession simply views their work as unacceptable scholarship. This viewpoint is even carried forward to those law professors who dare to prepare such court-oriented materials. Thus, a law professor who briefs and argues a case to any court gains few, if any, scholarship points.

Scholarship, to be fully recognized in the academic community, must address the theory of law - not its application. The basic premise of this essay is that such a definition of scholarship is detrimental to the law teaching profession and demeaning of the legal profession as a whole. As in the sciences, there is a need for both theoretical scholarship and applied scholarship. Both should be recognized as contributing to the overall knowledge, development, and beauty of the law as well as to the justice that that law seeks to achieve.

Scholarship must be evaluated by analysis of its quality and depth, rather than just the form that it takes. Any form of legal writing may or may not reflect true scholarship. And, of course, it can run the gamut from poor to excellent. Certainly, the potential for scholarship is greater in the classical law review article than in any other format. This is a reality based on the purposes of law

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<sup>14</sup> *Id.* at 127.

<sup>15</sup> *Id.* at 131.

review writing. Nonetheless, the potential for scholarship exists, at least to some extent, in all other forms of legal writing.

Examination of the legal research, analysis, and writing of any of the five categories described above shows that they are more similar than different. It is relatively rare to find a law review article which results in a change in the application of legal theory. Perhaps the work of Lon Fuller in regard to the reliance interest and the function of consideration in contract law<sup>16</sup> falls into such a category as does much of the writing of Brainerd Currie in the field of conflict-of-laws.<sup>17</sup> These exceptions blind us to the reality that the vast bulk of law review articles are mundane. Many articles have little impact on the evolution of the law. Rather, the law evolves through a combination of legislative and judicial effort which is sometimes guided by the merit of an argument found in the teaching profession's scholarly publications.

Perhaps the most marked difference between the various types of legal writing is that scholarship in the theoretically-grounded law review article is technically objective and nonadversarial, whereas, that of the more practice-oriented article, and especially court-related writing, is adversarial in nature. Such forms of legal writing often present scholarship from a given perspective. Practice oriented books or treatises such as Frumer & Friedman's *Products Liability*<sup>18</sup> are generally objective. Yet, they are viewed by the academic sector as lacking in sufficient legal analysis. This condemnation exists regardless of the degree of critical analysis necessary to prepare such a work. These books and treatises are viewed as mere collections of reported decisions and statutes without sufficient intellectual massaging and criticism. Scrutiny of many such works, however, reveals that they contain a probing for the meaning of the law and an insight as to the progress of the law, as well as critical analysis (where appropriate) within the confines of text objectives.

These, then, are the primary differences. They result from the audience to which the writing is directed, the goal of the writing, and the scope of the specific problem addressed. Yet, these differences are so important in the eyes of many law faculties as to conceal the vastly more important common elements of each.

All legal writing, regardless of the form it takes, must be predicated on research, synthesis, and analysis. The scope of research for a law review article

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<sup>16</sup>Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1940); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L. J. 52 (1936); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L. J. 373 (1937).

<sup>17</sup>Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963); Brainerd Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36 (1959); Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

<sup>18</sup>LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* (rev. ed. 1992).

may or may not exceed that necessary for an appellate brief or a chapter in a treatise. For example, my longest law review articles, which met the definition of scholarship utilized in academia, contained 243 and 294 footnotes respectively.<sup>19</sup> A chapter which I contributed to a practice oriented treatise, however, contained 480 footnotes, at least five times the number of cases, and equal or greater intellectual effort to prepare.<sup>20</sup> Similarly, well-written appellate briefs contain analysis of all significant case law and policy concerns related to the issue(s) to be heard. Such briefs require critical analysis and deep-rooted understanding of the theoretical principles which created the law and which permit, or compel, that law to change.

Whether writing an appellate brief, a treatise, or a law review article, the author must synthesize the available case law and policies into a cohesive whole. The principles must be extracted and applied whether to support a theoretical position such as Professor Fuller's concept that the reliance interest in contract damages is of paramount legal concern, or whether to argue that the discovery rule has no application past the date of death in an appellate brief seeking to affirm the dismissal of a wrongful death and survival action. Whether the available research is analyzed to advance a theoretical position (for example, that capital punishment should be abolished or that abortion rights should be upheld) as discussed in the law reviews; or to advance the rights of an actual party to an action involving such an area of law, identical legal analysis must be made. Where that analysis yields an advancement of the law, as distinct from a more straightforward application of the law, scholarship is present. Such work does more than apply facts to a given legal structure, it redefines the structure.

The result of such research, synthesis, and analysis yields a written application which supports the position taken by a given author or advocate. This application, whether designed to persuade a court, educate others, or to stimulate purely intellectual discussion, can be achieved only by good writing. Regardless of form, the process of application is identical. Facts, law, and policy must be interwoven throughout. If this is not done effectively, the article, book, treatise, chapter or brief will neither persuade, educate, nor create intellectual discussion. Judges and attorneys are as much in need of an intelligent, scholarly application of legal theory as are law professors.

The touchstone for legal writing is that it meet basic elements necessary for any effective writing. Whether the article seeks to propound a new legal theory or legal position, or whether the brief seeks to persuade a court that a given

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<sup>19</sup> Stephen J. Werber, *The Product Liability Revolution Proposals for Continued Legislative Response in the Automotive Industry*, 18 NEW ENG. L. REV. 1, 53 (1982-83); Stephen J. Werber, *A MultiDisciplinary Approach to Seat Belt Issues*, 29 CLEV. ST. L. REV. 217, 273, 277 (1980).

<sup>20</sup> *Indemnity, Contribution, and Apportionment of Damages*, in 2A FRUMER & FRIEDMAN, PRODUCTS LIABILITY, *supra* note 17, at 15.01-15.15 (revised by Stephen J. Werber).



position must be recognized, there is no difference insofar as effective writing is concerned. In any written form, the basic precepts of good legal writing promote the stimulation of the thought process or provide an educational tool which allows for such a process to take place. Volumes have been written devoted to the concepts of good legal writing. Many of these materials deal with appellate advocacy as taught in law schools.<sup>21</sup> A comparison of similarly focused materials directed to the practicing bar reveals an identity of thought.<sup>22</sup> Regardless of the nature of the completed work, it must conform to three basic tenets. It must be concise, precise, and clear.

The form of the work may differ, but, to achieve its goal, these tenets must be met. Concise legal writing means that each idea is set forth in as few words as possible. No reader wants to be delayed by superfluous wording. The most effective theoretical law review articles present their points in a very concise manner, even when the articles are quite long. Precise legal writing means that the word assigned to a given task is the best word for that task. Thus, good legal writing would not describe a principle or case as "vague" when it is actually "ambiguous." Precise legal writing would recognize that the words "effect" and "affect" have distinct meanings.<sup>23</sup> Clear writing means that the concepts presented, no matter how complex, are set forth in a manner which allows the reader to grasp their significance in a single reading. The more complex the concept, the more imperative it is that a lucid writing style be used. The simple sentence is often superior to the complex. At the same time, such writing will often make the reader want to read the material a second time not for basic understanding, but for a true appreciation of the total argument presented, whether theoretical or adversarial.

These overwhelming similarities lead to a conclusion that many in academic circles refuse to reach: any form of good legal writing can reflect true scholarship. Where that writing takes the form of a practice-oriented text or a brief, no decision as to its scholarship value can be made without an honest reading of the work. Where that reading discloses that the work does more than summarize the law and argue to a conclusion it may prove to include true scholarship. For example, a brief which merely argues that the law is *x* and therefore the decision must be *y*, does not meet a valid definition of scholarship. Where, however, the existing status of the law provides the foundation for argument which seeks to advance the law or give existing law a new

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<sup>21</sup> See, e.g., M. FONTHAM, *WRITTEN AND ORAL ADVOCACY* (1985); WESLEY GILMER, JR., *LEGAL RESEARCH, WRITING & ADVOCACY* (2d ed. 1987); GIRVAN PECK, *WRITING PERSUASIVE BRIEFS* xv (1984); MARIO PITTONI, *BRIEF WRITING AND ARGUMENTATION*, (3d ed. 1967); EDWARD D. RE, *BRIEF WRITING AND ORAL ARGUMENT* 1 (5th ed. 1983).

<sup>22</sup> See, e.g., William J. Bauer & William C. Bryson, *The Appeal*, *THE DOCKET*, Spring 1987, at 1, 12. See generally Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 520 (1984-85).

<sup>23</sup> BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 101 (1991).

application, it constitutes scholarship. In this context, legal scholarship and academic scholarship serve the same purposes and require identical amounts of intellect and skill necessary to complete the task.

Recognition of this conclusion would enable the academic world to be more creative, and would also encourage the writing of articles of far greater diversity than found in the present literature. Application of this conclusion would also encourage the practice-oriented professor to think along theoretical avenues while encouraging the theoretically minded to give greater attention to the ramifications of their work. The time has come to recognize that the academic sector can play a fuller and more important role in the development of the law which it is committed to teach. This result can be achieved by recognizing that the presentation of intellectual thought, a.k.a. scholarship, can take multiple forms.